A

NEW ABRIDGMENT

OF THE

L A W.

By MATTHEW BACON,
Of the MIDDLE TEMPLE, Esq;

THE FIFTH EDITION, CORRECTED;
WITH
Many Additional NOTES and REFERENCES of and to
MODERN DETERMINATIONS.

VOL. IV.

DUBLIN:
Printed by JOHN EXSHAW, No. 98, GRAFTON-STREET.
MDCCLXXXVI.

S
UK
903
BAC

TX
B129
5th Ed

MAY 27 1925

A

TABLE

OF THE

Several TITLES,

WITH THEIR

DIVISIONS.

VOL. IV.

Pleas and Pleading. Page 1.

(A) THE *ſeveral Pleas and the Order of Pleading.* 6

(B) *The Declaration.*

And herein,

1. The Nature thereof; and therein, of adding ſeveral Counts in the ſame Declaration. 8
2. Who may join or be joined in the ſame Declaration. 9
3. What Matters may be joined in the ſame Declaration. 11
4. Of the Declaration's agreeing with the Writ. 12
5. Of the Sufficiency and Certainty required in the Declaration; and therein, of Matters of Inducement, and that which is the Gift of the Action.

And herein,

1. Where by the Declaration it muſt appear that the Plaintiff hath a Right. 13
2. Where the Plaintiff muſt ſhew that he hath performed what was requiſite on his Part. 16
3. Where general Allegations in the Declaration are ſufficient; and therein, of Miſ-recitals and Omiſſions. 17

4. Where the Averments muſt be poſitive and expreſs in the Declaration. 22
5. Of the Certainty required in the Deſcription of the Thing declared for. 24
6 Of the Declaration's being good in Part, and void in Part. 25

(C) *Of Imparlance.*
And herein,
1. Of the Nature thereof, and the ſeveral Kinds. 27
2. What the Defendant muſt do before any Imparlance. 28
3. What he is to plead after a general Imparlance. 29
4. What may be pleaded after a ſpecial Imparlance. 29
5. In what Caſes the Courts exerciſe a diſcretionary Power in granting or refuſing an Imparlance. 30

D) *Of making Defence; and herein, of the Difference between full and half Defence.* 31

E) *The ſeveral Kinds of Pleas.*
And herein,
1. Of Pleas to the Juriſdiction.
And herein,
1. To what Courts to be pleaded, and of the Difference between a Plea to the Juriſdiction, and a Claim of Conuſance. 32
2. The Manner and Time of pleading to the Juriſdiction. 35

(F) *Of Pleas in Abatement.*
And herein,
1. Of Pleas in Diſability of the Perſon of the Plaintiff.
2. Of Pleas in Diſability of the Perſon of the Defendant; and therein, of Privilege. 36
3. Of Miſnomer and the Want of Addition. 38
4. Of Abatement by reaſon of Coverture. 39
5. Of Abatement by the Death of Parties. 40
6. Where a Defect in the Writ ſhall abate it. 43
7. Where the Writ's not agreeing with the Count ſhall abate it.
8. Where the Writ is abated *de facto*, or is only abateable. 44
9. Where the Writ ſhall abate *in toto*, or in Part only. 45
10. In what Caſes the Defendant hath it in his Election to plead in Abatement or in Bar. 46
11. Pendency of another Suit or Action, how to be pleaded in Abatement. 48
12. What ſhall be ſaid a Plea in Bar or in Abatement; and therein of the Concluſion proper to each Plea. 49
13. Pleas in Abatement how reſtrained. 51
14. Of the Judgment in a Plea of Abatement, and how far peremptory.
15. Foreign Plea. 52

(G) *Of Pleas in Bar and in Chief.*
And herein,
1. Of the General Iſſue, and how formed. 54
2. Immaterial and informal Iſſues, and where aided. 54
3. Of ſpecial Pleas; and therein of Pleas amounting to the General Iſſue, and of Matters which may be pleaded or given in Evidence. 60
4. Of ſham Pleas, and the Conſequence of falſe Pleading. 65

(H) *Traverſe.*
And herein,
1. The Nature thereof. 67
2. In what Caſe a Traverſe is permitted. 69
3. In what Caſe a Traverſe is neceſſary. 70

4. Whether

4. Whether there may be a Traverſe upon a Traverſe. Page 72
5. To what Point the Traverſe ſhall be taken; and therein what Matters are traverſable, and of the Manner of taking thereof. 75
(I) *Pleas in Bar, Sufficiency and Certainty.*
And herein,
1. That the Plea muſt be proper to, and adapted to the Action. 83
2. That the Plea muſt be good in Subſtance; and therein of Matter of Inducement, and that which is the Giſt of the Defence. 86
3. Of general Pleading to avoid Prolixity; and therein of affirmative and negative Pleas. 90
4. Of Surpluſage and Repugnancy in Pleading. 94
5. That the Pleading ought to be direct and not argumentative. 97
6. Negative Pregnant. 98
7. That Things muſt be pleaded according to their Operation in Law. 100
8. Of Colour in Pleading. 102
9. Of pleading Non-tenure and Diſclaiming. 104
10. Pleading *Hors de ſon Fee.* 105
11. Eſtoppels in Pleading. 106
12. Pleading with a *Profert*, and demanding Oyer.
And herein,
1. In what Caſes there muſt be a *Profert* or *Monſtrans de fait.* 109
2. Of demanding Oyer. 113
13. Pleading a Recovery in a former Action. 114
(K) *Duplicity in Pleading.*
And herein,
1. The Reaſon why Duplicity is a Fault, and the Manner of taking Advantage thereof. 118
2. What ſhall be ſaid Duplicity in Pleading. 119
3. Of pleading double by Leave of the Court. 121
(L) *Departure in Pleading.* 122
(M) *Repleader.* 126
1. Of the Nature of a Repleader, and Manner of awarding it.
2. A Repleader in what Caſes to be awarded.
3. Repleader at what Time to be awarded. 129
(N) *Demurrer.* 129
1. The Definition and Nature of a Demurrer.
2. The Manner and Form of demurring; and therein of joining in Demurrer, and waiving thereof. 130
3. What Facts are admitted by a Demurrer. 131
4. How far a Judgment on a Demurrer is peremptory. 132
5. Of the Difference between a general and ſpecial Demurrer.
6. What Things are good on a general Demurrer, that would be otherwiſe on a ſpecial one. 133
7. Demurrer to Evidence. 136
(O) *Plea at what Time to be put in, and the Ceremony requiſite therein.* 137
(P) *Continuance and Diſcontinuance in Pleading.* 139
[Continuance of Suit or Proceſs. 142
Diſcontinuance. 142]
(Q) *Pleas* Puis darrein continuance. 142
For more Pleadings, *vide* the Diviſion *Pleadings* under many Titles.

Premunire. Page 145.

(A) *What Offences come under the Notion of a Premunire.*
(B) *Of the Puniſhment therein.* 147

Pre-

Prerogative. Page 149.

(A) *When the King commences his Reign, and the Ceremony requiſite therein.* 151

(B) *Of the King's Prerogative as univerſal Occupant.*
And herein,
1. That he is univerſal Occupant, and intitled to all derelict Lands. 153
2. Of his Prerogative in Eſcheats. 154
3. Of his Prerogative in Seas and Navigable Rivers. 156
4. Of his Prerogative in Swans and Royal Fiſhes. 157
5. Of his Prerogative in *Beacons* and Light-Houſes. 158
6. Of his Prerogative in Wreck.
7. Of his Prerogative in Relation to Coins and Mines. 160
8. Of his Prerogative in derelict Goods; and therein of Waifs, Stays, and Treaſure Trove. 164
9. Of his Prerogative in Fines and Forfeitures. 165

(C) *Of his Prerogative over the Perſons of his Subjects.*
And herein,
1. Who ſhall be ſaid his Subjects. 166
2. That he is intitled to the Service and Allegiance of his Subjects; and therein of the Oaths injoined them. 167
3. That he may reſtrain his Subjects from going Abroad; and herein of the Writ *de Ne exeat Regno.* 168
4. That he may command his Subjects to return Home; and therein of awarding a Privy Seal. 169

(D) *Of the King as the Fountain of Juſtice, and intruſted with the Execution of the Laws.*
And herein,
1. That all Civil Juriſdiction flows from the King. 171
2. Of the King's Prerogative in Eccleſiaſtical Matters. 172
3. Of his Prerogative in creating Officers. 174
4. Of his Prerogative in making War and Peace.
5. Of his Prerogative in taking Care of Infants, Ideots, Lunaticks and Charitable Uſes. 176
6. Of his Prerogative in Pardoning.
7. Of Diſpenſations and *Non obſtantes.* 177
8. Of his Proclamations. 188

(E) *How the Rules of Law differ with reſpect to the King and a private Perſon.*
And herein,
1. Of what Things incapable from the Dignity of his Perſon and Office. 190
2. What Things enure to him in his natural, and what in his political Capacity. 191
3. Of the Difference in the Rule of Law as directing the King's Property otherwiſe than that of a Subject. 192
4. That his Rights ſhall be preferred to the Subjects where they happen to meet. 198
5. Of Acts of Parliament which extend to or bind not the King.
6. That no Laches can be imputed to him; and therein of the Maxim, *Nullum Tempus occurrit Regi.* 200
7. Of his Prerogative in his Suits and Proceedings in Courts of Juſtice. 202

(F) *Of the King's Grants and Letters Patent.* 203

And

And herein,
1. What Things the King may grant. Page 203
And therein,
1. Of Grants ariſing from his Prerogative of Power, and which are inſeparably annexed to the Crown.
2. Of Grants ariſing from his Intereſt. 205
3. How far the King muſt have an Intereſt, in order to enable him to grant. 206
4. Grants tending to a Monopoly; and therein of Things of a new Invention. 206
5. Grants of the ſole Liberty of Printing. 207
2. Of the Conſtruction of the King's Grants and Letters Patent, as to their being good or void; and herein of the King's being deceived in his Grant. 210
3. Where the King's Grantee ſhall partake of his Prerogative. 214.

Privilege. Page 215.

(A) *The Duties and Offices from which certain Perſons by reaſon of their Privilege are exempt.* 216
(B) *The particular Privileges in Suits allowed Officers and Attendants in the Courts of Juſtice.* 218
And herein,
1. What ſuch Officers are that are intitled to Privilege.
2. Of the Privilege and Protection allowed thoſe whoſe Attendance is neceſſarily required. 221
3. In what Caſes this Privilege is to be allowed. 222
4. Of claiming and allowing Privilege; and therein, that it muſt be ſet forth and pleaded. 223
5. How privileged Perſons are to ſue and be ſued. 226
6. Whether there can be Privilege againſt Privilege. 227
(C) *Privilege of Peers and Members of Parliament.* 228
1. Who ſuch Perſons are that are intitled to this Privilege.
2. How far this Privilege extends to their Servants, and Attendants. 229
3. In what Caſes this Privilege is to be allowed. 231
4. Of the Commencement and Continuance of this Privilege. 233
5. How Privilege is to be claimed and taken Advantage of.
6. What ſhall be deemed a Breach of Privilege. 235
7. Of the Proceedings in Courts by and againſt Perſons intitled to Privilege of Parliament. 236

Prohibition. Page 240.

(A) *What Courts may grant a Prohibition.* 241
(B) *Whether the granting a Prohibition be diſcretionary or* ex debito juſticiæ. 242
(C) *Who have a Right to ſuch Writ, and may demand it.* 243
(D) *Who may join in ſuch Writ.* 244
(E) *Of the Suggeſtion and Manner of obtaining a Prohibition.*
(F) *When to be granted abſolutely, or* hoc uſque *only, and herein of directing the Party to declare on his Prohibition.* 247
(G) *Whether more than one ſuch Writ is to be awarded.* 248
(H) *At what Time to be granted; and herein in what Caſes it may be granted after Sentence.* 249

(I) *To what Courts a Prohibition may be awarded; and herein, that the Superior Courts are to determine the Boundaries of all Inferior Juriſdictions.* Page 250
(K) *Prohibitions to inferior Temporal Courts in what Inſtances to be granted.* 253
(L) *Prohibitions to the Spiritual Court in what Inſtances.* 255
And herein,
1. Where they may meddle with a Matter purely Temporal.
2. Where they determine on a Matter of Freehold. 256
3. In what Caſes a Prohibition lies when they determine on Criminal Offences. 257
4. Where the Eccleſiaſtical Courts determine on Acts of Parliament. 258
5. In what Caſes they have a concurrent Juriſdiction, and may determine Incidents. 259
(M) *The Offence of paying Diſobedience to a Prohibition.* 262

[Recoveries.

See Fines and Recoveries, 2 V. 541. *&c.*]

Releaſe. Page 263.

(A) *Releaſes that are expreſs and by Deed.* 264
And herein,
1. Of the Words and Ceremony requiſite in an expreſs Releaſe.
2. How far a Covenant or Agreement may operate as a Defeaſance or Releaſe. 265
3. How far a Diſpoſition by Will may operate as a Releaſe. 267
(B) *Releaſe by Operation of Law, how created, and the Effect thereof.*
(C) *Releaſes of Lands and Hereditaments, how they enure.* 270
And herein,
1. Of Releaſes that enure by way of *Mitter le Eſtate.*
2. Releaſes by way of *Mitter le Droit.* 271
3. Releaſes that enure by way of Extinguiſhment. 273
4. Releaſes that enure by way of Enlargement; and therein of the modern Manner of Conveyancing by Leaſe and Releaſe. 274
5. What Eſtate or Intereſt paſſes by the Releaſe; and therein of the Words requiſite to an Enlargement. 277
(D) *Who in reſpect of their Right and Intereſt are capable of releaſing.* 278
(E) *Of Releaſes by Executors and Adminiſtrators.* 280
(F) *How far the Huſband's Releaſe ſhall bind the Wife.* 281
(G) *To whoſe Benefit a Releaſe ſhall enure; and who ſhall be bound thereby though not a Party to the Releaſe.*
(H) *How far a Poſſibility or Contingent Intereſt may be releaſed.* 283
(I) *How the operative Words in a Releaſe have been conſtrued.* 285
And therein of the Words,
1. Claims and Demands, what are releaſed thereby.
2. By a Releaſe of all Actions and Suits. 288
(K) *Releaſe, in what Caſes reſtrained to the ſpecial Purpoſe for which it was given.* 289
(L) *What Right and Intereſt ſhall be ſaid to be releaſed; and herein of Miſrecitals and Exceptions in Releaſes.* 291

Remainder and Reverſion. Page 292.

(A) *Of what Things a Remainder may be made.* 294
(B) *What Words are ſufficient to create a Remainder.* 296
(C) *What ſhall be a Reverſion, and not a Remainder.* 298
And herein,
1. Where a Limitation to the Heirs of the Donee, or Heirs of his Body, ſhall veſt in ſuch Heirs by Deſcent or Purchaſe.
2. Where a Limitation to the Heirs, or Heirs of the Body of a Stranger ſhall veſt in ſuch Heirs as a Remainder and by Purchaſe, or by way of Limitation and Deſcent. 301
3. Where by a ſpecial Deſcription the Remainder ſhall veſt by Purchaſe. 303
(D) *Of the ſeveral Kinds of Remainders as diſtinguiſhed into Remainders veſted, or in Contingency and Abeyance.* 306
(E) *What Eſtate is ſufficient to ſupport a Remainder.* 309
(F) *Of the Continuance of the particular Eſtate, and when the Remainder is to commence.* 311
(G) *Contingent Remainders, how prevented from riſing or coming* in Eſſe. 312
(H) *Of Remainders that ariſe on Conditions Precedent or Subſequent.* 317
And herein,
1. Of the Difference between a Condition and a Limitation, and in Caſe of the Condition when it precedes the Veſting of the Remainder as the Cauſe thereof, and is annexed to the firſt Eſtate, and when it is annexed abſolutely without any Regard to the Remainder. 318
2. Between a Deed and a Will, when in both the ſame Words of Condition are made uſe of for veſting the Remainder. 319
3. Between a Limitation over in Caſe of a Will, and where no Limitation is made over. 323
4. Between Remainders that are to ariſe upon Conditions agreeable to the Rules of Law, and ſuch as are to ariſe upon Conditions repugnant and againſt the Rules of the Law. 324
5. Between ſuch Words as actually make a Condition, and ſuch as are only deſcriptive of the Manner when and how the Remainders are to ariſe. 326
(I) *In what Caſes a Remainder or Reverſion ſhall be ſubject to the Acts or Charges of the particular Tenant.* 328
(K) *To what Purpoſes the Remainder is accounted but as one with the particular Eſtate, and where they are regarded as ſeveral Eſtates.* 330
(L) *Of Croſs Remainders, or thoſe ariſing by Implication and Conſtruction of Law.* 332

Rent. Page 334.

(A) *Of the ſeveral Kinds of Rents.* 335
And herein,
1. Of Rent-Service.
2. Of a Rent-Charge. 336
3. Of a Rent-Seck. 337
(B) *Out of what Things a Rent may iſſue.* 338
(C) *Upon what Conveyance a Rent-Service may be reſerved.* 340
(D) *By what Words a Rent may be reſerved or created.* 341
(E) *How ſeveral Rents may be reſerved in the ſame Deed.* 342

(F) *Of*

(F) *Of the Days of Payment.* Page 343
(G) *To whom Rents may be reſerved or granted.* 346
(H) *Of the Continuance of the Rent, and to whom to be paid, and herein of the diſtinct Intereſts of the Heir and Executors of the Leſſor.* 349
(I) *Of the Recovery and Demand of the Rents.* 353
And herein,
1. In what Caſes a Demand is neceſſary.
2. The Time of Demand. 357
3. The Place where a Demand is to be made. 358
(K) *The ſeveral Remedies for Recovery of Rents.* 359
And herein,
1. Of the Remedy by Diſtreſs. 359
2. Of the Remedy by Writ of Annuity. 360
3. Of the Remedy by Aſſiſe. 361
4. Of the Clauſe of Re-entry. 361
5. Of the *Nomine pœnæ.* 362
6. Of the Remedy by Action of Debt, and as grounded on ſeveral Acts of Parliament. 363
(L) *Rent when and how diſcharged, and herein of the Eviction of the Tenant.* 366
(M) *Of Apportionment, and therein of the Suſpenſion and Extinguiſhment of the Rent.* 368
And herein,
1. In what Caſes a Rent may be apportioned by the Act of the Parties, and herein of the Difference between a Rent-Service and a Rent-Charge. 368
2. In what Caſes they may be apportioned by the Act of Law, or the Act of God. 370
3. The Manner of ſuch Apportionment, and how the Tenant ſhall take Advantage of it. 371

Replevin and Avowry. Page 372.

(A) *The Nature and Deſcription thereof.* 372
(B) *The different Kinds of Replevins; and herein of Replevin by Writ at Common Law, and by Plaint or Act of Parliament.* 373
(C) *Replevins, out of what Courts and by what Authority they iſſue; and herein of the Power and Duty of the Sheriff.* 374
(D) *Of the Pledges in Replevin, and the Proceedings againſt them.* 375
(E) *Of the Writs or Proceſſes in Replevin.* 378
And herein,
1. Of the original Writ of Replevin. 378
2. Of the Withernam. 379
3. Of the Writ of ſecond Deliverance. 380
4. Of the Writ *de proprietate probanda*, and the Claim of Property. 381
5. Of the Writ *de returno habendo.* 382
6. Of Returns irrepleviſeable. 383
7. In what Manner the Sheriff is to return and execute ſuch Proceſſes. 383
(F) *Of what Property and for what Things a Replevin lies.* 384
(G) *Replevin, for and againſt whom it lies.* 385
(H) *Of the Declaration in Replevin.* 386
(I) *Pleas in Replevin.* 387
(K) *Avowries in Replevin; and herein of what Seiſin and Services, and the Certainty required therein.* 389
Coſts and Damages in Replevin. Vide Tit. *Coſts* Letter (F)

Reſcue. Page 396.

(A) *What it is, and of what Things it may be.* 396
(B) *In what Caſes a Reſcue may be juſtified.* 397
(C) *Of the Offence of making a Reſcue, and how the Offenders are to be proceeded againſt.* 397
(D) *The Form of the Proceedings on a Reſcous.* 400
(E) *Of the Return of a Reſcous.* 401
And herein,
1. In what Caſes the Sheriff may return a Reſcous; and therein of the Difference between a Reſcous on meſne Proceſs and Execution. 401
2. Of the Form of the Return, and for what Defects it may be quaſhed. 402
3. Whether the Sheriff's Return of a Reſcue be traverſable. 404

Scandalum Magnatum. Page 404.

(A) *The Perſons who may bring this Action.* 405
(B) *For what Words it lies.* 405
(C) *The Proceedings in this Action.* 407

Scire Facias. Page 409.

(A) *The Nature of the Writ.* 409
(B) *In what Caſes it is a proper Remedy.* 410
(C) *In what Caſes neceſſary, and herein who are to be Parties to it, and of the Privity required herein.* 411
And herein,
1. Of the *Sci. Fa.* to revive Judgments, and after what Time neceſſary. 411
2. Of the *Sci. Fa.* on Recognizances and Statutes. 413
3. Of the *Sci. Fa.* on Letters Patent. 415
4. *Sci. Fa.* by and againſt Executors and Adminiſtrators. 416
5. By and againſt Heirs and Tertenants. 417
6. By and againſt Huſband and Wife. 419
(D) *The Form of the Writ and Proceedings, and how far it muſt purſue the Nature of the original Action.* 421
(E) *Pleadings to a* Sci. Fa. 423

Sequeſtration. Page 424.

(A) *The Nature and firſt Introduction of ſuch Proceſs.* 425
(B) *In what Caſes to be awarded.* 426
And herein,
1. Againſt what Perſons. 426
2. To what Places. 426
3. What Eſtate or Intereſt ſhall be liable to a Sequeſtration, and from what Time. 426
(C) *Of the Power and Duty of the Sequeſtrators.* 427
(D) *Sequeſtration, when determined.* 428

Sheriff. Page 429.

(A) *The Nature of his Office.* 430
(B) *Who are qualified or exempt from ſerving.* 431
(C) *Manner of appointing him; and herein of his Oath.* 432
(D) *That he muſt attend his Office ſingly, and cannot execute any other.* 434
(E) *How long to continue in his Office, and by what determined.* 434
(F) *That he muſt be reſident in his County, and whether he hath any Juriſdiction out of it.* 435
(G) *Cannot diſpoſe of his Bailiwick.* 436
(H) *Of the High Sheriff's Power and Duty in appointing an Under Sheriff and other Deputies.* 436
And herein,
1. Of the Under Sheriff, and in what Manner appointed. 436
2. Of Covenants between the High Sheriff, his Under Sheriff, and other Officers. 438
3. Of Acts that may be done by either of them, or where the High Sheriff muſt himſelf be perſonally preſent. 440
4. The Manner of appointing Bailiffs and other Officers, and therein of his being anſwerable for their Acts. 441
5. Of his Juriſdiction over Gaols and Gaolers. 443
(I) *Of the preceding and ſucceeding Sheriff, and herein of the Acts neceſſary to be done by each of them.* 444
(K) *Where more than one Sheriff.* 447
(L) *Of his Duty and Acts as a Judicial Officer.* 448
(M) *Of his Duty and Acts as a Miniſterial Officer.* 449
And herein,
1. That he is the proper Officer to execute all Writs, except in Caſe of Partiality. 449
2. That he cannot diſpute the Authority by which they iſſue, nor any Irregularity in them. 450
(N) *How he is to execute ſuch Writ.* 452
And herein,
1. That it muſt be without Favour or Oppreſſion, and after ſuch a Writ is actually taken out, and before it is returnable. 452
2. Of his raiſing the *Poſſe Comitatus.* 453
3. Of breaking open Doors. 454
4. Whether he can execute his Writ on a *Sunday.* 456
5. In what Manner he is to do Execution. 457
(O) *Of his Duty in admitting Perſons to Bail; and herein of Securities taken for Eaſe and Favour.* 461

Simony. Page 465.

(A) *In what the Offence of Simony does conſiſt.* 466
(B) *How far a Bond for reſigning a Benefice is good at Law.* 470
(C) *Of the Power exerciſed over a Bond for reſigning a Benefice by Courts of Equity.* 471
(D) *Whether the Penalty of a Bond for reſigning a Benefice be ſaved, where the Ordinary has refuſed to accept a Reſignation.* 472
(E) *Some Objections to a Bond for reſigning a Benefice conſidered.* 473
(F) *Of the Forfeitures, Diſabilities, and Puniſhments, incurred by Simony.* 474
1. By the Incumbent. 474

2. By the Patron. Page 475
3. By the Ordinary. 475
(G) *In what Caſes, and at what Times, Advantage may be taken of the Forfeitures and Diſabilities incurred by Simony.* 476
1. By the King. 476
2. By other Perſons. 477
(H) *Of the Juriſdiction of Spiritual Courts in Simony.* 477
(I) *Of the Pleadings in an Action upon the* 31 Eliz. c. 6. 478

Slander. Page 480.

(A) *In what Caſes an Action for Words does in the general lie.* 482
(B) *What Words are in themſelves actionable.* 483
1. Words which import the Charge of a Crime. 483
1. Of Treaſon. 483
2. Of Murder. 484
3. Of Perjury. 484
4. Of Forgery. 485
5. Of Theft. 485
6. Of another Crime. 486
2. Words which import the Charge of having a contagious Diſtemper. 488
3. Words which are diſgraceful to a Perſon in an Office. 488
1. To a Perſon in a judicial Office. 488
2. To a Perſon in an Office of Truſt. 489
4. Words which are diſgraceful to a Perſon of a Profeſſion or Trade. 490
1. To a Clergyman. 490
2. To a Phyſician or Surgeon. 490
3. To a Barriſter or an Attorney at Law. 491
4. To a Perſon profeſſing an Art. 492
5. To a Tradeſman. 492
(C) *Some Words which become actionable by Reaſon of the Damage received from them.* 495
(D) *Certain Circumſtances, which are to be regarded in the Conſtruction of Words.* 496
1. The Time when the Words were publiſhed. 496
2. The Place where the Words were publiſhed. 497
3. The Language the Words were publiſhed in. 498
4. The Occaſion of publiſhing the Words. 498
5. The Intention of publiſhing the Words. 498
(E) *In what Caſes, Words publiſhed in a Courſe of Juſtice are actionable.* 499
(F) *In what Caſes, Words in the paſt or future Tenſe are actionable.* 500
(G) *How far Words muſt be affirmative, in order to render them actionable.* 500
(H) *How far Words muſt be certain, in order to render them actionable.* 502
(I) *By what Means the Want of Certainty, ſufficient to render the Words actionable, may be ſupplied.* 503
1. By the Intention of the Speaker. 503
2. By an Averment. 504
(K) *In what Caſes, doubtful Words are to be conſtrued* in mitiori ſenſu. 505
(L) *In what Caſes, doubtful Words are not to be conſtrued* in mitiori ſenſu. 505
(M) *In what Caſes, adjective Words are actionable.* 507
(N) *In what Caſes, Words which import only an Intent are actionable.* 508

(O) *In what Caſes, disjunctive or copulative Words are actionable.* Page 508
(P) *In what Caſes, an Action does not lie, by Reaſon of Repugnancy in the Words.* 509
(Q) *In what Caſes, an Action lies for repeating Words which were publiſhed by another Perſon.* 509
(R) *In what Caſes, actionable Words are rendered not actionable; or Words not actionable are rendered actionable, by ſubſequent Words.* 510
(S) *Of the Pleadings in an Action for Words.* 511
1. In the general. 511
2. In what Caſes, an Averment is neceſſary. 513
3. In what Caſes, a Colloquium is neceſſary. 515
4. What is the Uſe of an Inuendo. 515
5. What may be pleaded in Juſtification of Words. 516
(T) *In what Kinds of ſlanderous Words ſpiritual Courts have Juriſdiction.* 518
(U) *In what Caſes, a Prohibition lies to a Suit in a ſpiritual Court for Words.* 520
1. Where actionable Words are coupled with Words, which are a ſpiritual Defamation. 520
2. Where a temporal Damage has been received from Words, which are a ſpiritual Defamation. 520
3. Where the Words, which are a ſpiritual Defamation, import a Charge of an Offence not conuſable in a ſpiritual Court. 521

Smuggling. Page 523.

(A) *Of Cuſtoms in the general.* 524
(B) *Of the Origin of Cuſtoms.* 525
(C) *Of the ancient State of certain Cuſtoms.* 531
1. Of the Duties upon Wool, Wool-fells, and Leather. 531
2. Of the Duty of Tonage. 532
3. Of the Duty of Poundage. 533
(D) *Of the preſent State of the Cuſtoms.* 534
1. Of the Duty of Tonage. 534
2. Of the Duty of Poundage. 535
3. Of the Duties to which Aliens are liable. 540
(E) *Of prohibited Goods.* 542
(F) *Of the pecuniary Penalties and Forfeitures incurred by Perſons Guilty of Smuggling, or of ſuch Practices as have a direct Tendency thereto.* 543
1. In Ships at Sea, or hovering upon the Coaſt. 543
2. In the ſhipping or unſhipping of Goods at any Port, Member or Wharf, not lawfully appointed for ſuch Purpoſes. 546
3. In Ships in Port inward bound. 547
4. In Ships in Port, outward bound. 551
5. In coaſting Veſſels. 553
6. In the Caſe of Certificate and prohibited Goods. 555
7. In divers other Caſes. 556
(G) *Of the corporal Puniſhments to which Perſons who have been Guilty of ſmuggling, or of ſuch Practices as have a direct Tendency thereto, are liable.* 560
1. Impriſonment. 560
2. Whipping. 561
3. Tranſportation. 562
4. Death. 564

Sodomy. Page 569.

Soldiers. Page 571.

(A) *Of inliſting Soldiers.* 572
(B) *In what Caſes Soldiers are free from Arreſt.* 574
(C) *Of quartering Soldiers.* 576
(D) *Of Carriages for the Uſe of his Majeſty's Forces.* 583
(E) *Of the Penalties incurred by encouraging Deſertion, or harbouring a Deſerter, and of the Reward for apprehending a Deſerter.* 585
(F) *Of the military Puniſhments to which Soldiers are liable.* 587
(G) *Of the civil Puniſhments to which Soldiers are liable.* 589
(H) *Of the Liberty given to Soldiers of exerciſing Trades.* 592
(I) *Of divers Things, which did not fall under any of the foregoing Heads.* 593

Stamps. Page 595.

(A) *Of the particular Stamp Duties, to which certain Inſtruments, Writings and Things are liable.* 596
(B) *Of ſome Regulations, which principally concern the Officers of the Stamp Duties.* 606
(C) *What the Conſequence is, of ingroſſing or writing any Matter liable to a Stamp Duty upon Vellum, Parchment or Paper which has not been duly ſtamped.* 610
1. To any Perſon ſo ingroſſing or writing. 610
2. To ſome particular Perſons ſo ingroſſing or writing. 610
3. To the Inſtrument or Thing ſo ingroſſed or written. 612
(D) *Of Regulations for preventing Frauds to the Prejudice of the Stamp Duties.* 613
1. By writing a ſecond Matter liable to a Stamp Duty upon Vellum, Parchment or Paper which has not been a ſecond Time duly ſtamped. 614
2. In the Manner of writing certain Matters. 615
3. In legal Proceedings. 615
4 In News-Papers, Almanacks and Pamphlets, 618
5. In the Money or other Conſideration given with an Apprentice. 619
6. In Cards or Dice. 623
7. In ſome other Caſes. 628
(E) *Of the pecuniary Penalties incurred by Offenders againſt the Statutes impoſing Stamp Duties.* 629
(F) *Of the corporal Puniſhments, to which Perſons guilty of Offences againſt the Statutes impoſing Stamp Duties are liable.* 630

Statute. Page 633.

(A) *Of ſome Things neceſſary to the Validity of a Statute.* 634
(B) *Of ſome Things incidental to a Statute.* 636
(C) *From what Time a Statute begins to have Effect.* 636
(D) *How long a Statute continues in Force.* 637
(E) *Of the vaſt Power of a Statute.* 639
(F) *Of a public or private Statute.* 639
(G) *Of an affirmative or negative Statute.* 641
(H) *Whoſe Province it is to conſtrue a Statute.* 643
(I) *Rules to be obſerved in the Conſtruction of a Statute.* 644

1. Words and Phraſes, the Meaning of which in a Statute has been aſcertained, are when uſed in a ſubſequent Statute to be underſtood in the ſame Senſe. Page 644
2. In the Conſtruction of one Part of a Statute every other Part ought to be taken into Conſideration. 645
3. If divers Statutes relate to the ſame Thing, they ought all to be taken into Conſideration in conſtruing any one of them. 646
4. The Common Law ought to be regarded in the Conſtruction of a Statute. 647
5. The Intention of the Makers of a Statute ought to be regarded in the Conſtruction of the Statute. 647
6. In what Caſes, a Statute ought to have an equitable Conſtruction. 649
7. A Statute, which concerns the public Good, ought to be conſtrued liberally. 650
8. A remedial Statute ought to be conſtrued liberally. 650
9. A penal Statute ought to be conſtrued ſtrictly. 651
10. Some other Rules, which ought to be obſerved in the Conſtruction of a Statute. 652

(H) *How a Perſon guilty of Diſobedience to a Statute may be puniſhed.* 653
(L) *Of pleading a Statute.* 655
1. A public Statute. 655
2. A private Statute. 655
3. Some general Rules for pleading a Statute. 655
4. Some Rules for pleading a Statute, which relate to particular Parts of the Pleading. 656
5. Of Miſrecital in pleading a Statute. 657
6. Of Surpluſage in pleading a Statute. 659

Summons and Severance. Page 660.

(A) *The Neceſſity of Judgment of Severance in ſome Caſes.* 660
(B) *By whom Judgment of Severance may be given.* 661
(C) *Where a Summons muſt iſſue, before Judgment of Severance can be given.* 662
(D) *At what Time Judgment of Severance muſt be prayed in a Writ of Error.* 662
(E) *Who may pray Judgment of Severance.* 662
(F) *In what Actions Judgment of Severance may be given.* 663
(G) *Where a Writ abates after Judgment of Severance.* 665
(H) *The Conſequence of Judgment of Severance to the Party ſevered.* 666

Superſedeas. Page 667.

(A) *Of the different Kinds of Superſedeas.* 667
(B) *Who may award a Writ of Superſedeas.* 668
(C) *In what Caſes, a Writ of Superſedeas may be awarded.* 670
(D) *Of certain Writs which are Superſedeas's by Implication.* 674
1. A Writ of *Audita Querela.* 674
2. A Writ of ſecond Deliverance. 675
3. A Writ of *Habeas Corpus ad faciendum* and *recipiendum.* 675
4. A Writ of *Certiorari.* 676
5. A Writ of Error. 679
(E) *Of certain Requiſites, which are neceſſary to the making of a Writ of Error a Superſedeas by Implication.* 681

1. It must be allowed. Page 681
2. Bail must be put in thereto. 682
3. It must be proceeded in without Delay. 682
(F) *To what Time a Writ of Error relates as a Supersedeas.* 683
(G) *What the Effect of a Supersedeas is.* 684
(H) *How Disobedience to a Supersedeas may be punished.* 685

Surety of the Peace. Page 686.

(A) *In what Cases, a Justice of the Peace may* ex Officio *compel a Person to find Security for keeping the Peace.* 686
(B) *Who may crave Surety of the Peace.* 687
(C) *Against whom Surety of the Peace may be granted.* 687
(D) *In what Cases, Surety of the Peace ought to be granted.* 687
(E) *The Manner of granting Surety of the Peace by the Court of Chancery.* 688
(F) *The Manner of granting Surety of the Peace by the Court of King's Bench.* 689
(G) *The Manner of granting Surety of the Peace by a Justice of the Peace.* 691
(H) *In what Cases, a Recognizance for keeping the Peace is forfeited.* 693
(I) *In what Cases, a Recognizance for keeping the Peace may be discharged.* 694

Surety of the good Behaviour. Page 696.

(A) *In what Cases, Surety of the good Behaviour may be granted, where Surety of the Peace ought not to be granted.* 696
(B) *What is a Forfeiture of a Recognizance for being of good Behaviour, which would not have been so of a Recognizance for keeping the Peace.* 698

---

* Pleas and Pleading.

PLEADING in general ſignifies the Allegations of Parties to Suits when they are put into a proper and legal Form; and are diſtinguiſhed, in reſpect to the Parties who plead them, by the Names of Bars, Replications, Rejoinders, Surrejoinders, Rebutters, Surrebutters, *&c.* and though the Matter in the Declaration or Count does not properly come under the Name of pleading, yet being often comprehended in the extended Senſe of the Word, we have conſidered it under this Head.

Pleading in Strictneſs is no more than ſetting forth that Fact which in Law ſhews the Juſtneſs of the Demand made by the Plaintiff, or the Diſcharge and Defence made by the Defendant; and herein no greater Certainty is required than is ſufficient to bring on a Trial without inveigling Judge or Jury; and it ſeems, that originally Pleadings were ſo formed, and were very plain and conciſe; but in Progreſs of Time Pleaders, yea and Judges, became too curious in them, ſo that the Art and Dexterity of Pleading, which in its (*a*) Uſe, Nature and Deſign was only to render the Fact plain and intelligible, and to bring the Matter to Judgment with convenient Certainty, began to degenerate from its primitive Simplicity and true Uſe, and end in a Piece of Nicety and Curioſity, which how it hath improved therein in latter Times, the Length of the Pleadings, the many unneceſſary Repetitions, and the many Miſcarriages of Cauſes upon ſmall and trivial Objections, do but too ſufficiently teſtify.

(*a*) Recommended by *Littleton* as the moſt honourable, laudable and profitable Thing in the Laws of *England*. Lit. S. &. 534.

and by Lord *Coke*, Co. Lit. 17. a. 168, 303. 2 Co. *Tooker*'s Caſe, and Hob. 162, 292, 295.——And it ſeems, that anciently Fines were impoſed *pro ſtulte loquio*, or *ſtulte dicto*, which were Mulcts laid on Pleaders by the Courts for barbarous and diſorderly Pleading. 2 Inſt. 123.

Pleas were anciently (*b*) *Ore tenus*, and afterwards minuted down by the Prothonotaries, and entered of Record in the *Latin* Tongue, that being a dead Language, and leaſt ſubject to Variation, to remain as Muniments and Precedents of the Law: That the Pleadings ſhould be in *Latin* is expreſsly enacted by the 36 *E.* 3. *cap.* 15. which Statute was made to aboliſh a Law introduced by *William* the Conqueror, which ordained, that the Pleadings in the Courts of Juſtice ſhould be in *French*.

10 Co. 132.

(*b*) And being ſo is the Reaſon that a Plea, whilſt in Paper, may be amended. *Vide* Title *Amendment*.

But now by 4 *Geo.* 2. *cap.* 26. it is enacted, "That all Writs, Pro-
" ceſs, Pleadings, Rules, Indictments, Records, and all Proceedings in
" any Courts of Juſtice within *England*, and in the Court of Exchequer
" in *Scotland*, ſhall be in the *Engliſh* Tongue, and be written in ſuch com-
" mon Hand as Acts of Parliament are uſually ingroſſed in, the Lines
" and Words to be written at leaſt as cloſe as the ſaid Acts uſually are,
" and not abbreviated; and all Perſons offending againſt this Act ſhall
" forfeit 50 *l.* to any Perſon who will ſue for the ſame."

But by 6 *Geo.* 2. *cap.* 14. it is provided, "That the above Penalty ſhall
" not be extended to the expreſſing the Names of Writs, or technical
" Words in the ſame Language, as hath been uſed, nor to Abbreviations
" uſed in the *Engliſh* Language."

In

* Page 2 * In Pleading there are ſeveral general Rules laid down in our Books; as,

Co.Lit. 303. Plow.65,81. Cro.Jac.362. That good Matter muſt be pleaded in right Form, apt Time, and due Order, but that that, which is but Inducement or Conveyance to the Subſtance, need not be ſo certainly alledged, as that which is the Giſt of the Plea.

Co.Lit. 303. 7 Co. 40. Dyer 16. That that which is apparent to the Court, and appears from a neceſſary Implication in the Record, need not be averred.

Co.Lit. 303. Hob. 234. Latch 186. That every Man's Plea ſhall be taken moſt ſtrongly againſt himſelf, as every Body is preſumed to make the moſt of his own Caſe.

2 Mod. 5. That what the Parties have agreed in Pleading ſhall be admitted, tho' the Jury find otherwiſe.

Vaugh. 58, 60. *per* Lord *Vaughan.* That when a Man will recover a Thing from another, it is not enough for him to deſtroy ſuch Perſon's Title, but he muſt prove his own a better, according to the Rule, *Melior eſt conditio poſſidentis.*

Co.Lit. 285, 303. That every Man ſhall plead ſuch Pleas as are pertinent and proper for him, according to the Quality of his Caſe, Eſtate or Intereſt.

Hob. 164. *per* Lord *Hobart.* That the Law requires in every Plea two Things, the one, that it be in Matter ſufficient, the other, that it be deduced and expreſſed according to the Forms of Law; and if either the one or the other of theſe be wanting, it is Cauſe of Demurrer.

Dyer 66. Godb. 253. Leon. 78. That every Plea in Bar, being a Confeſſion and Avoidance of the Plaintiff's Action, muſt be ſubſtantive and certain, with an Avoidance of the Plaintiff's Demands, which he may traverſe, and thereon go to Iſſue; becauſe the Declaration of the Plaintiff ſtands confeſſed, as far as it is not avoided by the Defendant.

7 Co. 25. a. 8 Co. 120. b. Co.Lit. 303. That if a Count, Avowry, which is in Nature of a Count, Replication, &c. want (*a*) Form, or (*b*) omit Circumſtance of Time, Place, &c. they may be made good by the Plea of the adverſe Party; but if they want Subſtance, they cannot be made good; ſo in ſuch Caſes the Bar may be made good by the (*c*) Replication, and the Replication, by the Rejoinder, &c.

(*a*) Duplicity in the Declaration cured by pleading over. 2 Vent. 222. (*b*) A Suit depending muſt ſhew in what Court, but cured by pleading over. 1 Lev. 195. ——— Not alledging *pro ut patet per recordum* cured by pleading over. 3 Lev. 311. In Debt for Rent, if no Place be aſſigned where the Leaſe was made, the Defendant in his Plea confeſſing the Leaſe makes the Declaration good. Hob. 82. (*c*) Fault in the Plea cured by the Replication. Carth. 66. ——— And that if a Man pleads over, he ſhall never take Advantage of any Slip committed in the Pleading of the other Side, which he could not take Advantage of upon a general Demurrer. 2 Salk. 519. pl. 18. *Per Holt*, Ch. J.

Co.Lit. 303. *Vide poſtea.* That all Pleas muſt be alledged directly, and not by way of Rehearſal; nor is it ſufficient, that what ought to be expreſsly pleaded may be deduced by Argument from what is pleaded.

3 Leon. 300. Laid down as a Rule by Lord *Anderſon*, cited in Show. P. C. 94. That in Matters triable by our Law, all Things iſſuable ought to be ſpecially alledged in order to have a convenient Trial; but in (*d*) Matters Spiritual the Law is otherwiſe; becauſe there is no Peril in the Trial, and therefore if certain enough to ground a Certificate, it is ſufficient.

(*d*) Sentences in the Spiritual Courts may be alledged ſummarily; as that a Divorce was betwixt ſuch Parties for ſuch a Cauſe, and before ſuch a Judge; but the Judge muſt be named, that the Court may write to him; that this is ſufficient, it being to no Purpoſe to allege them particularly, becauſe the Forms of theſe Courts are different from thoſe of the Common Law; and our Judges preſume that they are obſerved by the Judges of thoſe Courts. Co. Lit. 303.

Vide poſtea. That Surpluſage does not vitiate, unleſs it be contrariant to the Matter pleaded before.

Co.Lit. 303. That where one is authoriſed to do a Thing by Common Law, Statute, Cuſtom, Grant, or Commiſſion, he ought to ſhew, that he hath purſued the Subſtance of it accordingly.

Tha

* That general Eſtates in Fee-ſimple may be generally alledged; as that *J. S.* was ſeiſed in Fee; but the Commencement of particular Eſtates muſt be ſhewn, becauſe they could not originally commence without a Conveyance, which muſt be ſhewn, unleſs they be alledged by way of Inducement only. *Page 3 Co Lit. 121. a. 303. But for this, and the pleading a *Que Eſtate*, *vide* Bro. Tit. *Que Eſtate*. 18 Ed. 4. 10. Dyer 238. b. Cro. Eliz. 22. Cro. Car. 190, 428. Cro. Jac. 673. Yel. 76. Lev. 190. Sid. 297. 2 Keb. 87, 96. Skin. 303. pl. 7. 2 Mod. 55. Raym. 389. 2 Salk. 562. Carth. 9, 208, 432, 444.

That Pleas ought to conclude properly, thoſe to the Writ to conclude to the Writ, thoſe in Bar to the Action; Eſtoppels muſt rely on the Eſtoppel. Co. Lit. 303.

But for the better underſtanding of theſe Matters, we muſt more particularly conſider,

(A) The ſeveral Parts and the Order of Pleading. 6.

(B) The Declaration. 8.

And herein,

1. The Nature thereof; and therein of adding ſeveral Counts in the ſame Declaration. 8.
2. Who may join or be joined in the ſame Declaration. 9.
3. What Matters may be joined in the ſame Declaration. 11.
4. Of the Declaration's agreeing with the Writ. 12.
5. Of the Sufficiency and Certainty required in the Declaration; and therein of Matters of Inducement, and that which is the Giſt of the Action. 13.

And herein,

1. Where by the Declaration it muſt appear that the Plaintiff hath a Right. 13.
2. Where the Plaintiff muſt ſhew that he hath performed what was requiſite on his Part. 16.
3. Where general Allegations in the Declaration are ſufficient; and therein of Miſ-recitals and Omiſſions. 17.
4. Where the Averments muſt be poſitive and expreſs in the Declaration. 22.
5. Of the Certainty required in the Deſcription of the Thing declared for, 24.
6. Of the Declaration's being good in Part, and void in Part. 25.

(C) Of Imparlance. 27.

And herein,

1. Of the Nature thereof, and the ſeveral Kinds. 27.
2. What the Defendant muſt do before any Imparlance. 28.

3. What

3 What he is to plead after a general Imparlance. 29.
4. What may be pleaded after a ſpecial Imparlance. 29.
5. In what Caſes the Courts exerciſe a diſcretionary Power in granting or refuſing an Imparlance. 30.

(D) Of making Defence; and herein of the Difference between full and half Defence. 31.

* Page 4 * (E) The ſeveral Kinds of Pleas. 32.

And herein,

1. Of Pleas to the Juriſdiction. 32.

And therein,

1. To what Courts to be pleaded, and of the Difference between a Plea to the Juriſdiction and a Claim of Conuſance. 32.
2. The Manner and Time of pleading to the Juriſdiction. 35.

(F) Of Pleas in Abatement. 35.

And herein,

1. Of Pleas in Diſability of the Perſon of the Plaintiff. 35.
2. Of Pleas in Diſability of the Perſon of the Defendant; and therein of Privilege. 36.
3. Of Miſnomer, and the Want of Addition. 38.
4. Of Abatement by reaſon of Coverture. 39.
5. Of Abatement by the Death of Parties. 40.
6. Where a Defect in the Writ ſhall abate it. 43.
7. Where the Writ's not agreeing with the Count ſhall abate it. 43.
8. Where the Writ is abated *de facto*, or is only abateable. 44.
9. Where the Writ ſhall abate *in toto*, or in Part only. 45.
10. In what Caſes the Defendant hath it in his Election to plead in Abatement or in Bar. 46.
11. Pendency of another Suit or Action how to be pleaded in Abatement. 48.
12. What ſhall be ſaid a Plea in Bar or in Abatement; and therein of the Concluſion proper to each Plea. 49.
13. Pleas in Abatement how reſtrained. 51.
14. Of the Judgment in a Plea in Abatement, and how far peremptory. 51.
15. Foreign Plea. 52.

(G) Of Pleas in Bar and in Chief. 54.

And

And herein,

1. Of the General Iſſue, and how formed. 54.
2. Immaterial and informal Iſſues, and where aided. 56.
3. Of ſpecial Pleas; and therein of Pleas amounting to the General Iſſue, and of Matters which may be pleaded or given in Evidence. 60.
4. Of ſham Pleas, and the Conſequence of falſe Pleading. 65.

(H) **Traverſe.** 67.

And herein,

1. The Nature thereof. 67.
2. In what Caſes a Traverſe is permitted. 69.
3. In what Caſes a Traverſe is neceſſary. 70.
4. Whether there may be a Traverſe upon a Traverſe. 72.
5. To what Point the Traverſe ſhall be taken; and therein what Matters are traverſable, and of the Manner of taking thereof. 75.

* (I) **Pleas in Bar, their Sufficiency and Certainty.** 83. * Page 5

And herein,

1. That the Plea muſt be proper to, and adapted to the Action. 83.
2. That the Plea muſt be good in Subſtance; and therein of Matter of Inducement, and that which is the Giſt of the Defence. 86.
3. Of general Pleading to avoid Prolixity; and therein of affirmative and negative Pleas. 90.
4. Of Surpluſage and Repugnancy in Pleading. 94.
5. That the Pleading ought to be direct and not argumentative. 97.
6. Negative Pregnant. 98.
7. That Things muſt be pleaded according to their Operation in Law. 100.
8. Of Colour in Pleading. 102.
9. Of pleading Non-tenure and Diſclaiming. 104.
10. Pleading *Hors de ſon fee.* 105.
11. Eſtopples in Pleading. 106.
12. Pleading with a *Profert*, and demanding Oyer. 109.

And herein,

1. In what Caſes there muſt be a *Profert* or *Monſtrans de fait.* 109.

2. Of

2. Of demanding Oyer. 113.
13. Pleading a Recovery in a former Action. 114.

(K) Duplicity in Pleading. 118.

And herein,

1. The Reaſon why Duplicity is a Fault, and the Manner of taking Advantage thereof. 118.
2. What ſhall be ſaid Duplicity in Pleading. 119.
3. Of pleading double by Leave of the Court. 121.

(L) Departure in Pleading. 122.
(M) Repleader. 126.

1. Of the Nature of a Repleader, and Manner of awarding it. 126.
2. A Repleader in what Caſes to be awarded. 126.
3. Repleader at what Time to be awarded. 129.

(N) Demurrer. 129.

1. The Definition and Nature of a Demurrer. 129.
2. The Manner and Form of demurring; and therein of joining in Demurrer, and waiving thereof. 130.
3. What Facts are admitted by a Demurrer. 131.
4. How far a Judgment on a Demurrer is peremptory. 132.

* Page 6 *5. Of the Difference between a general and ſpecial Demurrer. 132.

6. What Things are good on a general Demurrer, that would be otherwiſe on a ſpecial one. 133.
7. Demurrer to Evidence. 136.

(O) Plea at what Time to be put in, and the Ceremony requiſite therein. 137.
(P) Continuance and Diſcontinuance in Pleading. 139.
(Q) Pleas Puis darrein continuance. 142.

(A) Of the ſeveral Parts, and the Order of Pleading.

Doct. pl. 84. Co. Lit. 17. a. Plow. 84. *Vide* the next Title.

THE firſt Thing in Pleading is the Plaintiff's Count or Declaration, in which he ſets forth the Cauſes of his Complaint particularly, and thereby explains his Writ; and this he muſt do in ſuch a Manner, as to make it appear to the Court there is ſufficient Foundation

tion for his bringing the Action; and all Eſſentials, or whatever is of the Subſtance of the Action, muſt be alledged, that the Court may be enabled to give Judgment for him in caſe a Verdict ſhould be found in his Favour.

The next Thing is the Defendant's Plea or Bar: Pleas are variouſly diſtinguiſhed; the more general Diviſion of them is that of being Dilatory or Peremptory; or they are, *1ſt*, Pleas in Abatement; *2dly*, Such as ſuſpend the Action; or, *3dly*, Such as bar the Plaintiff for ever. And as the Plaintiff's Declaration muſt ſet forth all Eſſentials neceſſary to maintain it; ſo the Defendant's Bar muſt be ſubſtantially good and certain, with an Avoidance of the Plaintiff's Demands, which the Plaintiff may traverſe, and thereon go to Iſſue.

The Replication is the Plaintiff's Anſwer to the Defendant's Plea, which fortifies and ſupports his Declaration; the Rejoinder is the Defendant's Anſwer thereto; ſo of Surrejoinders, Rebutters, Surrebutters, *&c.* in which the material Thing is, that they purſue what hath been at firſt alledged and inſiſted upon, otherwiſe it will be a Departure in Pleading; as if a Matter be pleaded at Common Law, this can't be maintained by a Cuſtom †; as in Covenant on an Indenture of Apprenticeſhip to ſerve ſeven Years, the Breach aſſigned was, that he did not ſerve, *&c.* the Defendant pleaded Infancy; the Plaintiff replied the Cuſtom of *London*, and adjudged a Departure. So an Action at Common Law can't be made good in the Replication by an Act of Parliament; but if one pleads a Statute, and the other ſays it is repealed, he may reply, that it is revived by another, for this fortifies the firſt Matter.

Vide under the Diviſion *Departure in Pleading.*

†SeeCo.Lit. 304. a. and the Authorities there cited.

In Debt upon a Bond, conditioned to ſave a Pariſh harmleſs concerning a Baſtard Child which the Obligor was forced to father, he pleads *Non damnificatus*; they reply, that the Child was ready to ſtarve, and that therefore they put it out to nurſe, which coſt them 4*l.* Defendant rejoins, that he was ready to pay the Money and ſave the Pariſh harmleſs; upon this they demurred, and had Judgment, becauſe the Rejoinder is a Departure; for the Defendant ought to have * taken Iſſue on the Child's being ready to ſtarve; for if the Plaintiff's had once Cauſe of Expence about the Child, and were thereupon actually damnified, the Defendant's being ready to pay the Money will not ſave the Condition of the Bond.

Paſch. 22. Car. 2. in *B. R.* 2 Sand. 80. Sid. 444. Mod. 43. 2 Keb. 612, 619. S. C. *Richards* v. *Hodges.*

* Page 7

When the Plaintiff replies, ſurrejoins, *&c.* and it thereby appears, that he has no Cauſe of Action, he ſhall never have Judgment, though the Bar or Rejoinder be inſufficient, nor can any Admittance of the adverſe Party make it good, for the Court ought to judge on the whole Record; as in Debt on a Bond for Performance of Covenants, the Defendant pleads Performance generally, where ſome of the Covenants are in the Negative, whereby his Plea is inſufficient; if the Plaintiff reply, and ſhew a Breach, which of his own ſhewing is no Breach, Judgment ſhall be given againſt him; for on the whole Record it appears he has no Cauſe of Action.

8Co. 133. b.

But if the Bar be inſufficient in Subſtance, or amounts to a Confeſſion of the Point of the Action, and the Plaintiff in his Replication ſhews no Matter againſt himſelf but Matter explanatory, or perhaps not material, the Declaration being good the Plaintiff ſhall have Judgment for the Inſufficiency of the Bar, without any Regard to the Replication; as if the Defendant plead a Grant by Letters Patent in Bar which are not ſufficient, yet the Plaintiff in his Replication ſhews another Clauſe in the ſaid Letters Patent, which is not material, the Defendant demurs, the Plaintiff ſhall have Judgment.

8Co. 133. b. 9 Co. 110. Hob. 14, 199. Lev. 31. 3 Lev. 244.

If

Lev. 195. If the Plaintiff make a Title in his Replication, but does not plead as he ought, eſpecially in Point of Trial, the Rejoinder admitting this, and tendring Iſſue upon another Matter, makes it good.

Co.Lit. 303. The Order of Pleading is, 1. To the Juriſdiction of the Court. 2. To the Perſon of the Plaintiff, and next of the Defendant. 3. To the Count or Declaration. 4. To the Writ. 5. To the Action of the Writ. 6. To the Action itſelf in Bar thereof.

Co.Lit. 303. Hob. 71,72. Latch 178. 5 Mod. 146. This has been ſettled as the moſt natural Order of Pleading, becauſe by this Order each ſubſequent Plea admits the former; as where the Defendant pleads to the Perſon of the Plaintiff, he admits the Juriſdiction of the Court; for it would be nugatory to plead any Thing in that Court that has no Juriſdiction in the Caſe; when he pleads to the Count he allows that the Plaintiff is able to come into that Court to implead him, and that he may there be properly impleaded; but in pleading to the Count he does not admit the Writ to be good, yet if the Count be vicious, the Writ is conſequently deſtroyed; for though the Writ in itſelf may be good, yet it is ill purſued; but in pleading to the Writ he admits the Form of the Count to be ſufficient in Form, if the Writ be good; ſince it is not to any Purpoſe to object to the Form of ſuch Writ, if the Form of the Count be thereupon inſufficient; but if the Count be in Subſtance variant, † the Defendant may ſhew it at any Time in Arreſt of Judgment; becauſe the Court has no Authority to proceed in a Matter of Subſtance different from the original Writ.

†For trifling Variances, the Defendant may plead in Abatement.

If a Man pleads to the Action of the Writ he allows both the Form of the Count and of the Writ; for he admits, that if the Form of the Writ and Count were adapted to the Plaintiff's Caſe, that ſuch Form is good and ſufficient; ſince to object to the Action not agreeing with the Plaintiff's Caſe does admit, that if it be ruled by the Court that it does, that the Plaintiff has before the Court a Count in Form ſufficient.

If the Defendant pleads in Bar to the Action, he admits the Form of the Writ and Count, for he anſwers to the Right in Demand, and puts that Right in Iſſue, and thereby admits, that there is a ſufficient Form to put it in Iſſue, and therefore though a Man pleads *Non* * *aſſumpſit modo & forma*, yet the *Modo & forma* does not traverſe the Form of the Writ or Count, but the Subſtance of the Promiſe; which is the true Reaſon why another Promiſe may be given in Evidence different in Time and Place from that mentioned in the Declaration, though not different in Subſtance.

* Page 8

(B) The Declaration: And herein,

1. The Nature thereof; and therein of adding ſeveral Counts in the ſame Declaration.

Plow. 84. Lil. Reg. 414. (a) In *Engliſh* it is called *Declaration*, *Count* from the *French*, and *Narratio* in *Latin*. Co. Lit. 17. a. 303. Doct. pl. 83.——and is the ſame with what the Civilians call a Libel. Co. Lit. 17. a. (b) Muſt eſtabliſh a Title in the Plaintiff, as well as deſtroy the Defendant's; for the Rule is, *Melior eſt conditio poſſidentis*. Vaugh 58. 60.

THE (a) Declaration is an Explanation of the Plaintiff's Writ, in which he expreſſes at large his Complaint, ſetting forth the Nature and Quality of his Caſe more fully than in the Writ; and as it is the Foundation of his Suit, the Law requires that it contain Certainty and (b) Truth, that the Defendant may be able to make a proper An-

ſwer

ſwer thereto, and the Court be enabled to give a right Judgment thereon.

The Plaintiff having ſet forth the Cauſes of Complaint particularly, the Concluſion of his Declaration is, *Et inde producit Sectam*, which was proffering to the Court the Teſtimony of the Witneſſes or Followers; for according to *Fleta*, the (*a*) ancient Law was *Quod nullus Liber Homo ponatur ad Legem nec ad Juramentum per Simplicem Loquelam ſine Teſtibus fidelibus ad hoc ductis, &c.*

(*a*) And from this it hath been ſaid, the Practice of annexing Affidavits to Bills in Chancery hath been introduced.——But this Method in Declarations is now diſuſed. Doct. pl. 83. ‡

---

‡ And ſo is the Practice of annexing Affidavits to Bills in Chancery, unleſs, perhaps, in a few very particular Caſes, required by Statute.

An *Audita Querela* and a *Scire Facias* are in the Nature of a Declaration, for they do ſet forth at large the Cauſe of the Plaintiff's Action as a Declaration doth. Lil. Reg. 411. 7 Co. 25.

The Gift, and every Thing that is of the Eſſence of the Plaintiff's Action, muſt be ſet forth in the Declaration; and herein we may lay it down as a general Rule, that that ſeems properly to be the Eſſence of the Action, without which the Court could have no ſufficient Grounds to give Judgment; and this is to be determined in every Action according to its Nature. Doct. pl. 85.

If the Declaration be not a ſufficient Foundation to give Judgment, this may be moved in (*b*) Arreſt of Judgment after Verdict, becauſe Judgment cannot be given when it appears, that, though the Fact be found for the Plaintiff, yet he has not ſufficient Cauſe of Action.

(*b*) But Miſtakes in the Declaration cannot be taken Advantage of on a Plea in Abatement, but the Defendant muſt demur. Salk. 212.——But if the Declaration varies from the Writ the Defendant may plead in Abatement; for he has abated his own Writ by proſecuting it in a different Manner. Cro. Eliz. 722. Cro. Jac. 654. Jon. 304.

The Declaration may be General or Special; as in Debt upon an Obligation the Plaintiff may declare on the Penalty generally, or may ſet forth the Condition at his Election. Doct. pl. 84.

If there are three in Execution jointly at the Suit of *A.* and all eſcape, in Debt for the Eſcape, the Plaintiff may declare for the Eſcape * of all, and it will not be double, though the Eſcape of any of them will be (*c*) ſufficient to intitle him to the Action. Keilw. 68.

* Page 9

(*c*) If one declares for an Eſcape in a Cauſe of Action to 40*s.* and proves 30*s.* this is ſufficient; *per* Hale. But in the Book there is a *Quære de hoc*, being ſpecial. 2 Lev. 85.

If in an *Indebitatus Aſſumpſit* the Plaintiff declares for 100*l.* received to the Plaintiff's Uſe, and alſo upon an *Inſimul Computaſſet* for another 100*l.* the ſame Day, and the Defendant pleads that the ſaid ſeveral Sums of 100*l.* are for one and the ſame Cauſe of Action, and likewiſe that the Sum demanded is ſatisfied; this on Demurrer will be good; for though it is frequent to lay a Declaration for a Debt ſeveral Ways in an *Aſſumpſit*, and it is not a good Plea to ſay that the ſeveral Sums are but only for the Sum firſt mentioned, and ſo go on no further; yet when the Defendant pleads over, that the very Sum demanded is ſatisfied, it is a good Plea; and if the two ſeveral hundred Pounds were two diſtinct Sums, the Plaintiff might have replied ſo, and taken Iſſue thereupon. † Raym. 449. *Sheldon* v. *Clipſham.*

† If the Money was actually paid, *Non Aſſumpſit* would have been the proper Plea; for, having fulfilled the Promiſe, it is as if there never had exiſted any ſuch.

In

6 Mod. 148. *Smith* ver. *Aiery* adjudged. 2 Ld. Raym. 1034. 3 Salk. 14. pl. 1. 175. pl. 1. Holt. 329. pl. 4

In an Action for Money won at Play there were two Counts, one setting forth a ſpecial Agreement to play at ſuch a Game, and mutual Promiſes of Payment, which was right; the other was, that in Conſideration that the Plaintiff had won ſuch a Sum of the Defendant at Play, he promiſed to pay it, which was adjudged ill, in that an *Indebitatus* will not lie for Money won at Play; it was likewiſe held, that any Thing in the firſt Count which was right could not (*a*) help any Defect in the ſecond; for though they both were put in one Declaration, yet they were as diſtinct as if they had been in two ſeveral Actions. †

(*a*) That a Judgment cannot be reverſed as to one Count, and affirmed as to another. Salk. 24. & *vide* 7 Mod. 148. 2 Ld. Raym. 841.

† This was a Caſe after Verdict, for on a Demurrer to the whole Declaration, the Court might have given Judgment for Plaintiff on one Count, and for Defendant on the other.

Salk. 213. pl. 3. *Weſt* v. *Trales.*

The Plaintiff declared, that whereas the Defendant 6 *Maii* 1695, for 120 Weeks Diet then paſt, had promiſed to pay him 7*s. per* Week, and that the Plaintiff *poſtea*, *ſſ.* 6 *Maii* 1695, having found the Defendant Diet 120 Weeks then paſt, the Defendant promiſed to pay the Worth, and that it was worth 7*s. per* Week; upon *Non Aſſumpſit*, and Verdict *pro Querente*, it was moved in Arreſt of Judgment, that the Weeks in the *Quantum meruit* are not ſaid to be *aliæ* than thoſe laid in the ſpecial Promiſe, ſo that the Defendant is twice charged with the ſame Thing; *ſed non allocatur*; for they do not appear neceſſarily to be the ſame, and without Neceſſity the Court will not intend them ſo.

Lil. Reg. 408.

The Plaintiff after Plea pleaded, or after the End of the ſecond Term, ſhall not add a new Count to his Declaration (as an *Indebitatus Aſſumpſit*, or the like) under Pretence of amending his Declaration.

2. Who may join or be joined in the ſame Declaration.

Dyer 370. pl. 59. 2 Leon. 12.

Regularly, where two or more are jointly intitled, or have a joint Intereſt, they may join in the ſame Action or Declaration; as if two are joint Owners of a Sum of Money, and travelling together they are robbed on the Highway, they may join in an Action againſt the Hundred, otherwiſe if the Sums are ſeveral and ſeveral Properties.

Dyer 351. pl. 23. *Sed quære hoc.*

So if a Man holds ſeveral Lands of ſeveral Lords by Heriot Cuſtom, and to defraud them of their Heriots makes a fraudulent Gift of all his Beaſts heriotable, all the Lords may join in one Action upon the 13 *Eliz. cap.* 5.

[For their Claims and their Injuries are ſeveral?]

* Page 10 Bulſt. 68. Hard. 321.

If *A.* deliver Goods to *B.* to deliver over to *C.* and *B.* does not deliver them over accordingly, but converts them to his own Uſe, * either *A.* or *C.* may have an Action againſt *B.* but both ſhall not have an Action; but he that firſt begins his Action ſhall go on with the ſame, and by the latter Book they cannot both join.

Stile 156, 203. Rol. Abr 31. adjudged by three Judges againſt one; who ſaid, they are ſeveral Promiſes, *viz.* to deliver to each ſeverally their own Cattle, and ſo there muſt be two ſeveral Actions.

If *A.* and *B.* are diſtrained, and *C.* in Conſideration of 10*l.* to him paid by *A.* and *B.* aſſumes and promiſes to them to procure the Cattle to be re-delivered to them, if they are not re-delivered accordingly one joint Action lies; for the Conſideration is intire, and cannot be divided; and it is doubtful whether one of them could bring the Action alone.

If

If within the Parish of *A.* there is a Custom for the Parishioners yearly to elect two Persons to be Churchwardens there, and according to the said Custom *B.* and *C.* are elected, but the Surrogate of the Bishop refuses to admit and swear them into the said Office, upon which they bring a *Mandamus*, and he falsely returns a Custom for the Vicar to chuse one Churchwarden, and that therefore he cannot admit both the said Parties, but is ready to admit one of them, they may join in an Action for this false Return; for the *Mandamus* and the whole Prosecution and Charge thereof was joint; and this is no Office of Profit, nor Action brought for that, but for the unjust Return. 3 Lev. 362. *Ward* v. *Brampston.*

If the Register of the Bishop refuses to register a Licence of a Chapel for a Conventicle, according to 1 *W.* & *M. cap.* 18. and upon a *Mandamus* to do it makes a false Return, (*a*) all the Inhabitants may join in one Action against him. 3 Lev. 363.

(*a*) Upon a joint Grievance all Parties may join in a Writ; upon the Statute of Beau-pleader the whole Hundred or County may join. F. N. B. 270.——So one Writ *de essend' quiet' de tolneo*, or one *Monstraverunt*, lies for all the Tenants in Antient Demesne. F. N. B. 15. Bro. *Joinder in Action*, 81.

But if one Man calls two other Men Thieves, and shews in certain of what, &c. they shall not join in one Action against him, for the Wrong done to one is no Wrong to the other; so in false Imprisonment, Assault and Battery; for the Battery done to one cannot be the same as that done to another. Fitz. *Joinder in Action*, 17. Owen 106. Goulst. 76. Cro. Car. 512.

If a Man hath Cause of Action against two, he may in (*b*) some Cases sue them jointly, or separately, at his Election; as if *A.* takes the Goods of *C.* and *B.* takes them from *A.* *C.* shall have his Action against *A.* or *B.* at his Election, because both damnified *C.* in their taking. Sid. 438.

(*b*) Where two were made Defendants in the Declaration, the one, that he might make no Defence; and so the Plaintiff intitled to Costs, though Nonsuit or a Verdict against him as to the other. Comb. 364 §

---

§ In Actions against several, where one of the Defendants is acquitted, he may have Costs, as if a Verdict had been given against the Plaintiff, and all Defendants acquitted: unless the Judge certify upon the Record, that there was reasonable Cause for making such Person a Defendant. 8 W. 3. c. 11. s. 1.

If two Men procure another to be indicted falsely for a common Barrator, he may have an Action upon the Case † against them both; though in Strictness the Procurement of one is not the Procurement of the other; so in Maintenance and Trespass, and yet the Maintenance or Trespass of one is not the Maintenance or Trespass of the other. Latch 262.

† Its in Nature of an Action for a Conspiracy, and the Act of the Defendants may be considered as joint.

But a Man cannot declare against one Defendant for an Assault and Battery, and against the other for taking away his Goods; because the Trespasses are of several Natures, and against several Persons. Stile 153.

So one Action will not lie against several Men for speaking the same Words; for the Words of the one are not the Words of the other, and can no more produce a joint Action than their Words and Tongues can be said to be one. Palm. 313. Cro. Jac. 647. Bulst. 15.

* 3. What Matters may be joined in the same Declaration. * Page 11

Here we may observe, that personal Actions are such as arise *ex contractu*, such as Debt and Detinue; or such as arise *ex delicto*, as Trespass. *Vide* Title *Actions.*

Treſpaſſes founded on Force, which are Treſpaſſes *Vi & armis*; or upon a particular Fraud, which are Actions on the Caſe; which Diviſion hath given the Rule of what (*a*) may be contained in the ſame Declaration.

(*a*) That where ſeveral Actions are brought for ſeveral Things of the ſame Nature, the Court may compel the Joining of them in one. Comb. 214.

Reg. 95, 139. Vent. 366. For in Debt the old Proceſs was Summons, Attachment, and Diſtreſs; and on taking out the Original a Fine was paid to the King, which was in Proportion of the Sum demanded; but in Treſpaſs the Proceſs was a *Capias*, becauſe the Man that had committed a Tort might be ſuppoſed to fly from Juſtice; and in this Action the Court ſet a Fine on him in Proportion to his Offence, and levied it by a *Capiatur*; and therefore the true Reaſon why Actions may or may not be joined, ariſes from the Difference of the Proceſs, and the Fines paid on taking out the Original, and not on the Difference of the Defendant's Pleas; for if that were the Reaſon, Debt upon an Obligation, to which the Plea is *Non eſt factum*, and on a *Mutuatus*, *Nil debet*, could not be joined.

Bro. *Joinder in Action*, 97. Cro. Car. 20, 316. Keb. 147. Vent. 366. Raſt. Ent. 150, 174. Hence it hath been adjudged, that Debt on an Obligation and on a *Mutuatus* may be joined, becauſe the Writ is general; and the Declaration upon both will be warranted by the Authority given by the general Words of the Writ; ſo Debt and Detinue may be joined in the ſame Writ, becauſe there are Writs in the Regiſter in which they are both comprized in the ſame Writ; ſo Debt upon a Leaſe and for Cloaths may be joined, but Debt and Account cannot be joined.

8 Co. 87. Jenk. 211. Raym. 233. 3 Lev. 99. So ſeveral Wrongs or Treſpaſſes may be joined, becauſe they may be comprized in the ſame Writ; and ſo may ſeveral Actions on the Caſe, where the Caſe is of the ſame Kind; as an Action for a Fraud on the Delivery of Goods, and on the Warranty of the ſame Goods, being both on the Contract; ſo againſt a common Carrier, on the Cuſtom of the Realm, and Trover, may be joined, becauſe both on the Tort, it being a Violation of the Cuſtom not to deliver the Charge.

Lev. 101. Sid. 244. Keb. 59. Skin. 66. pl. 12. Carth. 189. Salk. 10. pl. 2. Ld. Raym. 58. 5 Mod. 90. 3 Mod. 322. But Actions founded upon a Tort and upon a Contract cannot be joined; as *Aſſumpſit* and Trover againſt a Carrier; for though theſe come under the general Head of Actions on the Caſe, yet are they more diſtinct Caſes than Debt and Account, which cannot be joined.

3 Lev. 99. *Bage* v. *Bromwell*. If Trover and *Aſſumpſit* are joined in one Action, and upon Not guilty the Jury, *quoad* the Trover, find for the Defendant, and *quoad* the *Aſſumpſit* for the Plaintiff, yet he ſhall not have Judgment; for theſe cannot be joined in the ſame Action, and the Severance by the Jury will not help it, the Declaration being naught at firſt.

In an Action upon the Caſe, the Plaintiff declares, that whereas *accommodaſſet* to the Defendant a *Gelding ad equitandum ab L. uſque E. & ibidem ſalvo deliberand.* to the Plaintiff; the Defendant intending to deceive the Plaintiff, rid upon the ſaid Gelding from *L.* to *E.* and *E.* unto *L.* again, and by that Riding ſo much abuſed the ſaid Horſe, that * Page 12 * he became of little Value; and though the Plaintiff at *E.* demanded a Re-delivery of the ſaid Gelding, yet the Defendant refuſed, and yet doth refuſe to deliver him, and hath converted the ſaid Gelding to his own Uſe; this Declaration is not good, becauſe it contains diſtinct Matters;

Cro. Car. 20 *White* v. *Riſden*. But in this Caſe the Plaintiff had Judgment, being after a Verdict; but ſaid by *Hobart*, the Defendant might have demurred for the Doubleneſs of the Declaration.

for

for Part is founded upon the Contract, and Part upon the Tort, which are ſeveral Cauſes of Action.

An Ejectment and Aſſault and Battery were joined, and Not guilty pleaded, and a Verdict and intire Damages given for the Plaintiff; and this ſeems to have been aided after Verdict. Hob. 249. Brownl. 235. But *Winch* doubting hereof, the Damages being found ſeverally, the Plaintiff releaſed thoſe for the Battery, and had Judgment for the Ejectment.

It hath been held, that an Action will lie for entering the Houſe of the Plaintiff, breaking his Cheſts and carrying away his Goods, and beating his Servant, *per quod ſervitium amiſit*; for a general Action of Treſpaſs and a ſpecial Action upon the Caſe || may be joined in one Action. Allen 9. & *vide* Stile 43, 202. || Such as this, the Cauſe whereof is founded *in Force*.

In Treſpaſs *quare vi & armis* the Defendants entered his Cloſe, containing 100 Acres, *&c.* (in which a Fair Time out of Mind had been kept on *Michaelmas* Day) *& adtunc & ibidem fregerunt & divulſer'* divers Booths, *&c. ibidem erect'* by the Plaintiff for expoſing Wares and Merchandizes to Sale there brought by Perſons thither reſorting, *nec non eo quod* (theſe Defendants) *adtunc & ibidem impediverunt & diſturbaverunt* the Plaintiff in erecting other new Booths, *&c.* for the Sale of Merchandize; by Reaſon whereof the Plaintiff loſt all the Profits of Piccage and Stallage. Upon Not guilty pleaded the Plaintiff had a Verdict, and on a Motion in Arreſt of Judgment it was objected to the Declaration, that the latter Part thereof, *viz.* the Diſturbance in building new Booths, ſounds altogether in Caſe and not in Treſpaſs, and therefore incompatible with the firſt Part of the Declaration, which is Treſpaſs *vi & armis*, and that theſe ſeveral Matters require ſeveral Judgments; the firſt a *Capiatur*, but the laſt a *Miſericordia* only, and therefore could not be joined in one Declaration. *Sed per Cur.* The Diſturbance, *&c.* is laid only in Conſequence of the firſt Treſpaſs, *&c.* and it is of the ſame Effect as a *Per quod* in a Declaration, which is often uſed in Actions of Treſpaſs *vi & armis*, to let in the conſequential Damages, *&c.* and one Plea goes to the Whole; for if the Defendant had pleaded a Licenſe from the Plaintiff to enter the Cloſe, that would have been a good Juſtification of the Treſpaſs. Carth. 113. *Drake* v. *Cooper* adjudged.

4. Of the Declaration's agreeing with the Writ.

The Count or Declaration is an Expoſition of the Plaintiff's Writ, and muſt regularly agree therewith; and herein the general Rule is, that every Thing that comes within the Compaſs of the Writ may be comprehended with the Declaration, but the Declaration cannot be extended beyond the Writ; for original Writs, iſſuing out of *Chancery*, are the Grounds and Foundations of the Proceedings of the Courts into which they are returnable; and ſuch Proceedings muſt be conformable to the Authority given them; whatever therefore may be comprized in the Writ, however multifarious, may be comprized in one Declaration; but whatever cannot be contained in one Writ, cannot be comprehended in the Declaration. Doct. pl. 84. Lil. Reg. 411.

The Writ may be general, according to Law, but the Declaration ſpecial; as where a Statute gives an Action, but does not preſcribe any Form of the Writ, the Writ framed by the Common Law will ſerve, and the ſpecial Matter may be ſet forth in the Declaration. Doct. pl. 84.

* So if Lands are given to a Woman *quamdiu ſola fuerit*, or to a Man *quamdiu ſe bene geſſerit*, in Waſte, the Writ ſhall be general *quod tenet pro termino Vitæ*, and the Count ſpecial. *Page 13 Doct. pl. 85.

Comb. 260. *per Holt* C. J. If a Man bring an Original in Treſpaſs againſt one, and declares againſt him with a *ſimul cum*, he abates his own Writ; but the Defendant cannot take Advantage of it without demanding *Oyer*; if the Writ be againſt two, the Plaintiff may declare againſt one of them with a *ſimul cum*. †

† But now, on Trial, the Court will expect ſome Evidence of an Attempt to ſerve with Proceſs, to take off his Evidence.

Lit. Sect. 67. Co. Lit. 54. b. If Lands be demiſed for Term of Half a Year or a Quarter of a Year, &c and the Leſſee commit Waſte, the Leſſor ſhall have a Writ of Waſte againſt him, and the Writ ſhall ſay, *quod tenet ad Terminum annorum*, but the Declaration muſt be ſpecial, according to the Caſe.

Co. Lit. 344. a. So if a Clerk that is donative be diſturbed in a *Quare Impedit* by the Patron, for this Diſturbance to his Church donative the Writ ſhall ſay, *quod permittat eum Præſentare ad Eccleſiam*, &c. and the Declaration ſhall be ſpecial.

Caſes L. and Eq. 210. Where the (*a*) Title is of one Sort of Action, there the Declaration can never change it to another; but it may make a fatal Variance between the Writ and the Declaration.

(*a*) If a Declaration begins *Queritur in placito tranſgreſſionis pro eo quod*, &c. yet may it be a Declaration in Caſe, notwithſtanding the Recital of the Bill be *in placito tranſgreſſionis*, for that will ſerve indifferently for Treſpaſs or Caſe. Cro Car. 325. *Tyffin* v. *Wingfield*.——But for this *vide* Hob. 180. Allen 84. Cro. Car. 254. 2 Rol. Rep. 49. Vent. 19.

5. Of the Sufficiency and Certainty required in the Declaration; and therein of Matters of Inducement, and that which is the Giſt of the Action. And herein,

1. Where by the Declaration it muſt appear that the Plaintiff hath a Right.

Hob. 199. Palm. 524. It is a general Rule in Pleading, that the Declaration muſt ſhew a Title in the Plaintiff; and that it is regularly true, that if the (*b*) Plaintiff will himſelf diſcover to the Court any Thing, whereby it may appear that he had no Cauſe of Action (*c*) when he commenced it, his Writ ſhall abate.

(*b*) Diverſity where ſuch Matter is diſcloſed by the Defendant. Cro. Eliz 111. Leon. 87. 2 Leon 20. (*c*) Where the *Teſte* of the Original was before the Day of Payment, in the Condition of the Bond, upon which Action was brought; and this, though after Verdict, was adjudged Error. Cro. Eliz. 325. Moor 598. *Buckley* v. *Williamſon*, & *vide* Cro Eliz. 565 ——So in Caſe for ſcandalous Words, the Day was alledged before the Words ſpoken. Rol. Abr. 792. ‡——So in *Aſſumpſit*, where it appeared by the Declaration, that Action was brought before Cauſe. Cro. Jac. 574 5.——In Ejectment, by the Declaration it appears, that the Defendant was ejected after the Leaſe made, it is ſufficient, though no certain Day is alledged in which he was ejected, for the Day is not material, being before the Action brought. Cro. Jac. 311 ——In Ejectment the Plaintiff declared, upon a Leaſe made 12 *Jun' habend' a dicto duodecimo die Jun'*, *virtute cujus* he entered, and that *poſtea*, *ſcilicet eod' 12o die Jun'* the Defendant ejected him; and becauſe the Plaintiff by his own ſhewing entered as a Diſſeiſor, and the Defendant ejected him before he had Title, after a Verdict and Judgment for the Plaintiff in *Ireland*, upon a Writ of Error here it was reverſed. 3 Mod. 195. *Evans* v. *Croker*, & *vide* Comb. 83. Like Point. ‖——Where the Declaration being of the Term generally, ſhall refer to the firſt Day.—— That ſome Day muſt be alledged before the Action brought. 5 Mod 287. And *note*; if the Cauſe of Action ariſes on ſome Day within the Term of which the Declaration is delivered, the Declaration muſt be of ſome Day in the Term after the Cauſe of Action accrued.

---

‡ The Day is not material, if laid before ſuing out Writ, if in *C. P.* or by Original in *B. R.* or before the firſt Day of the Term, whereof the Declaration is if by Bill. If the Cauſe of Action accrues in Term, and you ſue by Bill, &c. you make a ſpecial *Memorandum* of a Day ſubſequent to the Cauſe of Action.

‖ *Sed qu.* If the Words ſubſequent to *poſtea* might not have been rejected as Surpluſage?

Hence

Hence it hath been adjudged on the Statute of Hue and Cry, that it is not ſufficient for the Plaintiff to declare that the Goods were in his Cuſtody, but he muſt alledge that they belonged to him; but that in the Caſe of a Carrier, he may maintain an Action againſt the Hundred, ſetting forth the Cuſtom by which he is chargeable. 2 Saund. 379, 380.

* So in an Action upon the Caſe, the Plaintiff cannot declare, *quod cum* the Defendant was indebted to him ſuch a Sum, the Defendant in Conſideration thereof *ſuper ſe aſſumpſit* to pay, &c. without ſhewing the Cauſe of the Debt. *Page 14 10 Co. 77 a. But for this *vide* Hob. 5. Godb. 186.

Cro. Jac. 207, 213, 642. Hob. 18. Moor 854. pl. 1167. Hetl. 106. Rol. Rep. 391. Bulſt. 67. 3 Bulſt. 207. Cro. Jac. 397. Hard. 132.——But 171, *per Croke* and *Chamberlain*, there is a Diverſity where the Promiſe is to pay at a Day to come, and where not; for a Promiſe to pay at a Day to come implies a Forbearance in the mean Time; and *vide* Rol. Rep. 396.——And that ſuch a Declaration is not made good by Verdict. Cro. Car. 6, 31. Sid. 182. Brownl 14. Poph. 31. Jenk. 293.——Where the Plaintiff declared, that the Defendant was indebted to the Teſtator of the Plaintiff in 20*l. quas illi ſolviſſe debuit ſecundum agreamentum inter eos habit*'; and the Judgment was ſtayed after Verdict, for that the Agreement might be by Deed. 2 Lev. 162.

But if in an *Aſſumpſit* the Plaintiff declares, that whereas the Defendant was indebted to him in 30*l.* the Defendant, in Conſideration that the Plaintiff had given Day to the Defendant until, &c. did aſſume and promiſe to pay, &c this is a good Declaration, without ſhewing for what the Defendant was indebted, for the Debt is not in Queſtion; and though it be true, there muſt be a Debt to make this a good Conſideration, yet that is allowed in the Promiſe being actual. Hob. 18. *Wroloſton* v. *Webb*, adjudged after Verdict; & *vide* Like Point Cro. Jac. 397, 548, 593.

Moor 853. pl. 1167. 3 Bulſt. 206, 207. Rol. Rep. 379, 380. Godb. 13. Hob. 216. Rol. Abr. 19.

So if in an *Aſſumpſit* the Plaintiff declares, that whereas the Defendant had received 24*l.* of ſeveral Perſons, to the Uſe of the Plaintiff, in Conſideration thereof the Defendant did aſſume and promiſe to pay, &c. This is a good Declaration, without ſhewing of what Perſons in particular he received the Money, becauſe the Conſideration is executed, and not traverſable. Moor 854. pl. 1168.

If in an *Aſſumpſit* the Plaintiff declares, that the Defendant, in Conſideration of, &c. *inter alia* did aſſume to pay, &c. This has been held no good Declaration; becauſe he ought to ſet forth the whole Promiſe, which is intire. Allen 5 & *vide* March 100.

But in an *Aſſumpſit* the Plaintiff declares, *quod cum* there were ſeveral Reckonings and Accounts between the Plaintiff and Defendant, and at ſuch a Day, &c. *inſimul computaverunt* for all Debts, Reckonings, and Demands; and the Defendant upon the ſaid Account was found to be in Arrear the Sum of 20*l.* in Conſideration whereof the Defendant promiſed to pay, &c. This is a good Declaration, without ſhewing it was *pro mercimoniis*, or otherwiſe, wherefore he ſhould have an Account; for an Account may be for divers Cauſes and ſeveral Matters, and Things may be included and comprized therein, which *in pede computi* are reduced to a Sum certain; and thereupon being indebted to the Plaintiff, it is ſufficient to ground an Action. Cro. Car. 116. Hetl. 106, 883. S.C. and Poph. 177. Latch 141. Palm. 442. Yelv. 70. Rol. Rep. 396. S. P.

In *Aſſumpſit* the Plaintiff declared, that the Defendant was indebted 20*l. pro Præmio* upon a Policy of Inſurance upon ſuch a Ship, and the Defendant demurred ſpecially, becauſe he did not ſhew the Conſideration certainly what the *præmium* was, or how it became due; *ſed non allocatur*; for this is as good as an *Indebitatus pro quodam ſalario*, which has been adjudged good. 2 Lev 143. *Fawk* v. *Pinſack*.

In *Aſſumpſit* the Plaintiff declared *pro opere & labore* generally, without ſetting forth what Sort or Manner of Work or Labour it was; and though it was objected, that it ſhould be ſet forth particularly, ſo that Carth. 276. adjudged. Vent. 44. S P. Sid 425. S. P.

that it may appear to the Court to be lawful Work; yet the Court held it well enough; † and that the only Reaſon why the Plaintiff is obliged to ſhew wherein the Defendant is indebted is, that it may appear to the Court that it is not a Debt on (*a*) Record or Specialty,
*Page 15 * but only upon ſimple Contract; and any general Words by which that
2 Keb. 552. S. P. may be made to appear are ſufficient.

Mod. 8. S. P. (*a*) For Damages recovered in an *Aſſumpſit* will be no Bar to an Action of Debt grounded on a Record or Specialty. Cro. Car. 6. Leon. 155. Cro. Eliz. 242.

† It is now the common eſtabliſhed Form.

Show. 17. *Cary* v. *Bacchus.* If the Bailiff of a Liberty declares, that the Frauchiſe and Liberty of returning and executing all Writs, Bills and Receipts out of the King's Courts belongs to him; and that the Defendant, without his Licenſe, and againſt his Conſent, executed a *Fieri Facias* within the ſaid Liberty: This is a good Declaration, without ſetting forth any Title, or that he enjoyed the ſaid Liberty by Grant or Preſcription; adjudged upon Demurrer to ſuch a Declaration; for the Court held, that if the Defendant had taken Iſſue, it would have been incumbent on the Plaintiff to prove a Title.

2 Jon. 157. *Hart* v. *Baſſet.* Carth. 85. S. C. cited. So in an Action for ſtopping an uſual and convenient Way to his the Plaintiff's Lands, the Declaration was held good without ſhewing a Title.

Carth. 84. Show. 64. 3 Mod. 41. 3 Lev. 133. S. C. Skin. 65. pl. 10, 175. pl. 5. *Hablethwait* v. *Palms.* So in an Action on the Caſe for diverting a Water Courſe, the Plaintiff declared, that the Defendant *malitioſe, &c. infregit* a certain Mill Dam, *& perinde* did divert the Water Courſe *ab antiquo & ſolito curſu erga* the Corn Mill of the Plaintiff, by Reaſon whereof he loſt the Profits of his ſaid Mill; but did not ſet forth that Water uſed to turn his Mill, or that he had any other Profit thereof, or that the Water-Courſe was *Antiquus aquæ Curſus, &c.* Yet the Declaration was held good; the Court being of Opinion, that the (*b*) Poſſeſſion alone was ſufficient to maintain an Action againſt a Wrong-Doer, and that this was of the ſame Nature with an Action of Treſpaſs. But *Holt* Ch. J. ſaid, that if the Cauſe had been tried before him, the Plaintiff ſhould have proved his Mill to be an ancient Mill, otherwiſe he ſhould have been Nonſuit.

(*b*) Where in ſeveral Caſes Poſſeſſion without Property is ſufficient to maintain an Action, *vide* Palm. 200. 4 Co. *Luttrell*'s Caſe, and Title *Treſpaſs.*

Lev. 179. Sid. 279. 2 Keb. 8. S. C. & Cro. Eliz. 859. S. P. In *Aſſumpſit* it was, in Conſideration he permitted the Defendant to take the Profits of ſuch Lands for ſeven Years laſt paſt, at his Inſtance and Requeſt, the Defendant promiſed to pay him as much as they were worth; and it was moved in Arreſt, *&c.* that the Plaintiff had not ſet forth a Title here as he ſhould have done; but *per Cur.* it is well enough; and to maintain ſuch an Action as this upon Evidence, an actual Promiſe muſt be proved.

Noy 86. An Action upon the Caſe was brought for ſtopping a Way which the Defendant had from ſuch a Place over *Black-Acre*, where the Nuſance is, unto ſuch a Field by Name; and it was ruled to be good, without ſhewing what Intereſt he had in that Field, for it ſhall be intended to be a common Field; but otherwiſe had it been *uſque ad talem Clauſum*, there he ought to ſhew what Intereſt he has in the Cloſe. ||

|| That Poſſeſſion is ſufficient in a Declaration which charges a Wrong-doer. See *Strode* v. *Birt.* 4 Mod. 418.

In

In an Action upon the Caſe, ſuppoſing that he was ſeiſed in Fee of the Manor of *H.* and of a Fair to be held there every Aſcenſion-Day, and that the Defendant diſturbed him to take Toll, *&c.* the Defendant pleaded Not guilty, and found againſt him; it was moved in Arreſt of Judgment, that the Declaration was not good, becauſe he does not ſhew a Title to the Fair by Grant or Preſcription, and therefore no Cauſe of Action, but *per Cur.* not neceſſary, becauſe only a Conveyance to the Action, and is not any Claim thereof as to the Right, as in a *Quo Warranto*, and the Declaration, without ſpecial Title therein comprized, is good. Cro. Jac. 43. *Dent* v. *Oliver* adjudged, & *vide* Cro. Jac. 86, 123.

In Debt upon a Leaſe, the Defendant may declare *quod dimiſit*, and need not alledge a Seiſin in himſelf when he made the Leaſe. Yelv. 48.

In Debt againſt Leſſee for Years for the Arrearages of Rent reſerved upon it, he needs not declare that the Leſſee entered, for the Contract is the Ground of the Action. 4 Leon. 18.

* 2. Where the Plaintiff muſt ſhew that he hath performed what was requiſite on his Part. * Page 16

It is laid down as a general Rule, that in all Caſes where an Intereſt or Eſtate commences upon Condition, be the Condition or Act to be performed by the Plaintiff, Defendant, or any other, and be it in the Affirmative or Negative, there the Plaintiff ought to ſhew it in his Declaration, and aver the Performance of it; for the Intereſt or Eſtate commences in him upon the Performance of the Condition, and not before. But when the Intereſt or the Eſtate paſſes preſently, and veſts in the Grantee, and is to be defeated by Matter *ex poſt facto*, or Conditition ſubſequent to the Condition to be performed in the Affirmative or Negative, or to be performed by the Defendant or any other; there the Plaintiff may count generally, without ſhewing of any Performance; and this ſhall be pleaded by him who is to take Advantage of it. 7 Co. 10. Lil. Reg. 418.

As if an Annuity of 10*l. per Ann.* be granted to a Man when he ſhall be promoted to a Benefice, in his Demand of it he muſt ſhew that he is promoted; but if it be granted until he be promoted, there he ſhall have a Writ of Annuity; and he need not ſay that he is not yet promoted, becauſe the Annuity precedes, and the Promotion is ſubſequent. Co. 10. Doct. pl. 85.

If by the ſame Deed each Party is to do ſomething advantageous to the other, and on which there is not a mutual Remedy, the Plaintiff in his Declaration muſt aver, that he hath performed what was to have been done by him. Sand. 319, 320.

But where there are reciprocal Covenants, and on which each Party may bring his Action, it is held, that in aſſigning a Breach the Plaintiff need not ſhew a Performance on his Part; and on this Reaſon, that each hath a Remedy, it is held, that reciprocal Covenants cannot be pleaded one in Bar of another. 2 Mod. 309. 5 Co. 10. Cro. Jac. 645. 3 Lev. 41. Show. 391. Comb. 265. *Vide* Title *Covenant*.

As where a Writing was drawn in theſe Words; *It is agreed that* A. *ſhall pay to* B. 770l. *for his Land and Houſe*, &c. *the Money to be paid before* Midſummer; *in Witneſs*, &c. It was ſealed by both Parties; the Money not being paid at the Day, *B.* without making or tendering any Conveyance of his Land, brings an Action of Debt upon the Bill; and reſolved, that it was well brought; and in this Caſe it was ſaid, that *A.* might have an Action of Covenant againſt *B.* for the not conveying the Land. Sand. 319. *Cordage* v. *Cole*. Lev. 274. Sid. 423. Raym. 183. 2 Keb. 542. S. C.

J. S.

Hob. 88. *Nichols* v. *Rainbred*, and Hob. 106. S. P. That where there are mutual Promiſſes, the Plaintiff need not aver a Performance on his Part. Yelv. 134. Mod. 62. Rol. Rep. 336. Vent. 41. Hard. 102. March 75. Cro. Eliz. 703. Lev. 20, 293. Cro. Eliz. 137. Leon. 186. they will be *Nuda pacta*. Hob. 88. Cro. Eliz 137. Leon. 186.

J. S. brought an *Aſſumpſit* againſt *J. D.* declaring, that in Conſideration *J. S.* promiſed to deliver the Defendant to his own Uſe a Cow, the Defendant promiſed to deliver him 50*s*. Adjudged, that the Plaintiff need not aver the Delivery of the Cow, becauſe it was (*a*) Promiſe for Promiſe.

(*a*) That both Promiſes ought to be made at the ſame Time, otherwiſe

2 Sand. 107. In Debt on an Obligation for Payment of Money, ſo ſoon as ſeveral Bills of Coſts are ſettled, it ought to appear by the Declaration that the Bills were ſettled, or that there was ſome Default in the Defendant by which Means they could not.

* Page 17 * 3. Where general Allegations in the Declaration are ſufficient; and therein of Miſrecitals and Omiſſions.

3 Lev. 319. *Keech* v. *Knight*.

Although the Plaintiff muſt ſet forth in his Declaration every material Thing, and without which he could not be intitled to his Action; yet herein the Law requires no greater Certainty, than the Nature of the Thing is capable of; and therefore, if a Contract be made in general Terms, the Declaration upon ſuch Contract may be in the ſame Terms: as if the Plaintiff declare, that whereas the Defendant was poſſeſſed of the ſixth Part of a Ship, and it was agreed, the Defendant ſhould by Writing ſell his Intereſt to the Plaintiff for 600*l*. and that the Plaintiff ſhould pay 20*l*. in Hand, and the Reſidue *ſuper Executionem* of the ſaid Writing; and that in Conſideration the Plaintiff had paid the 20*l*. and aſſumed to perform the Agreement on his Part, the Defendant did aſſume to perform it on his Part; *præd' tamen* the Defendant had not performed the Agreement on his Part: This being on a mutual Promiſe, the Breach is well aſſigned in the Words of the Promiſe.

3 Bulſt. 31. *Crips* v. *Bainton*. Rol. Rep. 173. S. C.

So if in an *Aſſumpſit* the Plaintiff declares, that in Conſideration the Plaintiff would find and provide for a ſick Man all ſuch Neceſſaries as he ſhould want, the Defendant aſſumed and promiſed to pay, *&c.* and avers, that he found him Neceſſaries amounting to ſuch a Sum, *&c.* This is a good Declaration, without ſhewing in particular what thoſe Neceſſaries were, being in the Words of the Contract; and the adding the Particulars would make the Record too prolix.

Carth. 110, 111. *Huggins* v. *Wiſeman*. 3 Lev. 170. S. P. 3 Mod. 69, 70. *& vide* Cro. Jac. 486. *cont.*

In *Aſſumpſit* for Labour and Medicines in curing the Defendant of a Diſtemper, *&c.* who pleaded *infra ætatem viginti & unius annorum*; the Plaintiff replied, it was for Neceſſaries generally; and upon Demurrer to this Replication it was objected, that the Plaintiff had not aſſigned in certain how, or in what Manner, the Medicines were neceſſary; but it was adjudged that the Replication in this general Form was good.

Lev. 94. *French* v. *Pierce*.

In Debt upon an Obligation, conditioned to ſatisfy for all Goods that an Apprentice ſhall waſte, in his Replication the Plaintiff aſſigned for Breach, that he had waſted *diverſa bona ad Valentiam* 100*l*. And adjudged upon Demurrer that it was good, without ſhewing what the Goods were, for the Penalty of the Obligation is to be recovered upon any Breach; but *per Cur* it would be otherwiſe in (*b*) Covenant where there is to be a Recompence for the Damages.

(*b*) In an Action of Covenant ſeveral Breaches may be aſſigned; otherwiſe in Debt upon an Obligation conditioned to perform Covenants. Cro. Car. 176. *& vide* Title *Covenant*, and the Statute 8 & 9 W. 3. c. 10. [whereby it is enacted, tha in Actions on Bonds for Non performance of Covenants, Plaintiffs may aſſign as many Breaches as they think fit]

In

In an Action of Covenant, the Agreement was to pay Rents at ſeveral Days during the Term; Plaintiff aſſigns Breach, that he did not pay the ſeveral Rents at the ſeveral Days during the Term: This was urged to be double, uncertain, and naught; but the Court held, that in Covenant the Plaintiff may aſſign the Breach as general as the Covenant, tho' it includes 20 Matters; and that here it might be intended that no one Rent was paid upon any one Day during the Term. Lev. 78. Keb 371, 468, 490. *Conyers* v. *Smith.*

In Covenant by a Maſter againſt his Servant, on a Covenant not to buy or ſell without the Maſter's Leave within two Years; the Breach aſſigned was, that he had *diverſis diebus & vicibus*, between ſuch a Day and ſuch a Day, ſold to *H.* and to ſeveral other Perſons unknown, Goods to the Value of 100*l.* After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Breach was uncertain as to * Time and Perſons; but the Court held it certain enough, and that in Covenant it is ſufficient to aſſign a general Breach. Salk. 139. pl. 5. Ld. Raym. 478. *Farrow* v. *Chevalier.* * Page 18

If a Breach of Covenant is ſufficiently alledged, the Plaintiff need not conclude *& ſic non tenuit Conventionem in hac, &c.* for that is but Repetition. Cro Jac. 298. 2 Mod. 229. S. P.

If *A.* Leaſes to *B.* for Years, and covenants that he hath full Power and lawful Authority to Leaſe, *&c.* and in an Action upon this Covenant *B.* ſays, he had (*a*) not full Power and lawful Authority to Leaſe, *&c.* the Breach is well aſſigned, for he hath well purſued the Words of the Covenant *Negative*; and what Eſtate he had lies more in the Notice of the Leſſor than of the Leſſee; and therefore he ought to ſhew what Eſtate he had at the Time of making the Leaſe, that it may appear that he had full Power. 9 Co. 60. between *Bradſhaw* v. *Salmon.* Cro. Jac. 304. S. C. adjudged; and that the Defendant muſt ſhew that he was ſeized in Fee, and then the Plaintiff muſt ſhew a ſpecial Title in ſome Body elſe; but the Covenant being general, the general Aſſignment of a Breach *prima facie* is good. *(a)* That he was not lawfully ſeiſed in Fee of an indefeaſible Eſtate. Cro Jac. 369. Raym. 14, 15.

If *A.* covenants to permit *B.* his Heirs and Aſſigns, to take and enjoy the Rents, Iſſues and Profits of certain Lands, and in an Action upon this Covenant the Plaintiff aſſigns for Breach, that *A.* took the Profits, *&* (*b*) *non permiſit B.* to enjoy, *&c.* This Breach is well aſſigned; for the taking the Profits by *A.* is a ſpecial Diſturbance. Jon. 218. *Symons* v. *Smith.* Cro. Car. 176. S. C. adjudged, *& vide* Hard. 132, 133. 137. 2 Vent. 278. (*b*) But *Non permiſit* only is too general. 8 Co. 89. b. 91. b. *& vide* And.

If *A.* grants a Rent to *B.* and his Heirs for the Life of *C.* to the Uſe of *C.* and covenants with *B.* to pay the Rent *ad opus & uſum* of *C.* and in an Action upon this Covenant *B.* aſſigns the Breach in not paying the Rent to him, *ad opus & uſum* of *C.* This Breach is well aſſigned in the Words of the Covenant, though a negative Pregnant. Mod. 223. *Boſcawin* v. *Cook*, adjudged upon a ſpecial Demurrer. 2 Mod. 138. S. C. adjudged, and ſaid, that if it was paid to *C.* which is a Performance in Subſtance, the Defendant ought to have pleaded it; otherwiſe it ſhall not be intended.

In Trover for a Bond the Plaintiff need not ſhew the Date; for the Bond being loſt or converted, he may not know the Date; and if he ſhould miſtake it, it would be a Failure of his Suit. Cro. Car. 262. *Wilſon* v. *Chambers*, adjudged, after a Verdict for the Plaintiff, and affirmed upon a Writ of Error. Cro. Jac. 638. S. P. adjudged upon Demurrer. Hard. 111. Like Point in Trover for Letters Patent. Brown. Ent. 356. a like Precedent. *Vide* Ent. 265. a like Precedent.

If in an Action upon the Caſe againſt a Lighterman the Plaintiff declares the Defendant ſo negligently governed his Lighter, that it took Water, Palm. 523. *Symons* v. *Darknel.*

Water, and ſpoiled the Goods of the Plaintiff *ad damnum, &c.* the Declaration is good, without a more ſpecial Allegation how they were ſpoiled.

Palm. 523. Sid. 245. S.P. yet ſaid to be the beſt Way to recite it.

So it hath been held, that a Declaration againſt a Lighterman is good, though not alledged in the Declaration that he is a common Lighterman; as alſo againſt a Carrier, without alledging that he is a common Carrier.

Cro. Car. 219.

A Statute which does not give the Action, but is only in Affirmance of the Common Law, need not be recited; as on the Statute of *Marlbridge* (52 *H.* 3.) the Plaintiff may declare, that his Father was ſeiſed in Fee of certain Lands, and died ſeiſed; and that the Lands deſcended to him; and the Defendant had occupied them as Guardian in Socage, without any Recital of the Statute.

* Page 19

Sand. 38, 39. *Jones v. Pope.* Lev. 191. 2 Keb. 93. Sid. 305. S.C. —— That the Cauſe for which arreſted muſt be ſhewn and proved, 2 Lev. 85. ——But for what is neceſſary to be ſhewn in the Declaration, *vide* Carth. 149. Lutw. 110, 111. 2 Show. 17. pl. 10. Salk. 272. pl. 3. 5 Mod. 414.

* In an Action of Debt for an Eſcape of one in Execution, it is not ſufficient to ſhew only that a *Capias ad ſatisfaciendum* iſſued, by virtue of which he was taken, *&c.* but the Plaintiff muſt ſhew how he recovered Judgment, and thereupon a *Capias ad Satisfaciendum* iſſued, *&c.* for as to the Judgment the Defendant may plead *Nul tiel Record*; and though, if there was no Judgment, the Sheriff was bound to execute the Writ, and perhaps might be fined for the Eſcape, yet if there was no Judgment, there was no Debt or Duty to the Plaintiff.

3 Lev. 393. *Norden* v. *Fox. & vide* 1 Lut. 111. and 5 Mod. 8, 9. that where a Matter of Record is the Foundation or Ground of the Suit of the Plaintiff, or of the Subſtance of the Plea, there it ought to be certainly and truly alledged; *aliter* where it is but Conveyance; as in Eſcape, the not concluding *prout patet per recordum*, not being the Giſt of the Action, is aided.

If in an Action for the Eſcape of *B.* againſt the Warden of the *Fleet*, the Plaintiff declares, that *B.* was committed in Execution to him, he muſt conclude *prout patet per recordum*; for that is triable by the Record, though ſaid to be helped by the Defendant's pleading, that he ſuffered him to eſcape with the Leave of the Plaintiff.

Noy 72. *Vide* Title *Eſcape.*

In an Action for an Eſcape on meſne Proceſs, the Plaintiff muſt not only ſhew, that *ad largum ire permiſit*, but alſo that *Non comperuit ad diem*; becauſe the Party being bailable, the Sheriff might lawfully ſuffer him to go at large; tho' in ſuch Action upon an Eſcape after Execution, it is ſufficient to ſhew that *ad largum ire permiſit.*

Moor 834. 2 Bulſt. 236. Rol. Rep. 47.

In Action for the Eſcape of one committed by Commiſſioneas of Bankrupt, for refuſing to anſwer Interrogatories, the Plaintiff ſet forth, that upon the Petition of him and other Creditors, the *Lord Chancellor* by Commiſſion *dedit poteſtatem plenam* to the Commiſſioners *vigore ſtatuti* to examine, *&c.* and that the Commiſſioners offered him Interrogatories, *&c.* And though it was objected that the Office of the Chancellor is miniſterial only, and that it is the Statutes which give the Power, and it was not ſhewn what the Interrogatories were; yet the Declaration was adjudged good; for it is *per commiſſionem dedit, &c. vigore Statuti*; and it ſhall be intended that the Interrogatories are lawful till the contrary appears.

Mod. Caſes 78. *Tucker* v. *Goldburne.*

In Debt upon an Aſſignment of a Bail-Bond, taken by the Sheriff who had arreſted the Defendant on a *Capias*; it was objected, that the Plaintiff had not in his Declaration ſet forth the *Capias*, or the *Teſte*, or Return of any *Capias*; and this on a ſpecial Demurrer was held fatal, it being the *Capias* that gives Life to the Bond.

Leon. 72.

If in an Action of Debt upon an Award the Plaintiff declares, that the Arbitrators did make an Award, that the Defendant ſhould pay

unto

unto the Plaintiff 10 *l.* &c. this is a good Declaration, though nothing is ſhewn to have been awarded on the other Side; for it is ſufficient (*a*) for the Plaintiff to ſet forth that Part of the Award that intitles him to his Action.

(*a*) The Plaintiff may declare, &c. that *inter alia* it was awarded; *per* Lit.Rep. 312. But 1 Mod. 36. *per Twiſden cont'*; but for this *vide* Title *Award.*

If in an *Aſſumpſit* the Plaintiff declares, that the Defendant, in Conſideration that the Plaintiff would forbear him one Week, aſſumed, &c. and avers, that he did forbear him one Week, but ſays not one Week following; yet this is a good Declaration, for it muſt neceſſarily be intended ſo. Cro. Eliz. 272. *Tenacy* v. *Brown.*

* If in an *Aſſumpſit* the Plaintiff declares, that whereas there was a certain Bargain between the Plaintiff and the Defendant for certain Woods for which the Plaintiff was to pay 20 *l.* at a Day after; and that the Defendant, in Conſideration that the Plaintiff *aſportaret ſufficiendum hominem fore Obligat'* to the Defendant for the Payment of the ſaid 20 *l.* did aſſume and promiſe that the Plaintiff ſhould enjoy the ſaid Wood, &c. and the Plaintiff doth aver *quod aſportavit* B. *ſufficientem hominem fore Obligat'* to the Defendant, &c. yet this is no good Declaration; 1*ſt.* Becauſe it is not ſhewn (*b*) how he was ſufficient, ſo that it may appear to the Court to be according to the Agreement; 2*dly*, Becauſe it is not in Fact ſhewn that *B.* (*c*) did become bound, or that *obtulit ſe obligari*, and perhaps he came to be bound, but being there refuſed. *Page 20 Yelv. 19. *Allen* v. *Randall.*

(*b*) *Vide* Hob. 69, 70, 77. 1 Mod. 77.

(*c*) In an Action upon a Promiſe to repay Money laid out, or to be laid out, for Goods for the Uſe of the Defendant, the Plaintiff need not aver, that the Goods came to the Hands of the Defendant. Bulſt. 169. adjudged.

If in an *Aſſumpſit* the Plaintiff declares that his Father was ſeiſed of the Manor of *D.* and of divers Lands, &c. in *D.* in Fee, and in Conſideration that the Plaintiff, together with his Father *ſigillaret quandam Indenturam per quam* his Father *Barganizaret*, &c. the ſaid Manor and Lands, the Defendant did aſſume, &c. and alledges, that the Plaintiff ſuch a Day *ſigillavit Indenturam prædict'*; yet the Defendant, &c. This is no good Declaration; for *diverſa Terras in tenementa in D.* are uncertain, and comprehend not all his Lands in *D.* and therefore the Plaintiff ought to have ſhewn in certain, and particularly what Lands were compriſed within the Indenture. Yelv. 110. Lord *Mordant* v. *Walden*, adjudged.

Alſo in the above Caſe it was held, that the Allegation that he had ſealed *indenturam prædict'* was not good; for *prædict'* ought to refer to ſome Certainty before, but (*d*) *quandam Indenturam* is altogether incertain; and the Plaintiff ſhould have ſhewed in certain, that he ſealed ſuch an Indenture *per quam* the Plaintiff and his Father *Barganizaverunt*, &c. *de verbo in verbum*, as laid in the Premiſſes of the Declaration. Yelv. 111. adjudged.

(*d*) The Plaintiff declared, that whereas *quædam pars domus*, &c. was out of Repair, the Defendant, in Conſideration that the Plaintiff would repair *eandem partem* of the ſaid Houſe, aſſumed and promiſed, &c. and avers, that he did repair *eandem partem*; and though it was objected, the Plaintiff ſhould have ſhewed which Part of the Houſe was out of Repair, yet after a Verdict it was adjudged for the Plaintiff. 2 Leon. 53. 3 Leon. 91.

But if a perfect Indenture in Date, in the Nomination of the Parties and Limitation of the Land, had been mentioned before, it had been ſufficient to ſay, that they ſealed *Indenturam prædict'*, becauſe by the Premiſſes it appears there was *in facto* a true and perfect Indenture. Yelv. 111. *per Cur.'*

The Plaintiff declares, whereas he and the Defendant were joint Executors, and the Defendant had received all the Eſtate of the Teſtator, and the Plaintiff threatened to ſue the Defendant for one Moiety, the Defendant, in Conſideration the Plaintiff would forbear, &c. and would Raym. 203, 204.

ſhew

ſhew an Account concerning the Teſtator's Eſtate, did aſſume, &c. and the Plaintiff avers, that he did ſhew *quoddam Compotum*; and though not ſaid *Compotum prædict'*, yet after a Verdict for the Plaintiff it was adjudged for him.

3 Bulſt. 35. *Lee* v. *Adams*, adjudged after Verdict for the Plaintiff.

If in an *Aſſumpſit* the Plaintiff declares, that the Defendant, in Conſideration that the Plaintiff would leaſe certain Lands to the Defendant, rendering 10 *l. per Ann.* the Defendant did aſſume and promiſe to, &c. and avers, that he did make a Leaſe of the ſaid Lands, but does not ſay that it was rendering 10 *l. per Ann.* This is no good Declaration.

*Page 21

Hob. 105, 106. *Lumpleugh* v. *Blaithwait*, adjudged *per totam Curiam, præter Warburton*; and the rather, becauſe it was after Verdict. Mour. 866. Brownl. 7. S. C.

* If in an *Aſſumpſit* the Plaintiff declares, that whereas the Defendant had committed a Felony, and thereupon had requeſted the Plaintiff to do his Endeavour (*a*) to procure a Pardon for the Defendant; and thereupon the Plaintiff, by all the Means he could, and many Days Labour, did his Endeavour to obtain a Pardon for the ſaid Felony, *viz.* in riding and journeying, at his own Charge, from *London* to *N.* where the King was, and ſo to and from *New-market* to obtain a Pardon, &c. This is a good Declaration, (*b*) though nothing in particular is laid to be done, but only riding up and down, and nothing done when he came there; for an Endeavour in general is expreſsly laid, and Particulars ought to be ſet forth for Form's Sake only; for though upon the Trial he could have proved no riding nor journeying, yet any other effectual Endeavour, according to the Promiſe, would have ſerved.

(*a*) Stile 465. Like Point, where the Defendant did his Endeavour to reconcile Differences, &c. (*b*) But if the Plaintiff declares, that the Defendant, in Conſideration the Plaintiff had done him *Multa beneficia*, aſſumed and promiſed, &c. this is not good. Vent. 27. Sid. 413. adjudged, after Verdict for the Plaintiff; & *vide* 2 Keb. 552.

Rol. Rep. 382.

In *Aſſumpſit* the Plaintiff declared, that in Conſideration the Plaintiff would deliver all the Corn in a certain Barn, the Defendant did aſſume and promiſe, &c. and avers, that he did deliver all the Corn in the Barn, but does not ſhew that there was any Corn there; and it was agreed *per Curiam*, that had this been on a Demurrer, the Declaration would not be good; but that being after a Verdict, upon *Non aſſumpſit* pleaded, by which Iſſue it is admitted there was Corn there; it was adjudged for the Plaintiff, and afterwards affirmed upon a Writ of Error.

Cro. Jac. 503. *Lenerett* v. *Rivett* adjudged.

If in an *Aſſumpſit* the Plaintiff declares, that whereas *J. S.* had acknowledged himſelf to be indebted to the Plaintiff in 10 *l.* for divers Treſpaſſes, which 10 *l.* the Plaintiff at the Defendant's Requeſt had accepted; and that the Defendant, in Conſideration the Plaintiff would acquit and diſcharge the ſaid *J. S.* of the ſaid Debt, and would permit the ſaid *J. S.* to carry out of the Plaintiff's Houſe certain Goods, did aſſume and promiſe to pay the ſaid 10 *l.* to the Plaintiff; and alledges *in facto*, that he did acquit and diſcharge the ſaid *J. S.* and did permit the ſaid *J. S.* to carry away the ſaid Goods: This is no good Declaration, becauſe he doth not ſhow how he did acquit the ſaid *J. S.* for it could not be without Deed, which ought to have been particularly ſhewn; and though the Performance of the other Part of the Conſideration is ſufficiently averred, yet that will not help it.

Raym. 400. *Aglionby* v. *Towerſon* adjudged, after Verdict for the Plaintiff. Moor 595. Like P. adjudged.

If in an *Aſſumpſit* the Plaintiff declares, that whereas there was a certain Diſcourſe between the Plaintiff and Defendant concerning a Marriage to be had between the Nephew of the Plaintiff and the Niece of the Defendant; and thereupon the Defendant, in Conſideration the Plaintiff would do his Endeavour, and labour to perſuade his Nephew to marry the Niece of the Defendant, did aſſume and promiſe to pay to

the

the Plaintiff, &c. and avers, that ſuch a Day, and divers other Days and Times *omnibus modis quibus poterat Conatus fuit & elaboravit ſuadere* his ſaid Nephew to marry the Defendant's ſaid Niece, &c. This is a good Declaration, without ſhewing in particular how he did his Endeavour; for if he ſhould ſet forth his ſeveral Speeches to his Nephew in the Praiſe of the young Lady, or the Advantages of a married Life, &c. the Record would be too long.

* 4. Where the Averments muſt be poſitive and expreſs in the Declaration. *Page 22

The Declaration muſt contain ſuch certain Affirmation, that it may be traverſed; for if there be no certain Affirmation to make the Declaration itſelf traverſable, it will not be cured after a Verdict, becauſe it is a Defect in Subſtance; as if the Declaration be *quod cum* the Defendant *(a)* aſſaulted him, and the Defendant pleads Not guilty, here is nothing put in Iſſue, for the Pleadings have affirmed nothing; and though the Defendant be found guilty, yet cannot the Plaintiff have Judgment, becauſe nothing is poſitively affirmed: But if the Plaintiff declares *quod cum* the Defendant *conceſſit ſe teneri*, or *quod cum Mutuatus fuiſſet & non ſolvit*, or *quod cum demiſit*, the Defendant *ejecit*; in theſe Caſes there is a poſitive Charge upon the Defendant; and the *quod cum* being a Branch of the whole Period, and making one Sentence with the latter Part of it, it is a poſitive Affirmation, and therefore being equally poſitive, it is equally traverſable with the latter Part, and therefore a Man may plead *Non eſt factum*, *Non Mutuatus*, *Non dimiſit*; becauſe, though theſe come under the *quod cum*, yet, taken together with the reſt of the Sentence, being poſitive, they make ſubſtantive Iſſues of themſelves.

Co. Lit. 303. Plow. 128. Cro. Jac. 361, 362. 2 Bulſt. 214. Yelv. 121. Cro. Eliz. 33, 441. Co. Ent. 161. 2 Sand. 319. (a) 2 Lev. 206.

If on a Demiſe the Plaintiff declares, *quod cum per quandam Indenturam teſtat' exiſtit quod dimiſit*, this hath been held ill after a Verdict; becauſe there is no poſitive Affirmation that there was a Demiſe; and ſo he hath not ſet forth a Demiſe in a Manner that it might be traverſed, for the Traverſe muſt be of the Demiſe, and not of the Indenture; but if in Covenant he declares, *quod cum per quandam Indenturam teſtat' exiſtit*, that the Defendant did covenant, this, with a *Profert*, is good; becauſe when he ſays the Indenture atteſts that he did covenant, this is a certain Allegation there was ſuch an Indenture, and the Indenture only is traverſable on the Iſſue of *Non eſt factum*.

Lutw. 535, 877. & *vide* Lev. 12, 75. Sand. 275.

So it hath been held, that *Licet* is an Affirmation; for what is contained under it, as *Licet ad hoc faciend' ſæpius requiſit*,' is a poſitive Affirmation that there was a Requeſt.

Sand. 116. Lev. 194. 2 Vent. 278. Dyer 257.

In Debt on the Statute 12 *Car.* 2. *cap.* 25. for ſelling Wine without a Licence, the Plaintiff began his Declaration by Way of Recital, *pro eo, viz. quod cum* the Defendant at ſeveral Times, between ſuch a Day and ſuch a Day, had ſold Wines by Retail by the Pint, &c. on the general Iſſue pleaded, and Verdict for the Plaintiff, it was moved in Arreſt, that the Declaration was not poſitive, but by Way of Recital only, and ſo doth not directly charge the Defendant with the Crime intended; *ſed per Curiam* the Plaintiff had Judgment; for all the Precedents in the like Caſes are after this Manner; as in Debt upon the Statute of Tithes, &c. Moreover this is an Action of Debt, wherein the Offence is only an Inducement to the Action; for it is the Non-payment of the Penalty which is the original Cauſe.

Carth. 216. Show. 337. *Mullacke qui tam* v. *Steering.*

In

In Treſpaſs the Plaintiff declared, *quare* § *vi & Armis Clauſum fregit*, and after Verdict for the Plaintiff Judgment was arreſted; for *quare* is not poſitive, but interrogatory, and much worſe than *quod cum*.

2 Salk. 636. pl. 2. *Hore* v. *Chapman*.

§ This is the Form in the Writ, but the Count muſt contain a poſitive Allegation.

It hath been held a good Declaration to ſay, *quod defendens quendam canem ad mordendum oves conſuetum Scienter retinuit*, without ſaying, *quod retinuit quendam canem ſciens canem prædict' ad mordendum oves conſuetum*, * for this is tantamount, for the Word *Scienter* goes to all the precedent Matter; and the Court ſaid, the *Sciens* was not † traverſable, but ought to be proved in Evidence, and that otherwiſe the Action did not lie.

* Page 23

For this *vide* Rol. Abr. 4. Cro. Car. 254, 487. 2 Sid. 127. 4 Co. 18. Dyer 25, 256. Allen 92. 2 Bulſt. 291. 3 Bulſt. 76. Sid. 21. Rol. Rep. 43, 193.——In Caſe for ſelling two Oxen, affirming they were his, the Defendant's, whereas in Truth they were the Property of *J. S.* without alledging, that he *Sciens* they were the Property of *J. S.* yet the Declaration was held good. Carth. 90.

† The general Iſſue is in fact a Traverſe of the *Sciens*, for unleſs the Plaintiff on the Trial prove the Defendant knew his Dog was accuſtomed to bite Sheep, his Cauſe of Action falls to the Ground, as in ſuch Caſe the Defendant is not guilty of any Thing which can intitle the Plaintiff to an Action.

Noy 21. In Debt upon an Obligation, the Condition whereof was to perform all Covenants comprized within certain Indentures, bearing even Date with the ſaid Obligation, and, in Truth, both Obligation and Indentures were without Date; and it was held, that the Plaintiff ought to have averred a Date of the Obligation, and that the Indentures bore equal Date therewith.

Yelv. 18. *Soprani* v. *Skurro* adjudged. If in an *Aſſumpſit* the Plaintiff declares, that whereas it was agreed between the Plaintiff and one *A.* that the ſaid *A.* ſhould leaſe a certain Houſe to one *B.* for ſeven Years; and it was alſo agreed, that *B.* during the ſaid Term, ſhould repair the Houſe with Tile and Slate only, and thereupon an Indenture was drawn; but becauſe there was a Covenant therein, that *B.* ſhould be bound to all Manner of Reparations, *B.* refuſed to ſeal the ſaid Indenture, and the Plaintiff refuſed to ſeal a Bond for Performance, *&c.* and further ſhews, that in the ſaid Houſe there was a great Wall, Part whereof was ruinous, and likely to fall during the ſaid Term; and that the Defendant, in Conſideration that the ſaid *B.* would ſeal the ſaid Indenture, and the Plaintiff would ſeal the ſaid Bond, did aſſume and promiſe, that he the ſaid Defendant would maintain and uphold the ſaid Wall *durante predict' termino 7 Annorum*, and avers, that the ſaid *B.* the ſaid Indenture, and the Plaintiff the ſaid Bond, did thereupon ſeal; and in Fact ſays, that the ſaid Wall, during the ſaid Term, did fall, *&c.* This is no good Declaration, becauſe not expreſsly averred that *A.* did demiſe the ſaid Houſe; and if there was no Demiſe, it was not poſſible for the Defendant to repair it during the Term; and, for any Thing that appears, the Indenture was ſealed only on the Part of the Leſſee, and not on the Part of the Leſſor.

Yelv. 38. *Heyford* v. *Reeve* adjudged. If in an *Aſſumpſit* the Plaintiff declares, that whereas the Defendant had diſtrained ſix Oxen of the Plaintiff's for a Quit-Rent due to the Bailiffs of *B.* and thereupon the Defendant, in Conſideration that the Plaintiff would pay the Money for the Redemption of his ſaid Cattle, did aſſume and promiſe, upon Requeſt, to ſhew to the Plaintiff, or to ſuch other Perſon or Perſons as he ſhould name, a ſufficient Record to charge the ſaid Lands with the ſaid Quit-Rents; and alledges, that he appointed *B.* to ſee the ſaid Record, and requeſted the Defendant to ſhew it *B.* accordingly; but that the Defendant had not ſhewn to the ſaid *B.* any ſufficient Record to charge the ſaid Lands: This is a good Decla-

Declaration; for though the Sufficiency of the ſaid Record it is not triable *per Pais*, and the Plaintiff might have averred a Breach generally, *ſcilicet*, that he did not ſhew any Record, yet this is ſufficient and moſt proper for the Plaintiff to lay the Breach according to the Promiſe; and in this Caſe the Defendant may plead, that he did ſhew *tale Recordum* reciting it, and conclude, which was ſufficient; and thereupon the Plaintiff may demur, and put the Sufficiency thereof to the Judgment of the Court.

If in an *Aſſumpſit* the Plaintiff declares, that the Defendant, in Conſideration of, &c. aſſumed and promiſed to take the Son of the Plaintiff to be his Apprentice for ſeven Years, and to find him Meat, Drink, and Apparel, &c. during the Term, but avers, that he did not find him Meat, Drink, and Apparel, &c. but does not aver that he did put him, or that the Defendant did accept him as his Apprentice: This is no good Daclaration; for it ought to appear that he was his Apprentice, or elſe the Defendant was not bound to provide for him. Cro. Jac. 406. 3 Buſſt. 221. Rol. Rep. 414. *Talker* v. *Wrigg.*

* If in an *Aſſumpſit* the Plaintiff declares upon a Promiſe made by the Defendant to pay 50 *s.* to the Plaintiff when the Defendant ſhould have received the Money, and avers that the Defendant hath received the Money, but yet hath not paid, &c. This is no good Declaration, becauſe it doth not appear how much Money the Defendant hath received, and perhaps he hath not received ſo much as 50 *s.* and though the Promiſe is general, yet the Breach ought to be laid ſo as to be adequate to the Conſideration. † * Page 24 Mod. 169. agreed *per Cur'*, but being after a Verdict adjudged for the Plaintiff.

† The beſt Method would have been to have declared generally, that the Defendant was indebted to him in 50*s.* for Money had and received by Defendant to the Plaintiff's Uſe, and being ſo indebted, he promiſed to pay, and then, on proving any Part received, the Plaintiff would have been intitled to his Verdict, and the Declaration would not be liable to any Exception.

If in an *Aſſumpſit* againſt an Executor the Plaintiff declares, that the Teſtator of the Defendant, in Conſideration of, &c. did aſſume and promiſe that he would leave the Wife of the Plaintiff as good a Portion as he ſhould give to any of his Children; and avers, that the Teſtator to ſuch a Daughter *dedit* ſuch a Portion, but did not leave, &c. This is no good Declaration, becauſe it does not appear when he did give this Portion, and perhaps it might be before the Promiſe. Latch 203. by two Judges againſt one, after Verdict.

5. Of the Certainty required in the Deſcription of the Thing declared for.

The Law requires no greater Certainty than the (*a*) Nature of the Thing will admit of; as where an Action is brought for Things not ſubject to Diſtinction by Number, Weight or Meaſure; as in Treſpaſs for breaking his Cloſe with Beaſts, and eating his Peas, without ſaying how much; yet this Declaration hath been held good, becauſe no Body can number or meaſure the Peas that Beaſts can eat. For this *vide* Tit. *Treſpaſs.* (*a*) That where the Thing is well deſcribed, the Court ought not to be too ſtrict in ſcanning the Words; and that if the Thing is ſo deſcribed, that the Jury may know what is meant thereby, it is well enough. Stile 136, 235.

So where there are ſeveral Parts which compoſe an aggregate Body, there it is ſufficient to mention the Body, and it is not neceſſary to aſcertain the ſeveral Parts; as Trover for a Ship and Sails is good, becauſe the Sails go to make up the aggregate Body; but if it had been for Sails only, it would not have been good without ſpecifying the Number and Quality; ſo Trover lies for a Library of Books ‡. For this *vide* Tit. *Trover and Converſion.*

‡ *Sed qu?*

If

Raym. 2. *Seaman* v. *Barns* adjudged.

If in Trover the Plaintiff declares for two Pair of Pot-Hooks, *&c.* and Hangers; this Declaration is not good, becauſe of the Uncertainty of the Word Hangers; and they cannot be intended ſuch upon which the Pot-Hooks uſed to hang, becauſe they do not immediately follow the Word Pot-Hooks; but there are ſeveral other Words between.

Vide Tit. *Trover.*

So Trover for a Beam, and Scales and Weights, is not good for the Weights, becauſe there may be more or leſs of the Weights uſed with the Scales, and therefore altogether uncertain as to the Quantities or Weights of them.

2 Sand. 74. *Taylor* v. *Wells* adjudged.

If in Trover the Plaintiff declares *pro decem Paribus Velorum & tegulorum, Anglice* Curtains and Vallance; this is a good Declaration, and certain enough, and ſhall be intended for ten Pair of Curtains, and ten of Vallance; and in ſuch artificial Things there needs no other Deſcription, than to name them by their uſual Names by which they are commonly called, without ſhewing the Quantity of Yards or Stuff of which they are made.

Vide Tit. *Trover*, and the ſeveral Authorities there cited.

Where a Thing is laid in the Declaration by way of Aggravation, though ſuch Allegation is incertain, or that Circumſtance is not proved to the Jury, yet this ſhall not arreſt the Judgment; becauſe the Gift of the Action is the Thing itſelf in Demand, and the Aggravation is only the Manner of doing it; and though this may increaſe the Da-

* Page 25

* mage ſomething, yet it is not to be out of Proportion to the Thing in Demand; as if Trover be brought for a Box of Writings ‖, and Charters or Veſtments, this is good, becauſe the Trover is for the Trunk, and for the Detention of the Goods therein, which are witheld by the Detention of the Trunk, but not for the Value of the Goods; and therefore antiently they held that Trover lay only for a Trunk locked, but now they admit it though the Trunk be not locked, becauſe the Detaining is ſtill the ſame.

‖ If for Writings, the Plaintiff perhaps had better ſue in Detinue, as on Recovery in that Action he will be intitled to a Return of the Things in Specie, beſides Damages for the Detention.

Keb. 825. *Prior* v. *Dawks.* § See the Stat. 6 Ann. c. 31.

In an Action upon the Caſe for ſetting a Houſe on Fire §, *per quod* (amongſt divers other Goods) *ornatus & equis aratis & Carucis amiſit* was held certain enough; ſo if he had mentioned only *diverſa bona*; for when a Man's Houſe is burnt, he cannot ſet forth the Certainty of the Goods he loſt.

2 Sand. 379.

But where in an Action on the Statute of *Hue and Cry* the Plaintiff declared that he was robbed of a certain Sum of Money *ac diverſa bona & Catalla in Cuſtodia ipſius*, to the Value of 30 *l.* and becauſe he had not ſet forth the Goods particularly, and that he had not likewiſe alledged that they were his Goods, it was held, that as to this Part he could not have Judgment.

5 Co. 34. *Playter's* Caſe. Vent. 272. *& vide* 1 Vent. 329.

Declararion in Treſpaſs for breaking his Cloſe and taking away his Fiſh, without expreſſing either the Number or Nature of them, was held inſufficient; but in an Indictment for taking Fiſh out of a Pond, the Number need not be expreſſed, for Damages are not to be recovered; but the Party is to be fined according to the Circumſtances of the Fact, and not according to the Number of the Fiſh.

Vent. 53.

So Treſpaſs *Quare arbores ſuccidit ad Valentiam, &c.* was held inſufficient for not expreſſing the Kind of Trees.

6. Of the Declaration's being good in Part, and void in Part.

Rol Abr. 784 785. 10 Co. 115.

It ſeems to be now agreed, that if a Declaration be good in Part, though bad as to another Part, that the Plaintiff is intitled to Judgment,

ment, for ſo much as is well alledged, eſpecially if it be not of an (*a*) intire Demand; alſo where the Jury finds greater Damages than the Party declares of, the Court may, to prevent Error, give Judgment for ſo much as the Party declares of, *nullo habito reſpectu* to the reſt; alſo the Party may (*b*) releaſe the Overplus, and take Judgment for the reſt. Yelv. 45. 2 Show. 103.

(*a*) *Vide* 1 Vent. 27. Hob. 178, 189. ——That if one brings an Action for two Things, and of his own ſhewing it appears, that he cannot have an Action for one of them, or a better Writ, there the Writ ſhall be well for that Part for which it is good. 11 Co. 45. *Godfrey*'s Caſe. (*b*) Where the Plaintiff may releaſe Damages for Part, and take Judgment for the Reſt, *vide* F. N. B. 107. Moor 281. Leon. 92. 2 Bulſt. 280. Brown. 235. Stile 364. Hard. 58.

As where the Party avowed for 5 *l.* Rent, and a *nomine Pœnæ* for Non-payment at the Day, but laid no actual Demand of the Rent, the Avowry was held naught as to the *nomine Pœnæ*, becauſe it could not be forfeited without a Demand of the Rent; yet he had Judgment for the Return of the Cattle, becauſe he had a lawful Cauſe to diſtrain for Rent arrear, and the Demands were ſeveral. Hob. 133. *Howell* v. *Sambeck.*

So where the Plaintiff brought an Action of Debt upon the Statute of Uſury, and declared, that the Defendant *corruptive* did lend 40 *l. cont. formam ſtatuti*, and ſuch a Day did alſo lend 20 *l. contra formam*, &c. but did not ſay *corruptive*; upon *Nil debet* pleaded the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment that the Declaration was not good for the laſt 20 *l.* becauſe it wanted the Word *corruptive*; but notwithſtanding the Court gave Judgment for what * the Plaintiff had well declared, and a *Nil Capiat per Billam* was entered as to the Reſidue. Cro Jac. 104. *Woody*'s Caſe. 1 Saund. 286.

* Page 26

So if in Treſpaſs the Plaintiff declares for taking the Mare of the Plaintiff, and ſeveral Goods, but does not ſay of the Plaintiff, and thereupon the Defendant demurs, the Plaintiff may have Judgment for the Mare, and releaſe the Action for the reſt. Raym. 395. *Cutworthy* v. *Taylor.*

So if an Action of Debt be brought upon ſeveral Bonds, and it appears that one is not due, the Plaintiff may recover the reſt. Hob. 178. Sand. 286.

In Ejectment, if (*c*) Part of the Things be well demanded, and others not, and a Verdict is given for the Plaintiff for the whole, and intire Damages, the Plaintiff may releaſe all the Damages in that which is not well demanded, and pray Judgment for the Reſidue. Rol. Abr. 785. Cro. Car. 458.

(*c*) As in Ejectment of Land and a Free Fiſhery, becauſe an Ejectment does not lie of a Free Fiſhery. Cro. Jac. 144, 146. 1 Rol. Abr. 784.——So in an *Ejectione cuſtodiæ & hæredis*, where is does not lie of the Cuſtody of the Heir, but of the Land only. Dyer 369. 10 Co. 130. 5 Co. 108. 2 Bulſt. 28.——So in an Ejectment of a Meſſuage, Cottage and Tenement, if it be found for the Plaintiff, and one intire Penny Damages given to the Plaintiff for the whole, becauſe an Ejectment does not lie of a Tenement, † the Plaintiff may releaſe all the Damages for that it is intire, and have Judgment for all the Land, ſaving the Tenement. Cro. Eliz. 119. 3 Leon. 128. 2 Bulſt. 28. Stile 30.

† The Word Tenement ſtanding alone, being uncertain.

In a Writ of Debt for 100 *l.* againſt an Executor, if the Plaintiff counts upon an Obligation for 99 *l.* and upon a *Mutuatus* by the Teſtator for 20 *s.* and upon the Iſſue the Jury find for the Plaintiff in the Whole, and aſſeſs Damages intire, where it appeared no Action lay againſt the Executor upon the *Mutuatus* of the Teſtator; yet if the Plaintiff releaſes the 20 *s.* and all the Damages, he may have Judgment for the Reſidue. Rol. Abr. 784. *Aſhford*'s Caſe. 2 Sand. 286. Like Point.

In Debt for Rent the Plaintiff declared for more than was due upon his own ſhewing, and upon *Nil debet* pleaded the Plaintiff had Judgment, and Damages and Coſts; and it was moved in Arreſt of Judgment, that Rol. Abr. 785. *Barber* v. *Pomeroy.*

the Stile 175. & *vide* Allen 25.

the Plaintiff had made an (*a*) intire Demand for Rent to a certain Sum, when it appeared that he could not have an Action for ſo much; yet the Court held that he might releaſe the Surplus and Damages, and take Judgment for the Reſidue.

(*a*) In all Actions of Debt the Plaintiff is privy to the Sum in Demand; and therefore ought at his Peril to declare for the true Debt; and the Reaſon why he ought to demand the very Sum is, becauſe if he ſhould do otherwiſe, and recover, he might afterwards bring an Action for the true Sum, and ſo the Defendant would be doubly charged; and therefore in Debt on a Bond, if the Plaintiff declares for leſs than is due, he ſhall never have Judgment. 2 Rol. Rep. 54, 55. 5 Mod. 213. cited.

7 Mod. 87. *per Holt* Ch. J. 2 Salk. 658. pl. 3. 2 Ld. Raym. 814. S. P.

If there be a certain ſtated Sum ſpecified in the Deed itſelf, that ſhall not be abridged by any *Remittitur* or Releaſe of the Plaintiff, if he declare upon that Deed; as if a Man bring Debt upon a Bond of 30 *s.* and declares upon a Bond of 20 *l.* this will be bad; becauſe he has brought his Action for more than is due, and this reſts upon the Deed only, and the Sum in it does not amount to his Demand; but if the Action be brought upon a Deed which refers to a Matter of Fact, that makes the Duty more or leſs; if then the Fact which is referred to will intitle him to a leſs Sum only, and he demands more than the Fact which the Deed refers to upon (*b*) Computation will intitle him; there let him remit ſo much of his Demands as the Fact does not make out, it will be well, and he ſhall have Judgment for the Reſt; for that Fact which is not made out is not contradicted by the Deed.

(*b*) As in Debt for the Arrears of Rent, in which the Plaintiff declared for more Rent, and for a longer Time than upon his own ſhewing appeared to be due to him. Sand. 282. *Dupper* v. *Baſkervil.*——So where the Plaintiff declared for 100 *l.* due for ſo many Years, and it appeared upon the Record in caſting up the Sums, that he had declared for 8 *l.* too much. 5 Mod. 212. *Thwait & ux.* v. Lady *Aſhfield.* Comb. 365. S. C.

* Page 27 Salk. 24. pl. 8. *Cutting* v. *Williams.*

* *Aſſumpſit*, and two ſeveral Counts laid, one was a promiſſory Note, and the Plaintiff counted thereon as on a Bill of Exchange, upon the Cuſtom of Merchants; on *Non aſſumpſit* intire Damages were given, and Judgment accordingly; and upon a Writ of Error brought in *B. R.* it was held *1ſt*, That the Plaintiff could not declare upon the promiſſory Note as upon a Bill of Exchange; and as there could be no ſuch Count or Action, ſo there could be no ſuch Damages. *2dly*, That they could not reverſe the Judgment in Part, *viz.* as to the one Count, and affirm it as to the other; and denied *Jacob* and *Mill's* Caſe, *Hob.* 6. and took this Difference, *viz.* where the Judgment is partly by the Common Law, and partly by Statute, it may be reverſed in Part, for that which was a Judgment at Common Law will remain a Judgment, and be compleat without the other.

(C) Of Imparlance: And herein,

1. Of the Nature thereof, and the ſeveral Kinds.

2 Lil. Reg. 41. 2 Show. 310. pl. 321.

(*c*) IMparlance is, when one is to anſwer to the Action of another he deſireth ſome Time to adviſe what he ſhall anſwer; and (*d*) it is nothing elſe but the Continuance of the Cauſe till a further Day.

In

(*c*) This *Libertas interloquendi* has been thought to ariſe from a Notion of Religion, which is mentioned in St. *Matthew*, Chapter v. Verſe 25. *Agree with thine Adverſary quickly, whilſt thou art in the Way with him*; they looked upon the Plaintiff at the Time of declaring to be in his Way towards Judgment; and that therefore, ſince the Defendant was ordered by the Precepts of Religion to agree with him, that there was

In the Common Pleas they anciently proceeded by original Writs, which were Warrants out of Chancery for them to proceed; those always gave the Defendant Notice of the Cauſe of Action; and as he had a View of the Writ before he appeared, if he had any dilatory Plea he was to put it in immediately; but when he pleaded in Chief, and came in towards the End of the Term, they gave him Time to make his Defence, which was called Imparlance. 2 Show. 444. Skin. 2. pl. 2. Yelv. 211. Lev. 197. Gilb. Hiſt. C. P. 182.

But in the King's Bench, when the Defendant comes in by *Latitat*, he does not know, till after his Appearance, for what the Plaintiff declares; and as he had not Sight of the Bill beforehand, he had Time allowed him to plead any Plea in Abatement, which is called a ſpecial Imparlance. 12 Mod. 529.

When the Common Pleas proceed on *Clauſum Fregit*, as the Defendant was under the ſame Diſadvantages as when he was arreſted on a *Latitat*, he had the ſame Privilege as to Time to make his Objections to the Declaration. 2 Show. 310. pl. 321.

This begot the Diſtinction between general and ſpecial Imparlances, which latter is again diſtinguiſhed into the general ſpecial Imparlance, and that which is ſtill more ſpecial. 12 Mod. 529.

The general Imparlance is entered on the Imparlance Roll in the Words following, *Petit Licentiam Interloquendi*, which, in the King's Bench, and on *Clauſum Fregit* in the *C. B.* is entered of Courſe, and is all † that is done the firſt Term; but in ſpecial Originals, returnable in * an iſſuable Term, the Courts have denied the Defendant Leave to imparl, in order to put off a Trial; alſo after this general Imparlance, the Defendant cannot regularly plead any dilatory Plea. Gilb. Hiſt. C. P. 183. * Page 28 † Imparlances are now much diſcouraged, as tending to delay Plaintiffs in their juſt Demands ——*Note*, if a Declaration be *not* delivered or filed, and alſo *notice* of the filing given *before* the laſt four Days of Term, the Defendant is intitled to an Imparlance of Courſe.

The general ſpecial Imparlance is entered thus, *Salvis ſibi omnibus & omnimodis advantagiis & exceptionibus*; that which is more ſpecial is, *Salvis ſibi omnibus advantagiis ad Breve, Billam ſive Narrationem*; (a) general Imparlance is of Courſe, but the ſpecial muſt be obtained from the Gilb. Hiſt. C. P. 183. (a) Mr. Juſtice *Powel* thus lays down the different Kinds of Imparlances: There are two Sorts of Imparlances; the one general, after which one canno plead in Abatement at all; the other ſpecial, with a *Salvis ſibi omnibus exceptionibus tam ad breve quam ad narr'*, after which one may plead in Abatement of the Writ and Count; and this Sort of ſpecial Imparlance may be granted by the Prothonotary; there is another Sort of Imparlance more ſpecial, with a *Salvis ſibi omnibus exceptionibus & advantagiis quibuſcunque*, which cannot be granted without Leave of the Court, and is diſcretionary, and after which one may plead to the Juriſdiction of the Court. 12 Mod. 529. Gilb. Hiſt. C. P. 186. Mod. Rep. 14. pl. 41. 1 Ld. Raym. 118. 2 Ld. Raym. 1208. 11 Mod. 2. pl. 9. Comb. 251, 253, 465, 479. Str. 523, 532. 2 Lil. Reg. 372. (F). ‡

‡ In *B. R* on a Declaration of *Hilary*, there may be an Imparlance to *Trinity* Term; for it is the Courſe of that Court to give Imparlance on Declaration till the Day of pleading. *Fletcher* v. *Richardſon*, M. 10 Geo. 2. *Ca. B. R. Temp. Hardw.* 322.——Time to plead is the ſame as an Imparlance. Barnes 345.

was a Neceſſity to give him Time for that Purpoſe, and therefore *Libertas loquendi* was entered on the Roll. Gilb. Hiſt. C. P. 42, 43. (d) When the Defendant appears, and the Parties by Conſent obtain a Day before the Declaration, this is called *Dies Datus prece partium*. Gilb. Hiſt. C. P. 41.——A Day given before the Court is called *Dies Datus*; but when after it is called an Imparlance. Hard. 365, 366. But for this Diverſity between an Imparlance and the *Dies datus*, *vide* Moor 79. pl. 209. 3 Leon. 14. N. Bendl. 153. pl. 214. Cro. Eliz. 740.

2. What the Defendant must do before any Imparlance.

Dyer 210. 7 H. 6. 39. 27 H. 6. 7. 2. Palm. 406. Latch 83. Cro. Car. 9. Stile 90

If a Defendant pleads to the Jurisdiction of the Court, he must do it *instanter* on his Appearance; for if he imparls, he owns the Jurisdiction of the Court by craving Leave of the Court for Time to plead in.

Hard. 365. Gilb. Hist. C. P. 183, 184.

Sid. 318. Cro. Car. 9. & vide Tit. *Ancient Demesne.*

But the Plea of ancient Demesne may be pleaded after Imparlance; because the Lord may reverse the Judgment by Writ of Deceit, and it goes in Bar of the Action itself in that Court.

Raym. 34.

The Defendant after Imparlance pleaded to the Jurisdiction of the Court of *B. R.* that he was a Member of the Privy Chamber, and ought not to be sued in any other Court without the special Licence of the Lord Chamberlain of the Household for the Time being; this was held an ill Plea, and the Court offended thereat.

Gilb. Hist. C. P. 184. Dyer 210. pl. 26. That a View cannot be had, nor Non-tenure,

If the Defendant in a Plea of Land would have View, he must demand it before Imparlance; for by imparling he undertakes to defend the Lands mentioned in the Plaintiff's Count, and it would be absurd in him to defend what he does not know.

nor Jointenancy pleaded, after Imparlance; but in Jenk. 130. it is said, a View may be had after Imparlance. †

† In personal or mixt Actions, Views may be had on Motion made, even after Notice of Trial, if there is Time sufficient. In *B. R.* a Rule for a View is drawn up on Motion signed by Counsel.

Dyer 300. Hob. 62.

If in *(a)* Dower the Defendant pleads *Semper paratus*, this must be before Imparlance.

(*a*) Error on a Judgment in Dower in *Durham*, where after Imparlance the Defendant pleaded Detinue of Charters, and Judgment on Demurrer for the Plaintiff, and that Judgment affirmed in *B. R.* Show. 271. *Burdon* v. *Burdon.*

Dyer 300. Hob. 62. Sid. 365. Lutw. 238. 2 Mod. 62.

So Tender and *Uncore prist* must be pleaded before Imparlance; for by craving Time he avers he is not ready, and therefore falsifies his Plea.

Carth. 413. Salk. 622. pl. 1. Comb. 443. *Gilesv. Hart.* 3 Salk. 353 Ld. Raym. 254. S. C.

In *Assumpsit* for Goods sold the Defendant imparled specially, with a *Salvis sibi, &c.* in common Form, and afterwards he pleaded in Bar to the Action, that he tendered the Money demanded to the Plaintiff on the very Day on which he had laid his Request in the Declaration, and that from that Day forward *semper paratus fuit* to pay it, *& profert hic in Cur'*; and on Demurrer to this Plea, one Objection was, that this Tender could not be pleaded after an Imparlance, being contradictory to that Part of his Plea, *viz. semper paratus*; and after several Debates, * Page 29 * the Plea was for this adjudged ill; and in this Case the Court held, that the special Imparlance made no Difference, as it appeared thereby that he was not *semper paratus.*

3. What he is to plead after a general Imparlance.

1 Rol. Rep. 59 Jenk. 130.

After a general Imparlance the Defendant can only plead in Bar to the Action, and cannot regularly plead any dilatory Plea in Abatement;

ment; as Outlawry, Excommunication, Jointenancy, Misnomer or Non-tenure.

But though Outlawry after Imparlance cannot be pleaded in Abatement, yet if the Ground or Cause of Action be forfeited, as it is in Felony, it may be pleaded in Bar after Imparlance; so of a Debt certain and due to the Outlaw, which vests in the King by the Forfeiture; Outlawry in the Plaintiff may be pleaded after Imparlance, and the turning the Remedy from an Action of Debt to an Action on the Case (according to the modern Practice, to avoid the Law-Wager) whereby it becomes uncertain and sounds only in Damages, shall not divest the King of what he was once lawfully possessed of. § Bro. *Non-ability* 36. 2 Rol. Rep 59. Cro. Eliz. 203. 2 Vent. 282. 3 Lev. 29.

§ Therefore in *Assumpsit* Outlawry may be pleaded in Bar.

So if one be excommunicated after the Term to which the Imparlance is, such Excommunication may be pleaded after Imparlance. Doct pl. 224. Lutw. 1117.

That the Demandant is an Alien may in a real Action be pleaded in Bar after Imparlance, as well as to the Writ before Imparlance. Jenk. 130.

After a general Imparlance (*a*) a Feme cannot plead Coverture in Abatement, but may plead it in Bar.‖: But note, that if the Marriage was after the Cause of Action accrued, it must be pleaded in Abatement. Lutw. 23, 117.

(*a*) In an Assise against Baron and Feme, the Feme Tenant *per receit* not allowed to imparl. Dyer 298. pl. 28.

‖ It hath been a common Practice so to plead; *sed qu.* if it can be a good Bar, as Plaintiff may maintain another Action against Husband and Wife?

So in an Action against an Executor, he may plead that he is not Executor in Bar after Imparlance, but not in Abatement. 2 Lev. 190. Lutw. 1178.

In an Action of Debt, the Defendant pleaded an Attachment made in *London* after Imparlance, and adjudged ill. 3 Leon. 232.

4. What may be pleaded after a special Imparlance.

It is clearly agreed that all Pleas in Abatement, unless to the Jurisdiction, may be pleaded after a special Imparlance. *Vide* the Authorities *supra*.

But it hath been doubted whether Privilege could be pleaded after a special Imparlance, because it is neither an Objection to the Writ, Bill or Count; but it seems to be now settled (*b*) that it may be pleaded after a special Imparlance, in as much as it does not oust the Court of their Jurisdiction, but is a Privilege which each Court allows to the Officers of another to be sued in their own Court. 2 Rol. Rep. 244. Sid. 29. 2 Show. 145. pl. 124. (*b*) Hard. 365.

An Action of Assault and Battery was brought against one of the Members of the University of *Cambridge*, and a general Imparlance given from one Term to another. The Chancellor of the University comes and claims Cognizance of Pleas by Virtue of a Charter in Queen *Elizabeth*'s Time, whereby *Cognitio Placitorum*, with exclusive Words *non alibi*, &c. was given to the Court of the Vice-Chancellor to proceed *secundum legem & consuetudinem Universitatis*, in all Cases where any of the Body of that University should be Defendant, which Charter was confirmed by Act of Parliament, of which they produced a Copy; and whether this Claim, being made after Imparlance, should be received, was the Question; and adjudged that it should not; and herein the Court held, that, though the Crown might grant Conusances, * yet it could not grant them with Power to proceed by any other † Law than the Common Law; that as it was necessary to plead this Lutw. 46. Gilb. Hist. C. P. 185. 10 Mod. 125. Case of the University of *Cambridge*.

* Page 30

† As the Charter was confirmed by Parliament, *qu.* if liable to this Objection; and if there was any legal Objection to the Claim, by it's not being made in due Time?

Privilege,

Privilege, ſo there was the like Neceſſity to plead it according to the Rules of Law, which muſt be before a general Imparlance.

Comb. 68. On a Plea to the Juriſdiction on ſpecial Privileges, it is uſual to grant a ſpecial Imparlance; as in the common Caſe of Conuſance, &c. for *Oxford*, &c. but they cannot imparl generally.

5. In what Caſes the Courts exerciſe a diſcretionary Power in granting or refuſing an Imparlance.

Skin. 2. pl. 2. *vide ſupra.* It is ſaid, that where the Cauſe is by Original, it is a Favour of the Court whether they ſhall have an Imparlance or not.

2 Show. 145. pl. 124 Lil. Reg. 43. Alſo it is ſaid, that on a ſpecial *Capias* in *C. B.* the Defendant ſhall plead the ſame Term (eſpecially if it be an iſſuable Term) the Writ is returnable, without any Imparlance, becauſe the whole Caſe is ſet forth in the Writ; and an Imparlance being only the better to inform himſelf of the Cauſe of Action in order to his Defence, there is no Occaſion for it when he is ſufficiently informed thereof by the ſpecial *Capias*.

Comb. 13. Want of an Imparlance where allowable, if prayed, is Error; *ſecus* if not prayed.

Comb. 12. A ſecond Imparlance was moved for in a *Quo Warranto*, and ſaid to have been granted in the Caſe of the City of *London*, but the Court denied it; for *Aſtry* ſaid, that by the Courſe of the Court they were to have but the common Imparlance; and the Court ſaid, that being *ex gratia* they may grant or deny it as they pleaſe.

Cro. Jac. 429. If a Man plead by Force of an Indenture which is loſt, and Affidavit made thereof, the Party ſhall be compelled by the Court to ſhew his Counterpart, and he plead thereto, otherwiſe the Court (*a*) may grant an Imparlance.

(*a*) The Court would not grant the Defendant an Imparlance, though he was ſued upon a Bond of twenty-eight Years old, and could not ſee the Bond, but bid him pray Oyer of it, and plead, for the Antiquity of the Bond is no Cauſe of Imparlance. 2 Lil. Reg. 42.

3 Salk. 186. Ld. Raym. 285. It is ſaid, that no Imparlance is allowed in a *Homine Replegiando*, or in an Aſſiſe, unleſs upon good Cauſe ſhewn; becauſe it is *feſtinum remedium*.

Salk. 397. pl. 3. 6 Mod. 243. 8 C. *The Queen* v. *Rawlins*, & *vide* 3 Mod. 315. Comb. 3. *A.* bound by Recognizance to appear and anſwer to an Information, appeared and prayed an Imparlance; the Attorney General ſaid an Imparlance is not to be denied, but aſked how long he ſhall be allowed; and *per Cur.* an Imparlance is a reaſonable Time to adviſe; and theſe have been from one Return-Day to another, but now they are always from one Term to another in the Crown-Office; but by *Holt* Ch. J. it ſeems reaſonable that the Defendant ſhould have the ſame Time on ſuch Appearance as if he had ſtood out, and come in upon Attachment or *Capias*, *viz.* the ſame Time that the Length of the Proceſs would take up, and no more; for when he had come in upon that he muſt plead *Inſtanter*.

6 Mod. 243. *per* Northey *arguendo.* Heretofore, when one came in upon a Recognizance or *Habeas Corpus*, he was put to plead *Inſtanter*, which was thought hard, and is therefore now redreſſed.

Sid 325. † *Vide ante*, 28. n In an Appeal of Murder the Appellant cannot imparl, but the Court may adjourn it by a *Dies datus* till ſuch a Day. †

(D) Of

On an Amendment Defendant ſhall have an Imparlance or Coſts, at his Election. *Lechill* v. *Reynell*, T. 6 Geo. 2. Str. 950.——In Action for Words Defendant ſhall have Imparlance, on Affidavit of Plaintiff's

(D) Of making Defence; and herein of the Difference between full and half Defence.

DEFENCE cometh from the Word *Defendo*, ſo called from the Manner of pleading, *viz. Venit & defendit*, and is twofold; 1. Half Defence, which is *Venit & defendit vim & injur.* 2*dly*, Full Defence, *viz. Venit & defendit vim & Injur. quando, &c.* Co.Lit. 127. b.

Defence, ſays my Lord *Coke*, is what the Defendant ought to make immediately after the Count or Declaration; and in real Actions is thus, *Et prædict'* B. *venit & defendit jus ſuum, &c.* In perſonal Actions is thus, *Et prædict'* B. *venit & defendit vim & injuriam quando, &c. & damna & quicquid quod ipſe defendere debet*; by the ſecond Part of the Defence, *& damna, &c.* he affirms the Plaintiff is able to ſue and recover Damages on juſt Cauſe; if the Defendant pleads in Diſability of the Perſon, he muſt not make this Part of the Defence; as by the laſt Part, *viz* "and "all that which he ought to defend, when and where he ought," *&c.* he affirms the Juriſdiction of the Court; and therefore this Part muſt be omitted when he pleads to the Juriſdiction. ‡ Co.Lit. 127. b. Lit. Sect. 199 Brownl. 75.

‡ Defence, in it's true legal Senſe, as defined by Mr. Juſtice *Blackſtone*, ſignifies not a Juſtification, Protection, or Guard, which is now its popular Signification, but merely an *oppoſing* or *Denial* (from the *French* Verb *defender*) of the Truth or Validity of the Complaint. It is the *conteſtatio litis* of the Civilians: A general Aſſertion that the Plaintiff hath no Ground of Action; which Aſſertion is afterwards extended and maintained in his Plea. For it would be ridiculous to ſuppoſe that the Defendant comes and *defends* (or, in the vulgar Acceptation, juſtifies) the Force and Injury, in one Line, and pleads that he is *not guilty* of the Treſpaſs complained of, in the next. *Vide* Black. Com. 3 V. 296, *&c.*

Defence alſo, ſays he, is ſo neceſſary in all Caſes, that though the Defendant appear and plead a ſufficient Bar without making Defence, Judgment ſhall be given againſt him. Co.Lit. 127. b.

And therefore, where in Debt on an Obligation the Defendant *Venit & dicit*, that the Plaintiff was excommunicated, *&c.* without making Defence, *&c.* it was adjudged ill, and a *Reſpondeas Ouſter* awarded. 3 Lev. 240. *Hampſon* v. *Bill.*

But though this be a general Rule, and though the *Venit* is the Record of the Defendant's coming into Court, and is neceſſary to make him a Party; yet it hath been held that the *defend vim' & injur'* were not (*a*) uſed in *Clauſum fregit* and Aſſaults, and that therefore the Want of them in thoſe Caſes is not fatal, though ſhewn for ſpecial Cauſe. Lutw. 9.

(*a*) As appears in the old Book of Entries, fol. 5, 13, 30.

Alſo where a Plea to the Juriſdiction was offered in an inferior Court, without making Defence, it was reſolved not to be neceſſary where the Court have no Juriſdiction of the *Matter*, otherwiſe where not of the *Perſon*. Vent. 334.

So

Plaintiff's being under Proſecution for the Offence. Barnes 224.——If Defendant is lunatic there ſhall be Imparlance. Barnes 225.—It ſhall be granted, though Writ returnable on firſt Return, if Declaration was not delivered with Notice to plead. Barnes 225.—If Plaintiff has a Rule to file a Bill to warrant Proceedings, he may enter Imparlance on Roll; but if not entered in Time he pays Coſts. Barnes 227.——If Notice of Declaration is ſerved on *Sunday*, Imparlance ſhall be granted. Barnes 309.——If *Habeas Corpus* removes a Cauſe from Sheriff's Court to *B. R. November* 6, and Declaration is delivered *November* 12, and Rule to plead given, the Court will not grant Imparlance. *Wood* v. *Wenman*, M. 20 Geo. 2. 1 Wilſ. 154.——On Proceſs returnable the firſt, ſecond, or third Return of any Term, if Declaration is delivered within four Days before the End of the Term, Defendant ſhall plead without Imparlance. *General Rule C. B.* T. 8 G. 3. 2 Wilſ. 381.—Not in real Actions. Barnes 2.—Not after a peremptory Rule to plead. Barnes 225.—Nor if Notice to plead has been ſerved, though not indorſed on the Declaration. Barnes 226, 227.

Salk. 30. Comb. 319. S. C. *Kirkham* v. *Wheeler*. Ld.Raym.27.

So where an Attorney of *C. B.* was ſued in *B. R.* in Action *qui tam*, for exerciſing the Office of Under-Sheriff longer than one Year, and he *venit & dicit*, and pleaded his Privilege, and held good without Defence.

Salk. 217. *Ferrers* v. *Miller*. Carth. 220. 221. S. C. adjudged; and that being a Plea to the Juriſdiction, it is good without *Defendit vim & injuriam*, and that moſt of the Precedents were ſo. 3 Lev. 182. *North* v. *Hoyle*, S. P. reſolved, and ſaid, that the Precedents were both Ways.

In Ejectment the Defendant *venit & dicit* that the Land is Ancient Demeſne, without making Defence; the Plaintiff demurred ſpecially; and it was reſolved that the Plaintiff may refuſe the Plea for want of Defence; but that if he receives the Plea, he admits a Defence; as if one pleads Outlawry, he ought to plead it *ſub pede ſigilli*, and if he does not ſo plead it, the Plaintiff may refuſe it; but if he accept the Plea, he ſhall not demur for that Cauſe, for it is well enough if he allow it.

3 Lev. 182. Defence is never made in a *Scire Facias*.

---

* Page 32 * (E) **The ſeveral Kinds of Pleas**: And herein,

1. Of Pleas to the Juriſdiction; and therein,

1. To what Courts to be pleaded, and of the Difference between a Plea to the Juriſdiction and a Claim of Conuſance.

Gilb. Hiſt. C. P. 188, 189 See Tit. *Courts*, Letter (D).

HERE it will be neceſſary to obſerve, that the Courts of *Weſtminſter* are the ſuperior Courts of the Kingdom, and have a Superintendency over all the other Courts by Prohibitions, if they exceed their Juriſdiction, or Writs of Error and falſe Judgment, if their Proceedings are erroneous, and have Conuſance of all tranſitory Actions, except between the Scholars of *Oxford* and *Cambridge*; and every Thing is ſuppoſed to be done within their Juriſdiction, unleſs the contrary appears; but, on the other Hand, nothing ſhall be intended within the Juriſdiction of an inferior Court, but what is expreſsly alledged to be ſo; alſo ſuch inferior Courts being bounded in their original Creation to Cauſes ariſing within the Limits of their Juriſdiction, if a Debtor, who has contracted a Debt out of ſuch limited Juriſdiction, comes within it, yet they cannot ſue for ſuch Debt; and if any ſuch Action be brought, the Defendant may plead to the Juriſdiction.

Sand. 74. Sid. 331. *Peacock* v. *Bell*. Gilb. Hiſt. C. P. 189, 190.

But there is a Diſtinction which is now fully eſtabliſhed between the Counties Palatine and other inferior Courts, in this laſt Reſpect; for a County Palatine is a general Court for all the Subjects of the Palatinate, and not merely for the Cauſes ariſing within that Palatinate; ſo that if a Debtor goes from a foreign County into a Palatinate, his Obligations go along with him as much as if he went from one Kingdom into another; and if it were otherwiſe, a Palatinate Juriſdiction would be a Shelter and *Aſylum* to Debtors, for no Proceſs but the ſupreme prerogative Proceſs runs there; and therefore it hath been determined, that though the Cauſe of Action be out of the Palatinate, yet if the Party be a Subject of that Palatinate, as he is by coming into that Dominion, that the Action may be brought againſt him there.

In

In all Actions Tranſitory the ſuperior Courts have a Juriſdiction, unleſs the Plaintiff by his Declaration ſhews that the Action accrued within a County Palatine; or if it be between the Scholars of *Oxford* and *Cambridge*, in which Caſe the Univerſity ſhall have Conuſance; becauſe by their Charter, confirmed by Act of Parliament, they have Juriſdiction over the Perſons of their Scholars; but though an inferior Court, might have determined it, yet the ſuperior Court, being once poſſeſſed of the Action, cannot be hindered from proceeding †

4 Co. 213. Sid. 103.

† Unleſs Conuſance be claimed, or a Plea put in, to the Juriſdiction, as the Caſe may require, in due Time.

In local Actions inferior Courts have a Juriſdiction; but here a Difference muſt be obſerved as to the Manner of claiming it; for as to the principal Courts of this Kind, and into which *Brevia domini Regis non currunt*, as the (*a*) Counties Palatine, they may plead their Juriſdiction when intrenched upon by the ſuperior Courts; but where a Franchiſe, either by Letters Patent or Preſcription, hath a Privilege of holding Pleas within their Juriſdiction; if the Courts at *Weſt-* * *minſter* intrench on their Privileges, they muſt demand Conuſance; that is, deſire that the Cauſe may be determined before them, for the Defendant cannot plead it to the Juriſdiction; and the Reaſon is, becauſe when a Defendant is arreſted by the King's Writ, within a Juriſdiction where the King's Writ doth not run, he is not legally convened, and therefore may plead it to the Juriſdiction; but the creating a new Franchiſe does not hinder the Writ from being made out as before, nor the Courts above from having the ſame Juriſdiction over the Cauſe, but grants Juriſdiction to the Lord of the Liberty; and whenever the King's Courts intrench on his Juriſdiction, he may make his Claim, and demand that the Cauſe may be determined before him.

4 Inſt. 224. Rol. Abr. 489. Hard. 509.

* Page 33

(*a*) So Ancient Demeſne, or held of the King's Manor, may be pleaded. Herne's Pleader 7, 351. Hanſ. 103. Tho. 2. Raſt. 419.—

So may the Juriſdiction of the Cinque Ports. 4 Inſt 224. But *vide* Carth. 109. & *quære*; for it is there ſaid to be ſuch a Franchiſe as *Ely*, and there reſolved, that *Ely*, being no County Palatine, but only a Royal Franchiſe, the Defendant cannot plead to the Juriſdiction of a ſuperior Court, but muſt demand Conuſance. —— But in what Caſes, in what Manner, Conuſance is to be made, *vide* V. 1. f. 561. [and 1 Com. Dig. f. 2, &c. &c.]

If the Plaintiff in his Declaration ſhews that the Action accrued in a County Palatine, the Defendant cannot take Advantage of it in Arreſt of Judgment, nor can he take Advantage of it by way of Demurrer, but muſt plead to the Juriſdiction of the Court; and here note, that wherever the Defendant can plead to the Juriſdiction of the Courts at *Weſtminſter*, there the Franchiſe may demand Conuſance, but not *vice verſa*.

Carth. 11, 354.

Alſo in ſuch Caſes as the Defendant may plead to the Juriſdiction of the Courts of *Weſtminſter*, Leave muſt be obtained from the Court for that Purpoſe; (*b*) as was done in an Ejectment brought in *B. R.* for Lands in the County Palatine of *Lancaſter*.

Paſch. 5 G. 2. in *B. R. Jones* v. *Hammond*. Andr. 368.

(*b*) So Trin. 3 & 4 Geo. 2. in *B. R. Truſtant* v. *Brocklehurſt*, on the Demiſe of Lady *Lawley*, Leave was given to plead to the Juriſdiction for Lands lying in *Cheſhire*. Barnard. K. B. 352, 365.

As to pleading to the Juriſdiction of an inferior Court, herein we muſt again take Notice, that inferior Courts are bounded in their original Creation to Cauſes ariſing within ſuch limited Juriſdiction; ſo that if an Action is brought on a Promiſe in a Court below, not only the Promiſe but the Conſideration muſt be alledged to ariſe within its Juriſdiction; for a Debtor who has contracted a Debt does not, by coming into the Limits of ſuch Juriſdiction, give ſuch Court Authority to hold Plea thereof; nor is it ſufficient to alledge the Cauſe of Action within the Juriſdiction

2 Inſt. 231. Rol. Abr. 545, 6. Gilb. Hiſt. C. P. 188, 189.

diction of the Court, but it muſt be proved on the Trial; and if the Plaintiff proves a Conſideration out of the Juriſdiction, it cannot be given in Evidence; and if it is, the Defendant's Counſel may tender a Bill of Exceptions; and upon ſuch Bill of Exceptions the Judgment will appear to be erroneous.

Raym. 63. Lev. 69. Sid. 85. —And Salk. 404. pl. 1. S. P. adjudged, the Loſs of the Marriage being held to be the Giſt of the Action.

As in an Action in an inferior Court for calling the Plaintiff Whore, by which ſhe loſt her Marriage, it was adjudged, that the Loſs of the Marriage ſhould be laid within the Juriſdiction, the Words not being actionable without ſpecial Damage.

Lev. 50. Sid 65. *Ramſey* v. *Atkinſon.*

So if in the Marſhal's Court the Plaintiff declares, that in Conſideration the Plaintiff, at the Requeſt of the Defendant, had taken Pains to procure him a Leaſe of an Houſe in *Holborn*, the Defendant *apud S. infra jur'*, *&c.* promiſed to pay him 10*l.* *&c.* this is not ſufficient to intitle the Court to a Juriſdiction, in as much as it does not appear that *Holborn*, where the Houſe ſtands, is within the Juriſdiction; and the Jury are not only to try the Promiſe, but the Conſideration alſo.

Sid. 87. Lev. 96.

So in an *Indebitatus Aſſumpſit* for Money for a Cow ſold, it muſt appear that the Sale was within the Juriſdiction; for the being indebted there does not neceſſarily imply that the Sale was there, for he that is indebted in one Place is ſo in every Place.

* Page 34 Lev. 104. Sid. 151. Vent. 2. S. C. *Drake* v. *Beare.*

* So in Debt for Rent upon a Leaſe made *infra jur'* of an inferior Court it muſt appear alſo, that the Lands lie within the Juriſdiction; for if Part of the Cauſe ariſes within the inferior Juriſdiction, and Part without, the inferior Court ought not to hold Plea.

Sid. 151, 180. Vent. 72.

But if that which is only Inducement, or Matter of Aggravation, be alledged to be out of the inferior Juriſdiction, this will not ouſt ſuch inferior Court of its Juriſdiction; as if in the Court of *H.* the Plaintiff declares, that he lent his Horſe at *H.* for the Defendant to ride to *B.* and that the Defendant aſſumed at *H.* to re-deliver him, this is well enough; for it is not the Riding but the Re-delivery which is the Cauſe of the Action.

Cro. Car. 570. Jon. 450. Rol. Abr. 546. S. C. *Howell* v. *Ireland.*

So where in Caſe the Plaintiff declared in the Court of *Bath in Com' Somerſet*, that he was a Taylor, and that he uſed the ſaid Art for ſeveral Perſons inhabiting *tam infra civitat' prædict' quam alibi infra regnum Angliæ*, and the Defendant, to ſcandalize him in his ſaid Art, ſaid theſe Words of him, *Thou haſt ſtole as much Cloth out of my Suit and Cloak which thou madeſt for me as did make thy Wife a Waiſtcoat*, by which he loſt his Cuſtomers; and the Action lies in that Court, notwithſtanding the Allegation, *quam alibi infra regnum Angliæ*, for that is only Matter in Aggravation of Damages.

Salk. 404. pl. 1. 6 Mod. 223. S. C. *Stannian* v. *Davis.* 2 Ld. Raym. 795.

So in a Writ of Error of a Judgment in the Palace Court in an Action on the Caſe, wherein the Plaintiff declared, that ſuch a Day, in ſuch a Pariſh in the County of *Middleſex*, he delivered to the Defendant (being an Inn-keeper) a Gelding ſafely to be kept in his Inn, and that he ſuffered him to be taken out of his Stable, and rid ſo immoderately that the Gelding was ſpoiled; and it was objected in Error, that the Riding did not appear to be within the Juriſdiction of the Marſhal's Court. But *per Cur'*. In Actions in inferior Courts it is neceſſary that every Part of that which is the Giſt of the Action ſhould appear to be within their Juriſdiction; otherwiſe of ſuch Matters as are inſerted only for Aggravation of Damages, and might be omitted, and yet the Action remain, as in this Caſe; and therefore the Judgment was affirmed.

That

The Defendant, when ſued in an inferior Court for a Matter not arising within its Juriſdiction, muſt plead to the Juriſdiction; and if ſuch Plea be refuſed, the Courts above will grant an Attachment. 2 Inſt. 229, 230. Raym. 189. Mod. 81.

Alſo it hath been *(a)* held, that if the Defendant admits the Juriſdiction of ſuch Inferior Court, the Courts above may grant (*b*) a Prohibition; but in the Caſe of (*c*) *Mendyke* v. *Stint* it hath been adjudged, that after Verdict and Judgment no Prohibition lies; but in this Caſe it was ſaid, that if any Matter appears in the Declaration which ſheweth, that the Cauſe of Action did not ariſe *infra juriſdictionem*, a Prohibition may be granted at any Time; ſo if the Subject Matter of the Declaration be not proper for the Judgment and Determination of that Court; or if the Defendant, who intended to plead to the Juriſdiction, is prevented by any Artifice, or by the Attorney's refuſing to plead it, or if his Plea be not accepted, or is over-ruled; in all theſe Caſes a Prohibition will lie at any Time. (*a*) F. N. B. 45, 46. 2 Rol. Abr. 317. (*b*) Where upon the Statute Weſtm. 1. c. 35. a. Prohibition will be granted, *vide* Salk. 201. pl. 5. 202. (*c*) 2 Mod. 271, 272.

If in the County-Court, or other Inferior Court, they ſhall divide a Debt of 20 *l.* into ſeveral Plaints, under 40 *s.* in ſuch Caſe the Defendant may plead the ſame to the Juriſdiction of the Court, or may have a Prohibition to ſtay that indirect Suit. 2 Inſt. 312.

But it hath been held, that no Action will lie for ſuing in a Court that hath no Juriſdiction of the Matter. § Carth. 189, 190.

§ *Qu.* If the Defendant pleads in Abatement to the Juriſdiction, abates the Suit, and is not allowed any Coſts, if an Action on the Caſe might not be maintained? For he has a temporal Damage, by the Wrong of the other Party.

* 2. The Manner and Time of pleading to the Juriſdiction. * Page 35

A Plea to the Juriſdiction is not properly a Plea in Abatement, though in its Conſequence it be ſo; and therefore is to have its proper Concluſion; as *reſpondere non debet*, or *ſi curia cognoſcere velit*, and not *quod billa caſſetur*. 5 Mod. 145, 146. Carth. 363. Salk. 298. pl. 9.

According to the Order of Pleading, the Defendant muſt firſt plead to the Juriſdiction of the Court, and this he muſt regularly do before Imparlance; for by craving leave to imparl he ſubmits to the Juriſdiction, except where ancient Demeſne is pleaded, which may be done after Imparlance, becauſe the Lord might reverſe the Judgment by Writ of Diſceit; and it goes in Bar of the Action itſelf in that Court, becauſe it is *coram non judice*. 2 H. 6. 30. 22 H. 6. 7. Doct. pl. 234. Hard. 365. Lutw. 46. Dyer 210. Stile 30. Latch 83.

The Defendant muſt make *(d)* but half Defence, for if he makes the full Defence *quando &c.* he ſubmits to the Juriſdiction, the, *&c.* being *quando & ubi cur' conſideraverit*. Co. Lit. 197. b. Lutw 9. Show. Rep. 386. (*d*) Where an inferior Court hath no Juriſdiction of the Matter, it is not neceſſary to make any Defence at all. Vent. 334.

The Defendant muſt plead *in Propria Perſona*, for he cannot plead by Attorney without Leave of the Court firſt had, which Leave acknowledges their Juriſdiction; for the Attorney is an Officer of the Court, and if they put in a Plea by an Officer of the Court, that Plea muſt be ſuppoſed to be put in by Leave of the Court. 6 Mod. 146. that ſuch Plea muſt be put in *propria perſona*, and whilſt the Court is ſitting, an Oath muſt be made of the Truth thereof; but in Carth. 402. it is held, that a Plea to the Juriſdiction need not be on Oath, as a foreign Plea muſt. †

† No dilatory Plea without Affidavit. 4 Ann. c. 16. ſ. 11.

He

Doct. pl. 234. He who pleads to the Juriſdiction, ought by his Plea to give Juriſdiction to ſome other Court.

(F) Of Pleas in Abatement: And herein,

1. Of Pleas in Diſability of the Perſon of the Plaintiff.

(a) *Abatement de Brief* is a Proſtration or Overthrowing of the Writ, and comes of the *French* Word *Abater*, which ſignifies *deſtruere*, or *proſternere*. Co. Lit. 134. b.

THERE are ſeveral Diſabilities to the Perſon of the Plaintiff which may be pleaded in (a) Abatement of the Writ, and which the Plaintiff muſt remove before he can intitle himſelf to any Anſwer; for in theſe Caſes, by the ancient Law, he was ſaid to loſe *Liberum Legem*, becauſe he was not *rectus in Curia* until he had removed ſuch Impediment.

For this *vide* V. 3. f. 761, 762, &c.

1*ſt*, *Outlawry*; for until this is reverſed, or the King has granted his Charter of Pardon, the Plaintiff is out of the Protection of the Law, becauſe he would not be amenable and attendant to the Law, and ought not therefore to have any Privilege from it; but this does not intirely abate the Writ, but is only a temporary Impediment, that diſables the Plaintiff from proceeding; for upon obtaining the Charter of Pardon, or reverſing the Outlawry, he is reſtored to his Law, and ſhall oblige the Defendant to plead to the ſame Writ.

* Page 36 *Vide* Title *Excommunication.*

2*dly*, *Excommunication*, which is a good Plea, though the Plaintiff ſue in *auter droit*, as Executor or Adminiſtrator, an excommunicate Perſon being excluded from the Body of the Church, and incapable to lay out the Goods of the deceaſed to pious Uſes; but when this is pleaded, the Biſhop's Letter, under his Seal, witneſſing the Excommunication, muſt be ſhewn; and though the Plaintiff cannot deny the Plea, yet the Writ ſhall not abate; but the Defendant *eat inde ſine die*, becauſe the Plaintiff, upon producing his Letters of Abſolution, ſhall have a Re-ſummons or Re-attachment.

Vide Title *Aliens.*

3*dly*, *Alienage*; for by the Policy of our Law an Alien, unleſs naturalized by Act of Parliament, or made a Denizen by Letters Patent, can bring no Action; with this Difference, that an Alien Enemy, or one whoſe King is in Enmity to ours, cannot bring any Action, either real, perſonal, or mixed; but an Alien in League may maintain perſonal Actions, otherwiſe he would not be able to trade and merchandize amongſt us ‡.

‡ In perſonal Action muſt ſhew Plaintiff an Alien Enemy: It ſhall not be preſumed. Stra. 1082. Andr. 76 S. C.

Vide Title *Præmunire.*

4*thly*, *Præmunire*; when a Man has Judgment given againſt him on a Writ of *Præmunire Facias*, or is attainted of Treaſon or Felony, he is diſabled to bring any Action.

Vide Title *Papiſts and Popiſh Recuſants.*

5*thly*, *Popiſh Recuſancy*; this Diſability of Popiſh Recuſancy convict, is by virtue of the Statute 3 *Jac.* 1. *cap.* 5. which diſables to all Intents, &c. except where he ſues for Lands, Tenements, Leaſes, Annuities, Rents and Hereditaments, or the Iſſues or Profits thereof, which are not to be ſeiſed into the King's Hands, his Heirs or Succeſſors.

2. Of Pleas in Disability of the Person of the Defendant; and therein of Privilege.

The original Reason of Privilege arises from this, that Attornies and Officers, whose Attendance is required in those Courts to which they belong, should not be drawn into other Courts to the Prejudice of their Clients; for they cannot be supposed able to attend the Business of the Courts at *Westminster*, and a Suit brought against them in the Country; which was likewise a good Reason in relation to the King's Bench, Common Pleas and Chancery, in their original Creation. For the King's Bench and Chancery being ambulatory with the King, *ubi tunc fuerit in Anglia*, if the Officers of each Court were drawn by Suits into the other, it might be a Prejudice to the Business of the Court. *Vide* Title *Privilege*, and Title *Abatement*, Letter C.

Whenever therefore an Attorney is sued out of his own Court, he shall say, that he is Attorney, &c. of another Court, and conclude with *unde non intendit quod cur', &c. hic placit' prædict' versus cum cognoscere velit aut debeat, &c.* But the Plaintiff may reply that he is a Husbandman, &c. in the Country, and traverse his being an Attorney. Lutw. 44, 639. Vaugh. 155. 23 H. 6. 15. Bro. *Traverse* 27.

In an Action against *B.* an Attorney, he pleaded *quod ipse est unus Attornat' cur. Domini Regis B. R.* without saying *fuit tempore Impetrationis Brevis*, and a *Respondeas Ouster* was awarded. ‖ Salk. 1. pl. 2. *Pease* v. *Parsons*.

‖ And *vide* the Cases of *The Mayor of Basingstoke* v. *Bonner*. P. 3 Geo. 2. Stra. 864. Ld. Raym. 1567.

An Attorney, although he does not practise, yet he shall have his Privilege so long as he continues an Attorney on *(a)* Record. § Lutw. 1667.

(a) And in pleading his Privilege must say, *prout patet per recordum*. 1 Salk. 1.

§ *Qu.* of this, and if on Motion grounded on Affidavit, that Defendant had left off Business, not denied, the Court would not order Defendant to plead in Chief?

This Privilege, which the Court indulges their Officers with, is restrained to those Suits only which they bring in their own Right, or are brought against them in their own Right; for if they sue or are * sued as Executors or Administrators, they then represent common Persons, and are to have no Privilege. * Page 37 Hob. 177. *Gay*'s Case.

2 Salk. 2. pl. 5. 274. S. P. 2 Ld. Raym. 853. 7 Mod. 51, 53, 105. Comb. 86, 311.

So if an Officer of one Court sues an Officer of another Court, the Defendant shall not plead his Privilege; for the Attendance of the Plaintiff is as necessary in his Court, as the Defendant's is in his; and therefore the Cause is legally attached in the Court where the Plaintiff is an Officer. ‡ 2 Rol. Abr. 275. Moor 556. & 2 Mod. 298. 2 Lev. 129. *Hamilton* v. Just. *Scroggs*.

‡ They must sue by Original, or Writ of Privilege. See Barnes 371.——It is said an Attorney of *C. B.* has not any Privilege to be sued in *Middlesex* only; if he is sued in *C. B.* it is enough. *Bareton* v *Stephenson*. P. 5 Geo. 2. Fort. 343. *Reeves* v. *Blyth*. T. 5 & 6 Geo. 2. Fort. 343. *Everet* v. *Blyth*. H. 6 Geo. 2. Fort. 344.

So if a privileged Person brings a joint Action, or if an Action be brought against him and others, he shall not have his Privilege; but this is to be understood where the Action is joint, and cannot be severed; for if the Action can be severed without doing any Injury, the Officer shall have his Privilege. Dyer 377. a. pl. 30. Godb. 101. Vent. 293.

Also

38 H. 6. 29. b. 9 E. 4. 35. Cro. Car. 585. Leon. 189. 2 Leon. 156. Alſo the Plaintiff muſt have the ſame Remedy againſt the Officer in his own Court, as in that where he ſues him; as if a Writ of Entry, or other real Action be brought againſt an Attorney, he cannot plead his Privilege; becauſe if this ſhould be allowed, the Plaintiff would have a Right without a Remedy, for the King's Bench hath not Cognizance of real Actions.

Sand. 67. So if an Attorney of the Common Pleas be ſued in an Appeal, he ſhall not have his Privilege; for his own Court hath no Cognizance of this Action, and by this Protection he ſhould go unpuniſhed.

Sand. 67. *Turvil's* Caſe. So if Money be attached in an Attorney's Hands by foreign Attachment in the Sheriff's Court in *London*, he ſhall not have his Privilege, becauſe in this Caſe the Plaintiff would be remedileſs; for the foreign Attachment is by the particular Cuſtom of *London*, and does not lie at Common Law; but if the Attorney ſhould have his Privilege, the Plaintiff would be without Redreſs.

Hob. 44. Bro. *Superſedeas* 1. 2 Rol. Abr. 274. Alſo an Attorney, or other Officer, ſhall not have his Privilege againſt the *(a)* King; for as the Executive Power is lodged in the King, it would be unreaſonable that his Court, which gives Relief to private Perſons, ſhould protect any Subject from being brought to Juſtice for offending againſt the Laws which concern the whole Commonwealth.

(a) But in an Action *qui tam* at the Suit of an Informer he ſhall have his Privilege. Lil. Reg. 7. and Salk. 543.

2 Rol. Abr. 275. Salk. 125. pl. 2. Mod. 310. 3 Lev. 243. See Ld. Raym. 181. If an Attorney of the Common Pleas be *in Cuſtodia Mareſchalli* for want of Bail, at the Suit of *A.* he may plead his Privilege; for though he be taken upon Bill of *Middleſex* or *Latitat*, where in a common Perſon's Caſe being ſo brought in, he is to anſwer to the Plaintiff's Demand lodged againſt him by Bill, and not to the Proceſs that brought him in; yet ſince *actus legis nemine facit injuriam*, ſuch fictitious Treſpaſs to bring the Party to appear ſhall never ouſt the Attorney of his real Privilege: But if he be *in Cuſtodia Mareſchalli* at the Suit of *A.* and *B.* declares againſt him *in Cuſtodia Mareſchalli*, he ſhall not plead his Privilege againſt *B.* becauſe *B.* declares againſt him collaterally, as he is in Priſon at the Suit of *A.* and as to *B.* he is truly *in Cuſtodia Mareſchalli*, for being once ouſted of his Privilege at the Suit of *A.* he can no longer attend as an Attorney in the other Court, but is fixed in the King's Bench, and therefore cannot, by the Suppoſition of the Neceſſity of his Attendance, ouſt *B.* of his Action.

2 Lutw. 1667. It is ſaid that the Courts will take Notice of the Privilege of Attornies, and that the Cuſtom herein need not be ſo preciſely alledged as other Cuſtoms.

* Page 38

* 3. Of Miſnomer, and the Want of Addition.

Vide Title *Miſnomer and Want of Addition.* Miſnomer is a good Plea in Abatement; as if *John* be ſued by the Name of *Thomas*, he may plead, that *(b)* at the Time of the Writ purchaſed he was called and known by the Name of *John*, *&c.* For ſince Names are the only Marks and *Indicium* of Things that human Kind can underſtand each other by, if the Name be omitted or miſtaken there is a Complaint againſt no Body.

(b) Muſt in ſetting forth his Name, ſay, that by ſuch Name he was known at the Time of the Writ purchaſed. Skin. 620. pl. 14. Salk. 7. pl. 16. Gouldſb. 86. See Ld. Raym. 64.

9 H. c. 1. Finch. 363. When there is a Miſtake in the Writ or Declaration as to the Name of Baptiſm or Surname, and the Defendant pleads the ſame in Abatement,

ment, he must in such Plea set forth his right Name, so as to give the Plaintiff a better Writ.

Also such Mistake must be taken Advantage of by being pleaded in Abatement, and cannot be assigned for Error after the Party has appeared, it being a Rule, that a Man shall not assign that for Error which he might have pleaded in Abatement. Carth. 124. Salk. 2. pl. 3. S. P.

As if an Action be brought against Sir *Francis Forteſcue Militem & Baronetum*, and he appears and pleads to Issue, and a Verdict and Judgment is given for the Plaintiff, the Defendant, in a Writ of Error, shall not assign for Error that he was a Knight of the Bath, and ought to be so named; for he has lost this Advantage by appearing to the other Name, and thereby concluded himself. Rol. Abr. 781, 791. Rol. Rep. 450. S. C. *Markham* v. Sir *John Forteſcue*.

The Defendant, though his Name be mistaken, is not obliged to take Advantage of it; and therefore, if he be impleaded by a wrong Name, and afterwards impleaded by his right Name, he may plead in Bar the former Judgment, and aver that he is *una & eadem Persona*. *J. Villars*; who pretended himself to be Earl of *Buckingham*, was arrested by the Name of *J. Villars Armiger*; and on Motion the Court gave him Leave to put in Bail, without joining in the Recognizance, and thereby not estop himself. Salk. 3. pl. 7.

One Defendant cannot plead Misnomer of his Companion, for the other Defendant may admit himself to be the Person in the Writ.

In Case of Felony at Common Law, if a Person were indicted by a wrong Name he could not plead Misnomer, but was obliged to plead to the Felony; for the Fact being sworn against the Party present, it was thought there could be no Injury by the Misnomer, as might be where the Party appeared by Attorney, and Felons generally go by no certain Name, nor have they any fixed Habitation; but this is now altered by the Statute 1 *Hen.* 5. *cap.* 5. called the Statute of *Additions*, which requires the Estate, Degree, Mystery, and Place of Abode to be added to the Defendant's Name, and was made to prevent the Inconvenience of troubling one Person for another; but though by this Statute the Party accused may take Advantage of Misnomer or Want of Addition, yet he must plead over to the Felony; and though his Plea in Abatement be found for him he is not to be discharged, but is to be indicted over again; or the Indictment may be amended, sitting the Grand Jury; also his Plea in Abatement, if found against him, is not peremptory, but he is to be tried on his Plea in Chief. 21 E. 4. 72. Cro. Car. 104. Sid. 40. Lit. Rep. 8. 2 Hawk. P. C. 186.

If a Man be indicted, and no Addition is given to him as there ought; yet, if the Defendant appears and pleads to Issue, and this is found against him, this is helped; for the Addition is ordained by the Statute, that the Party who happens to be outlawed ought to have Notice of it; and here he hath Notice, and *Constat de Persona*. Cro. Jac. 609. 2 Rol. Rep. 225. Rol. Abr. 780.

* As the Name, State, Place of Abode, and Dignity of the Person impleaded, is necessary to be set forth in judicial Proceedings, lest an innocent Person, by having the same Name with the real Defendant, should suffer; so also such Additions as are Inducements to the Action must be made Use of; as if one be liable as Heir, he must be named Heir; so if as Executor he must be named such. * Page 39 *Vide* the several Titles *Heir* and *Executor*.

4. Of Abatement by reason of Coverture.

There is no Case where a Feme Covert shall sue or be sued as a Feme Sole, but in Case where she is a sole Trader, according to the Custom Co. Lit. 132. But for this *vide* Title *Baron and Feme*.

of

of *London* †, or where her Husband has abjured § the Realm, or is banished, in which Case he is *civiliter mortuus*; and the Husband being disabled to sue for the Wife, it would be unreasonable that she should be remediless; and it would be equally hard on those who had any Demands on her, that not being able to have any Redress from the Husband, they should not have any against her.

† But the Suit must be in one of the City Courts.

§ So where the Husband is tranported for a Felony, &c. the Wife may be sued for a Debt contracted by her, after his Transportation; and for the best of Reasons. On the same Ground we may presume the Courts of Law would permit such a Woman to maintain an Action in her own Name.

Dect. pl. 3. Sid. 140. Leon. 168. *Lee* v. *Maddox.*

Coverture therefore is regularly a good Plea in Abatement, which may be either before the Writ sued, or pending the Writ; by the first the Writ is abated *de facto*, but the second only proves it abateable; but both must be pleaded, with this Difference, that Coverture pending the Writ must be pleaded *post ultimam continuationem*, whereas Coverture before the Writ brought may be pleaded at any Time; because the Writ is *de facto* abated, being never a good Writ, the Defendant not being legally arrested; and therefore if the Husband brings an Action for Things so vested in him, the Recovery of the Wife will be no Bar; and therefore the Law resolves, that Coverture, at the Time of the Writ's being sued, may be pleaded at any Time, since it cannot be finally determined between the Parties; but if a Feme Sole takes out a Writ, and after marries, the Defendant was legally attached on such Writ; and therefore may plead in chief to it any Defence he has; and if on such Pleading it be found for the Defendant, it will be a good Bar to the Husband's Action; and therefore the Defendant has it in his Choice whether he will defend himself on such Writ or not, and such Choice must be made *Puis darrein continuance*; for it is but reasonable, since she has given the Right of the Demand to another, that the Defendant should plead it against her to abate it, that since he was once legally convened by this Writ, he may plead to the Demand, so as to get rid of it for ever.

Theol. 119. Latch 24

If a Writ be brought against a Feme Covert as Sole, she may plead her Coverture; but this must be before there is a Day given by the Court *prece partium*, for by praying a Day she admits she is properly sued, and before Imparlance.

Cro. Jac. 356. Cro. Car. 509. Rol Rep. 14. Moor 469.

In Ejectment against Baron and Feme, after Verdict for the Plaintiff Baron dies between the Day of *Nisi prius* and the Day in Bank; adjudged that the Writ should stand good against the Feme; because it is in the Nature of a Trespass, and the Feme is charged for her own Act, and therefore the Action survives against her; so if the Wife had died, the Baron should have Judgment entered against him.

Cro. Car. 232. Bulst. 5.

If a Feme Sole Plaintiff, after the Verdict and before the Day in Bank, takes Husband, she shall have Judgment; and the Defendant cannot plead this Coverture, for he has no Day to plead it at.

Stile 254. 2 Rol. Rep. 53.

If a Man recovers against a Feme Covert, as Sole, the Husband may avoid it by Writ of Error, or he may come in at any Time and plead it.

* Page 40 2 Rol. Rep. 53. *Heydon* v. *Miller.*

* If a Feme Sole intermarries pending the Suit, this shall not abate the Writ, but the Plaintiff shall proceed to Judgment; for this is her own Act, and the Husband took her attached with the Action, and therefore ought not to prejudice the Plaintiff: But *Dodderidge* in this Case held, that if a Feme Sole Defendant marries between the Issuing of the Original and the Return, this shall abate the Writ; the Reason seems to be, that she is Covert before she comes into Court, and the Husband taking her before she was attached, *quære* whether he shall be liable to that, since he at that Time ought to be arrested.

In

In an Action againſt Baron and Feme the Baron dies, and the Feme intermarries *pendente placito*; and the Court inclined to think the Writ abated, becauſe her Name was changed. Style 138.

If a Writ be brought by *A.* and *B.* as Baron and Feme, whereas they were not married till the Suit depended, the Defendant may plead this in Abatement; for though they cannot have a Writ in any other Form, yet the Writ ſhall abate, becauſe it was falſe when ſued out; ſo if a Feme Sole brings Treſpaſs and recovers, and has a Writ of Inquiry of Damages awarded, and takes Huſband before the Return, the Writ is not abated, but abateable; and therefore the Defendant muſt plead it, for he ſhall not have Advantage of it in Error. Fitz. *Brief* 476.

If an Action be brought in an inferior Court againſt a Feme Sole, and ſhe pending the Suit intermarries, and afterwards removes the Cauſe by *Habeas Corpus*, and the Plaintiff declares againſt her as Feme Sole, ſhe may plead Coverture at the Time of ſuing the *Habeas Corpus*; becauſe the Proceedings are here *de novo*; and the Court takes no Notice of what was precedent to the *Habeas Corpus*; but upon Motion of the Return of the *Habeas Corpus*, the Court will grant a *Procedendo*; for though this be a Writ of Right, yet where it is to abate a rightful Suit, the Court may refuſe it; and the Plaintiff had Bail below to this Suit, which by this Contrivance he is ouſted of, and poſſibly by the ſame Means of the Debt. Salk. 8. pl. 20. *Hethering-ton* v. *Reynolds.*

5. Abatement by the Death of Parties.

Here the general Rule to be obſerved is, that wherever the Death of any Party happens pending the Writ, and yet the Plea is in the ſame Condition as if ſuch Party were living, there ſuch Death makes no Alteration; for where the Death of the Parties makes no Change of Proceedings, it would be unreaſonable that the ſurviving Parties ſhould make any Alteration in the Writ; for if ſuch Writ and Proceſs were changed, it would ſet Rights but in the ſame Condition they were in at the Death of the Parties; and it would be abſurd that what made no Alteration ſhould change the Writ and the Proceſs; and on this Rule all the Diverſities turn. 3 Mod. 249. 2 Vent. 196.

The firſt Difference is in real Actions, where there are ſeveral Plaintiffs, and this is Summons and Severance, as there is in moſt real Actions, there the Death of one of the Parties abates the Writ; but in perſonal and mixt Actions (where one intire Thing is to be recovered) there the Death of the Parties does not abate the Writ; and the Reaſon of the Difference is, that where there are two joint Tenants, and the one goes on to recover his Moiety, and the other will not proceed, there is no Reaſon that he who is willing ſhould not recover his Right, ſince ſuch Tenant has a diſtinct Moiety, and therefore ſhould have an Action to recover. But no Summons or Severance lies in perſonal Actions as if Treſpaſs be committed on ſuch joint Tenants, they muſt both join in the Action; for as one may releaſe the Whole, ſo the * other may refuſe to go on, and the other cannot recover his Part of the Damage without him; ſo in Debt on an Obligation to two there can be no Summons and Severance, becauſe one of the joint Obligees may releaſe the Bond; but if a Man appoints two his Executors, there ſhall be Summons and Severance, becauſe one of the Executors may releaſe; yet ſuch a Releaſe is a *Devaſtavit* in him; but if he will not proceed at Law, it is no *Devaſtavit*; and therefore both Executors being only Truſtees for the Perſon deceaſed, they ſhall not be compelled to go on together; but if Cro. Eliz. 982. Co. Lit. 139. Cro. Jac. 117. 10 Co. 134. Jon. 452. 6 Co. 26. * Page 41

one refuſes the other may bring his Action in the Name of both, and have Summons and Severance; for otherwiſe each Executor might by Colluſion with the Debtor, and not proceeding, keep the other from recovering the Aſſets, and not create a *Devaſtavit* in himſelf; but after ſuch Summons and Severance he does not proceed for the Moieties as in real Actions, but he proceeds as the whole Repreſentative of the Teſtator, and is intitled to the Whole the Teſtator was in his Life-time.

Co. Lit. 139. From theſe Premiſſes it follows, that if there be two Jointenants or Copartners, and they bring a real Action, and one is ſummoned and ſevered, the other ſhall proceed for his Moiety; and if the Perſon ſevered dies the Writ abates, becauſe he goes for the Whole, in caſe of the Death of the Jointenant, or of the Copartner without Iſſue; and it would be improper to do it on that Writ, where by the Summons and Severance he went only for a Moiety before; and the Writ cannot have a double Effect, to one for a Moiety in caſe of Summons and Severance, and for the Whole in caſe of Survivorſhip; and therefore ſince the Nature of Things is changed by the Death of one of the Parties, there muſt be another Writ; and it is the ſame Law if ſuch Jointenants proceed without Summons or Severance; for ſince both by the Writ might by Poſſibility recover their Moieties, they ſhall not go on for the Whole in caſe of Survivorſhip; becauſe the Words and Effect of the Writ at the Time of its firſt purchaſing was, that each might recover his Moiety, and therefore a new Writ muſt be purchaſed to enable one to proceed for the Whole: But in perſonal and mix'd Actions, where there is Summons and Severance, and yet after ſuch Summons and Severance the Plaintiff goes on for the Whole, there, if one of them dies, yet the Writ ſhall not abate, becauſe they go on for the Whole after Summons and Severance; and if they were to have a new Writ, it would only give the Court Authority to go on for the Whole.

Cro. Eliz. 652. Leon. 44. Therefore if there be two Executors, and they bring an Action of Debt, and one of them is ſummoned and ſevered, or not, and ſuch ſevered Perſon dies, yet the Writ ſhall not abate.

Co. Lit. 139. So if two Jointenants bring a Writ of Ward, and they are ſummoned and ſevered, and the ſevered Perſon dies, the Writ ſhall not abate; Becauſe after ſuch Severance he went on for the Whole, and ſo he does after the Death.

Dyer 279. So in a *Quare impedit* by two Jointenants, and one is ſummoned and ſevered, and the ſevered Perſon dies, the Writ ſhall not abate; becauſe the Advowſon is an intire Thing, and he proceeded for the Whole after the Severance, and ſo he may after the Death.

13 Co. 134. Co. Lit. 139. In (*a*) judicial Writs it ſhall not abate by Death, if the Perſon ſurviving be intitled to the Whole; as if a Fine be levied by two Coparceners, and one of them dies without Iſſue, Proceedings ſhall go on for the other, becauſe he is intitled to the Whole by Survivorſhip; but if the other Coparcener had Iſſue, then the Writ would have abated, for

* Page 42 * the Survivor was only intitled to a Moiety: for there is no Summons and Severance in judicial Writs.

(*a*) But ſhall abate in a *Sci. Fa.* being in an original Writ Brownl. 64. but not upon a Writ of Inquiry. Leon. 263.

20 H. 6. 30. 18 E. 4. 1. 2 H. 7. 16. Brownl. 3, 4. Clift. Ent. 6. Raſt. Ent. 226. But if there be ſeveral Perſons named as Plaintiffs in the Writ, and one of them was dead at the Time of purchaſing the Writ, this may be pleaded in Abatement; becauſe it falſifies the Writ, and becauſe the Right was in the Survivors at the Time of ſuing the Writ, and the Writ not accommodated, as the Caſe there was.

But

But if an erroneous Judgment be given againſt two, either of them may bring a Writ of Error, and he may ſummon and ſever the other; becauſe it would be unreaſonable, that he ſhould not diſcharge himſelf of an erroneous Judgment becauſe the other will not intermeddle; and that Default of one in a Perſonal Action ſhall not prejudice the other. 26 Aſſ. pl. 25. Bro. Sum. Sever. 19.

If there be ſeveral Defendants in the original Action, and one dies, the Writ does not abate; becauſe, there being a joint Demand, it ſurvives againſt the Reſidue; but if one happen to die pending the Writ, there muſt be a Suggeſtion on the Roll, becauſe it would be Error to give Judgment againſt a deceaſed Perſon. CroCar. 426. Jon. 367. Stile 299. Hard. 151, 164. Show. Rep. 186.

In a Writ of Error, if there be ſeveral Plaintiffs, and one dies, the Writ ſhall abate; becauſe, the Writ of Error is to ſet Perſons *in ſtatu quo* before the erroneous Judgment was given below; and they that are Plaintiffs in Error were diſtinct Sufferers in the Judgment, ſince there might be different Executions iſſued thereupon, and different Liens were made by ſuch Judgment on the Lands of each of them; and by Conſequence the Survivor cannot proſecute the Writ of Error for the Whole, leſt by a colluſive Perſuaſion, or by Negligence or Deſign, he ſhould hurt the Repreſentative of the Deceaſed. Yelv. 208, 212, 213. Vent. 34. *cont.* Sid. 419.

But if any of the Defendants in Error die, yet all Things ſhall proceed; becauſe the Benefit of ſuch Judgment goes to the Survivor, and he only is to defend it. Sid. 419.

In an *Audita Querela* by two, the Death of one ſhall not abate the Writ; for the Survivor is not to be reſtored to any Thing he has loſt, but to diſcharge himſelf of the Execution, and thereupon, notwithſtanding the Death of the other, he may proceed for a Diſcharge *in toto* for himſelf. Theol. 179. Vent. 34. 3 Mod. 249.

By the (*a*) 17 *Car.* 2. *cap.* 8. it is enacted, 'That the Death of either of the Parties (*b*) between Verdict and Judgment ſhall not be alledged "for Error, ſo as Judgment be (*c*) entered within two Terms after ſuch "Verdict."

(*a*) Made perpetual by 1 Jac. 2. c. 17.

(*b*) If either of the Parties dies at any Time before the Aſſizes, it is out of the Statute; but if after the Aſſizes, though before the Trial, it is no Error, for the Aſſizes is but one Day in Law. Salk. 8. pl. 21. (*c*) If after Verdict, and before the Day in Bank, the Plaintiff dies, and the Defendant ſigns Judgment the ſecond Term after the Verdict, this is within the Statute, and the ſame as if he had actually entered Judgment on the Roll. Sid. 385.

Alſo by the 8 & 9 *W.* 3. it is enacted, "If there be two or more "Plaintiffs and Defendants, and one or more of them ſhould die, if the "Cauſe of ſuch Action ſhould ſurvive to the ſurviving Plaintiff or Plaintiffs, "or againſt the ſurviving Defendant or Defendants, the Writ or Action "ſhall not be thereby abated; but ſuch Death being ſuggeſted on the Re-"cord the Action ſhall proceed at the Suit of the ſurviving Plaintiff "or Plaintiffs againſt the ſurviving Defendant or Defendants. And it "is further enacted, that if any Plaintiff happen to die after an in-"terlocutory Judgment, and before a final Judgment obtained therein, "the ſaid Action ſhall not abate by reaſon thereof, if ſuch Action "might originally be proſecuted or maintained by the * Executors * Page 43
"or Adminiſtrators of ſuch Plaintiff; and if the Defendant die after "ſuch interlocutory Judgment, and before final Judgment therein ob-"tained, the ſaid Action ſhall not abate, if ſuch Action might origi-"nally be proſecuted or maintained againſt the Executors or Admi-"niſtrators of ſuch Defendant; and the Plaintiff, or if he be dead after "ſuch interlocutory Judgment, his Executors or Adminiſtrators, ſhall "and may have a *Sci. Fa.* againſt the Defendant, if living, after ſuch "interlocutory Judgment, or if he died after, then againſt his Execu-

" tors or Administrators, to shew Cause why Damages in such Action " should not be assessed and recovered by him or them; and if such De- " fendant, his Executors or Administrators, shall appear at the Return of " such Writ, and not shew or alledge any Matter sufficient to arrest the " final Judgment, or being returned, warned, or upon two Writs of " *Sci. Fa.* it be returned, that the Defendant, his Executors or Administra- " tors, had nothing whereby to be summoned, or could not be found in " the County, and he shall make Default, that thereupon a Writ of In- " quiry of Damages shall be awarded, which being executed and returned, " Judgment final shall be given for the said Plaintiff, his Executors or " Administrators, prosecuting such Writ or Writs of *Sci. Fa.* against such " Defendant, his Executors or Administrators respectively."

6. Where a Defect in the Writ shall abate it.

Vide Title *Writs*, and a Defect in Process is aided by Appearance, Title *Error*.

The foregoing Objections, such as want of Jurisdiction, Disability in the Plaintiff, or Privilege in the Defendant, *&c.* being Matters *dehors*, must be shewn to the Court, and must be pleaded in proper Time and Manner; but for Defects in the Writ itself the Court may *ex Officio* abate it.

9 H. 7. 16. 10 E. 3. 1. pl. 2. 2 Inst. 662. Hob. 1, 51, 52, 84. Carth. 172. Cro. Jac. 576-7.

And herein we must observe, that the Law hath been very strict in obliging Men to keep to the legal Forms it prescribes; and therefore in the Writ, which is the Foundation of the whole Proceeding, requires that Certainty and Exactness, as that no Person should be arrested or attached by his Goods, unless there appears sufficient Grounds to warrant such Proceedings; so that if the Writ vary materially from that in the Register, or be defective in Substance, the Party may take Advantage of it.

Hob. 84.

But though the Writ vary from the Register, yet, if it be warranted by the modern Precedents, this shall not abate it.

7. Where the Writ's not agreeing with the Count shall abate it.

Cro. Eliz. 722. Cro. Jac. 651. Jon. 304.

If the Count or Declaration varies in Form, the Defendant may plead it in Abatement, for he has abated his own Writ by prosecuting it in a different Manner; but if it varies in Substance, the Defendant may move it in Arrest of Judgment, because the Court has no Authority to proceed, having prosecuted a different Matter from that which the Writ has given Authority to the Court to take Cognisance of.

(*a*) Fitz. *Brief*, 219, 231.

The Declaration varying from the Writ, (*a*) as by laying the Cause of Action in the Reign of a present King, where the Writ supposed it to have been in the Reign of a former King, or by giving the Defendant a Name different from that in the Writ; *(b)* as where the Writ calls him *A. B.* of *London*, Alderman, and the Plaintiff declares * against him, as *A. B.* of *London*, Esq; or where the Declaration is otherwise defective in not pursuing the Writ, or not setting forth the Cause of Action with that Certainty the Law requires, or in *(c)* laying the Offence in a different County from that in which the Writ was brought; in all such Cases the Defendant may plead in Abatement.

* Page 44

(*b*) Yely. 120. Finch of Law 357. Latch 173.

(*c*) Allen 17, 18.

Doct. pl. 84, & *Plus* un-

But the Writ may in some Cases be general, and the Declaration special; as where a Statute gives an Action; but does not prescribe any Form

Form of the Writ, the Writ framed by the Common Law will ſerve, and the ſpecial Matter may be ſet forth in the Declaration.

der the Diviſion of *The Declaration's agreeing with the Writ.*

If a Feme Sole be diſſeiſed, and afterwards marry, and ſhe and her Huſband bring an Aſſiſe, the Diſſeiſin muſt be alledged to be done to the Wife; but if a Feme Diſſeiſoreſs marries, in an Aſſiſe againſt them the Diſſeiſin ſhall be alledged to be done by them both, becauſe there is no other Form of Writ.

14 H. 6. 14. 2 And. 97. and ſeveral Caſes there cited to this Purpoſe.

8. Where the Writ is abated *de facto*, or is only abateable.

The general (*a*) Rule herein to be obſerved is that where the Writ is *de facto* a Nullity, and deſtroyed, ſo that Judgment thereon would be erroneous, there the Writ is *de facto* abated; as if an Action is brought againſt a Feme Covert as Sole, this makes another Man's Property liable without giving him an Opportunity of defending himſelf, which would be contrary to common Juſtice, and therefore the Writ is *de facto* abated; but though the Writ be for this abateable, yet it muſt be abated by pleading in Time, or the Writ ſtands good; and therefore Coverture after the Writ purchaſed muſt be pleaded *Poſt ultimam continuationem:* for the Huſband takes her attached with the Action, and therefore muſt plead in Time, or the Judgment will be upon him; for the Wife cannot by her own Act deſtroy another Man's Action, nor the Huſband unleſs he comes in Time.

2 H. 6. 4. Doct. pl. 3. (*a*) That where it appears to the Court from the Writ itſelf, that it ought to abate, there the Court ought *ex officio* to give Judgment againſt the Plaintiff, though the Defendant does not plead it in Abatement; otherwiſe where this does not appear in the Writ, Rol. Rep. 2. and for what in particular the Court *ex Officio* will abate the Writ, *vide* Cro. Eliz. 121, 185, 193, 330. Goulſ. 106. 2 Leon. 162. 3 Leon. 93. Rol. Rep. 176. Palm. 311. Hob. 37, 162, 279, 281. Godb. 119. Stile 477. Yelv. 56. 3 Co. 85. Vaugh. 95.

If the Return of a *Pluries Mandamus* is laid to be after the Beginning of a Term, and the *Memorandum* of the Bill is entered generally of that Term, this makes the Writ a perfect Nullity; for by the Plaintiff's own ſhewing he had no Cauſe of Action at the Time when the Action was brought.

Carth. 172.

Where the Writ is only abateable, it muſt be abated by pleading in Time; for Matters in and before the Writ cannot be taken Advantage of in (*b*) Error.

Salk. 2. pl. 5. Show. 169. Rol. Abr. 783. (*b*) A Man ſhall not aſſign that for Error which he might have pleaded in Abatement. Carth. 124.

And therefore if a Feme Covert bring an Action in her own Name *per attornatum*, and the Defendant pleads in Bar to the Action, he ſhall never afterwards aſſign the Coverture for Error.

Carth. 124.

So though it be a good Plea for the Defendant to ſay, that a Stranger is Tenant in Common with the Plaintiff; yet if he does not plead it in Abatement, he ſhall not have Advantage of it in Arreſt of Judgment.

Cro. Eliz. 554. Skin. 12. pl 12. Salk. 4. pl. 10.

* So if a *Quare impedit* be brought againſt the Biſhop and Incumbent only, without naming the Patron, though this might have been pleaded in Abatement, yet if the Defendant pleads in Bar, *&c.* it cannot after upon a Writ of Error be aſſigned for Error; for though the Want of the Patron's being made a Defendant might make the Writ abateable, yet it was not thereby actually abated; and nothing ſhall be aſſigned for Error concerning the Writ but what actually abates it.

* Page 45 Cro. Jac. 651. Bulſ. 4 5. 2 Brownl. 229. Palm. 306. 311. 2 Rol. Rep. 239.

If

Rol. Abr. 781, 791. Rol. Rep. 45. If an Action be brought againſt Sir *F. F. Militem & Baronettum*, and he appears and pleads to Iſſue, and a Verdict and Judgment given for the Plaintiff; the Defendant in a Writ of Error ſhall not aſſign for Error, that he was a Knight of the *Bath*, and ought to be ſo named; for he hath loſt this Advantage by appearing to the other Name, and thereby concluded himſelf.

Palm. 270. If a Writ be brought to the Damage of 40*l.* and the Plaintiff declares *ad damnum* 200*l.* and the Verdict gives 30*l.* this is no Error after Verdict; for the Writ is not abated *de facto*, but only abateable by Plea.

9. Where the Writ ſhall abate *in toto*, or in Part only.

22 H. 4. 4. Hob. 199. Bulſ. 1. 9 H. 7. 3. *per* Fineux. Here the general Rule is, that whatſoever proves the Writ falſe at the Time of ſuing it out ſhall abate the Writ intirely; as if it appears on the Plaintiff's own ſhewing, that he has no Cauſe of Action for Part; therefore if an Action of Treſpaſs be brought againſt two Defendants, and the one pleads that the other was dead *die impretationis brevis*, or that there is none ſuch *in rerum natura*, the whole Writ ſhall abate; for it is the Plaintiff's Fault to uſe the Authority of the Court to call in a Man that was dead; and it was no leſs an Abuſe of the Proceſs to iſſue it againſt a feigned Perſon.

Raſt. Ent. 365. Doct. pl. 7. Co. Lit. 285. But if one of the Defendants die pending the Writ, this ſhall not abate the Action againſt the other Defendant; for this is the Act of God, and no Default in the Plaintiff: But herein it is to be obſerved, that this Falſification of the Writ muſt be in a material Point; for in a *Præcipe quod reddat* againſt two, if one pleads Non-tenure, and the other takes the whole Tendency on himſelf, the Writ ſhall not abate in the whole, but ſtand good againſt him who hath accepted the Tenancy; becauſe he is a proper Defendant to the Action, and the Non-tenure of the one does no way prejudice the other Defendant.

Doct. pl. 7. 21 H. 6. 4. But if there be two Executors, and one is named of *D.* and ſays he is of *C.* the Writ ſhall abate againſt both; becauſe they are both Repreſentatives of one Perſon, and muſt both be legally ſummoned; and as they are both but one Perſon in the Eye of the Law, the Plaintiff cannot proceed againſt one (*a*) without the other; but in this Caſe the other Defendant will be obliged to plead, though the Defendant's Plea in Abatement ſhall be firſt determined; and if it be found for him ſhall abate the Writ *in toto*.

(*a*) The Diſbility of one Plaintiff ſhall ſtop the others from proceeding; for the Writ when abated for Want of Form is abated *quoad* all, though they have pleaded to Iſſue. 8 Co. 159. Carth. 96. But if two Executors ſue and ſet forth themſelves Executors, and that they proved the Will; if on the Probate ſet forth it appears that one only proved the Will, and the Defendant pleads this in Abatement, a *Reſpondeas Ouſter* will be awarded; for both have a Right in them, and he that did not prove may come in when he pleaſes. Salk. 3. pl. 6.

38 H. 6. 7. Booth 29. At Common Law Non tenure of Parcel of the Lands abated the whole Writ; for this falſified the Writ which alledged the Defendant to be Tenant of the whole; but it was thought very hard, that a Writ, which was good in Part, ſhould be totally deſtroyed by this Plea; and therefore 25 *E.* 3. *cap.* 16. enacts, that the Writ ſhall only abate for that Part of which Non-tenure is alledged.

* Page 46 * If the Demandant enters into any Part of the Lands pending the Writ, this ſhall abate the Writ *in toto*.

4 E. 4. 32. Doct. pl 5.

Sand. 182. *Duppa* v. *Mayo*. The Plaintiff declared for Arrears of a Rent-charge, and demanded a larger Sum than was due to him by his own ſhewing by 7*l.* 10*s.* The Defendant pleaded a bad Plea, and the Plaintiff had Judgment for his whole

whole Demand; but perceiving his Miſtake on the Entry of the Judgment he releaſes the 7 *l.* 10 *s.* and it was held a good Releaſe; and that it was not a Falſification of his Writ, but rather an Affirmance; but in the Argument of the Caſe it was ſaid, if the Defendant had taken Advantage of it in due Time, it would have abated the Writ.

If an Action is well begun, and Part of the Action determines by Act in Law, and yet the like Action is given for the Reſidue, the Writ ſhall not abate, but the Plaintiff may proceed for the Reſidue; but where, by the Determination of Part, the like Action does not remain for the Reſidue, there the Action, though well commenced, ſhall abate. Co. Lit. 285. a.

As if an Action of Waſte be brought againſt Tenant *pur auter vie*, and pending the Writ *Ceſtui que vie* die, this ſhall not abate the Writ in *toto*, but the Plaintiff may proceed to recover Damages on this Writ; for the Leſſor might have an Action for the Damages, though *Ceſtui que vie* had died before any Action of Waſte brought. Co. Lit. 285. a.

So if an Ejectment be brought, and the Term determine pending the Writ, yet the Action ſhall proceed for the Damages only. Co. Lit. 285. a.

But if Tenant *pur auter vie* had brought an Aſſiſe pending the Writ, and *Ceſtui que vie* had died; although the Action was well commenced, yet the Writ ſhall abate, becauſe no Aſſiſe lies for Damages only.

So if an Action of Waſte was brought by Baron and Feme in Remainder in Special Tail, and pending the Writ the Wife die without Iſſue, the Writ would abate; becauſe all Actions of Waſte muſt be *ad exhæreditationem*. Co. Lit. 285. a.

So if a Writ of Annuity be brought, and pending the Writ the Annuity determine, the Writ faileth for ever; becauſe the like Action cannot be maintained for the Arrearages only. Co. Lit. 285. a.

When a Writ is brought for two Things, and it appears the Plaintiff cannot have any other Action for the one of them, the Writ ſhall ſtand for the Part that is good; but where it appears he can have another Writ in another Form for one, there the whole Writ ſhall abate; becauſe where there can be no better Writ brought for the Parcel, it ought to continue; but if another Writ could be brought for that Parcel, it is bad, and ought to abate *in toto*. Co. Lit. 45. *Godfrey's* Caſe. Sand. 182.

10. In what Caſes the Defendant hath it in his Election to plead in Abatement or in Bar.

Whatever deſtroys the Plaintiff's Action, and diſables him for ever from recovering, may be pleaded in Bar; but the Defendant is not always obliged to plead in Bar, but may plead in Abatement; as in Replevin for Goods, the Defendant may plead Property in himſelf or in a Stranger, either in Bar or in Abatement; for if the Plaintiff cannot prove Property in himſelf, he fails of his Action for ever; and it is of no Avail to him who has the Property, if he has it not. Vent. 249. 2 Lev. 92. Salk. 5 pl. 12. Carth. 243. Ld. Raym. 217. 2 Ld. Raym. 184.

If there are ſeveral Part-owners of a Ship, and an Action is brought againſt ſome of them, they cannot, after they have pleaded in Chief, take Advantage of this, being a Matter that ſhould have been pleaded in Abatement. 3 Lev. 268. 3 Mod. 321. *& vide* Tit. *Merchant*, the Caſe at large.

* So if an Action be brought againſt one Executor, where there are more, if that one Executor doth not plead that Matter in Abatement, but pleads to the Action, he ſhall never have the Advantage of ſuch a Plea afterwards. * Page 47 Carth 261.

So

Carth. 261. So where Treſpaſs is brought by one Jointenant, or by one Tenant in Common, and the Defendant pleads to the Action, and the Jury find ſpecially, that another (not named) is Jointenant or Tenant in Common with the Plaintiff; yet he ſhall have Judgment, notwithſtanding the Writ at firſt was abateable.

Cro. Eliz. 554. Sand. 291. Moor 466. 3 Mod. 323. Mod. 102. Skin. 280. Trin. 24. Car. 2. Rot. 1216. in *B. R.* between *Blackburn* v. *Grove.* So where an Action of Debt is brought on a joint Bond againſt one of the Obligors, and upon *Non eſt factum* pleaded the Jury find, that *J. S.* (then living) was jointly bound with the Defendant, yet the Plaintiff ſhall have Judgment.

Tenant in Common of Lands brought an Action of Trover in his own Name alone, for cutting down Trees and carrying them away; the Defendant pleaded to Iſſue; and in a ſpecial Verdict it was found, that the Plaintiff was Tenant in Common with *J. S.* not named; yet the Plaintiff had Judgment, becauſe this was a Matter pleadable in Abatement.

Co. Lit. 128. *vide* Title *Outlawry.* Outlawry may always be pleaded in Abatement, but not in Bar, unleſs the Cauſe of Action be forfeited.

Bro. *Denizen* 10. Co. Lit. 129. † *Vide ante*, 36. Alienage † may be pleaded in Bar or in Abatement; but with this Difference, that Alienage can only be pleaded in Abatement to an Alien in League; but may be pleaded in Bar to an Alien Enemy, becauſe the Cauſe of Action is forfeited to the King, as a Repriſal for the Damages committed by the Dominion in Enmity with him.

Carth. 136. (*a*) Carth. 1, 2. In an Action of Debt on a Judgment obtained, the Defendant cannot plead a Writ of Error brought and pending, either in Bar or in Abatement; but in *(a)* one Place it is ſaid, it may be pleaded in Abatement, though not in Bar. ‡.

‡ But the Court, on Motion, will ſtay Proceedings.

Lucas's Rep. 112. A Man may plead in Bar or Abatement to a *Sci. Fa.* as well as to other Actions.

6 Mod. 103. ——*Priſal in auter lieu* muſt be In Replevin, if the Defendant will take Advantage of a Variance in the Place where the taking is laid, from that in which it really was, he muſt plead it in Abatement.

pleaded in Abatement, and cannot be pleaded in Bar. Salk. 3. pl. 8. 2 Ld. Raym. 1016. Carth. 244. Show. 98.

Comb. 483. *Owen* v. *Bulkley.* Ld. Raym. 345. In Debt on a Bond the Defendant pleads the Condition for the Payment of three ſeveral Sums at three ſeveral Days, and that he hath paid two of them at the Days limited, and the third is not yet come, and concludes in Abatement; and it was argued, that this ought to be pleaded in Bar, and not in Abatement; for in every Plea in Abatement the Defendant ought to ſhew the Plaintiff how to bring a better Writ, and here he ſhews that he ought to have none at all, the Day of Payment of the third Sum not being yet come; as in an Action for an Attorney's Fees, if the Defendant pleads, that the Plaintiff delivered no Bill of them to him, he ought to conclude in Bar; and of this Opinion were the Court.

Comb. 375. *Sully* v. *Arundel.* The Plaintiff in Bar to an Avowry pleaded a Diſtreſs for the ſame Duty in other Lands chargeable: And *Holt* ſaid the Plea was naught; for it ſhould have been pleaded in Abatement of the Avowry, that a former Replevin was depending (if the Truth was ſo) or if determined, then levied by Diſtreſs, & *iſſint riens arere.*

* 11. Pendency of another Suit or Action how to be pleaded in Abatement. *Page 48

Here the general Rule is, that whenever it appears on Record, that the Plaintiff has ſued out two Writs againſt the ſame Defendant for the ſame Thing, the firſt not being determined, the ſecond Writ ſhall abate; for the Law abhors Multiplicity of Actions, and will not allow, that a Man ſhall be (*a*) twice arreſted or twice attached by his Goods for the ſame Thing; for if he might ſuffer twice, by the ſame Reaſon he might ſuffer *in infinitum*. 9 H. 6. 12. Moor. 418. 539. 5 Co. 61. Doct. pl. 10. Vent. 101.

(*a*) Where a prior Writ of Appeal may be pleaded in Abatement to a ſecond Appeal. 2 Hawk. P. C. 190. and where a prior Suit depending may be pleaded to an Information. 2 Hawk. P. C. 275. But it is no good Plea in Abatement of an Indictment, as it is of an Appeal or an Information, that there is another Indictment againſt the Defendant for the ſame Offence; but in ſuch Caſe the Court will in Diſcretion quaſh the firſt Indictment. 2 Hawk. P. C. 367.

And it is not neceſſary that both ſhould be pending at the Time of the Defendant's pleading in Abatement; for if there was a Writ in Being at the Time of ſuing out of the ſecond, it is plain the ſecond was vexatious, and ill *ab initio*, and therefore could not be rectified by a ſubſequent Determination of the firſt; but then it muſt appear plainly to be for the ſame Thing; for an Aſſiſe of Lands in one County ſhall not abate an Aſſiſe in another County, for theſe cannot be the ſame Lands. 4 H. 6. 24. Doct. pl. 10. Hob. 184.

But a *Formedon* for Rent may be pleaded in Abatement of a *Formedon* for the ſame Manor whence the Rent iſſues, & *vice verſa*; becauſe the Plaintiff cannot have a Manor and the Rent iſſuing out of it, and therefore the ſecond *Formedon* is apparently vexatious. 3 H. 7. 3, 4. Doct. pl. 10.

In general Writs, as *Treſpaſs*, *Aſſiſe*, *Covenant*, where the ſpecial Matter is not ſet forth, and the Plaintiff is nonſuited before he counts, and the ſecond Writ is ſued pending the other; yet the former ſhall not be pleaded in Abatement, becauſe it does not appear to the Court that it was for the ſame Thing; for the firſt Writ being general, the Plaintiff might have declared for a diſtinct Thing from what he demanded by the firſt Writ; but when the firſt is a ſpecial Writ, and ſets forth the particular Demand, as in a *Præcipe quod reddat*, &c. there the Court can readily ſee that it is for the ſame Thing; and therefore though the Plaintiff be nonſuited before he counts, yet the firſt ſhall abate the ſecond Writ, it being apparently for the ſame Thing. 5 Co. 61. Doct. pl. 11, 12.

An Action depending in an (*b*) inferior Court cannot be pleaded to an Action brought in one of the Courts at *Weſtminſter* for the ſame Thing. 5 Co. 62. *Sparry's* Caſe.

(*b*) The Plaintiff counted upon ſeveral Promiſes for Work and Labour in the Pariſh of St. *Mary Le Bow*, *London*; the Defendant pleaded in Abatement, that before this Action brought the Plaintiff had libelled in the Admiralty for the ſame Cauſe of Action; upon Demurrer it was inſiſted for the Plaintiff, that this was within the Rule laid down in 5 Co. 62. and the whole Court gave Judgment againſt the Defendant, *quod Reſpondeas Ouſter*. Fitzgib. 313. 5 Geo 2. in *C. B. Dudfield* v. *Warden*.

The Law will not allow two *Quare Impedits* to be brought for the ſame Preſentation, *viz.* a ſecond by the Defendant againſt the Plaintiff, when there is one pending in Court by the Plaintiff againſt the Defendant, & *ſic in brevi de partitione*; becauſe the Defendant can have the ſame Remedy on the firſt Writ as he could on a ſecond. Dyer 92, 93. Hob. 15.

The Law is ſo watchful againſt all vexatious Suits, that not only it will not ſuffer two Actions of the ſame Nature to be pending for

*Page 49 * for the ſame Demand, but not even two Actions of a (a) different Nature.

(a) Therefore it is a good Plea in Treſpaſs, that the Plaintiff has brought a Replevin for the ſame Thing, becauſe in both Caſes Damages are to be given for that Caption. 8 H. 6. 27. Doct. pl. 10. So in an Aſſiſe of *Darrein Preſentment* a *Quare impedit* depending for the ſame Preſentation is a good Plea. Hob. 134.

Hob. 137. In a *Quare impedit* brought by the Earl of *Bedford* againſt the Biſhop of *Exeter* and others, the Defendants pleaded, that the Plaintiff had brought another *Quare impedit* for the ſame Preſentation, which is ſtill depending and undetermined, with an Averment, that it was the ſame Plaint, Avoidance, and Diſturbance: The Earl replies, that ſince his former Writ purchaſed, the ſame Church being ſtill void, he preſented *Henry Curtis* to the Biſhop, who refuſed him, which is the Diſturbance he now complains of; and traverſes, that it is the ſame Diſturbance on which both Actions were brought; the Defendant demurred: And it was ruled, that the Writ ſhould abate; for though there muſt be a Diſturbance naturally to maintain the Action, yet the principal Effect of the Suit is to recover the Preſentation; and the Nature of a *Quare impedit* is to be final, or Nonſuit, or Diſcontinuance, which this would defeat; for by this Rule the Plaintiff might bring a new one without leaving the former Suit; and though in this Caſe there was a *(b)* new Defendant; yet the Writ abated, becauſe there were two *Quare impedits* againſt the ſame Man; and therefore a freſh Defendant could no more enable him to bring a ſecond *Quare impedit* than a ſecond Diſturbance could.

(b) That where an Action of Treſpaſs is brought, and afterwards a Replevin for the ſame Thing, there muſt not be more Defendants in the Replevin than there were in the Action of Treſpaſs, becauſe it cannot ſquare with the Averment that it is *una eademque Captio*. Doct. pl. 10. In Treſpaſs againſt two Defendants, they both pleaded in Abatement another Bill of Treſpaſs pending againſt one of them, and three Judges againſt *Holt*, who doubted, held the Plea good as to both. Carth. 96, 97.

Allen 34. If a ſecond Writ be brought the ſame Day the former is abated, it ſhall be deemed to be ſued out after the Abatement of the firſt.

Dyer 227. Carth. 453. Ld. Raym. 347. 6 Mod. 122. If an Action pending in the ſame Court be pleaded to a ſecond Action brought for the ſame Thing, the Plaintiff may pray that the Record may be inſpected by the Court, or demand Oyer of it; which if not given him in convenient Time, he may ſign his Judgment.

Carth. 517. *Creamer* v. *Wickett*. Ld. Raym. 509, 550. So an Action of Battery and falſe Impriſonment brought in *B. R.* the Defendant pleaded in Abatement another Action depending for the ſame Matter in the ſame Court; the Plaintiff replied, *Quod non habetur aliquod tale recordum & petit quod recordum illud, &c inſpiciatur*, without giving Liberty to the Defendant to rejoin, *Quod habetur tale recordum*; and upon a Demurrer to this Replication the Plaintiff had Judgment; becauſe this being a Record of the ſame Court in which it was pleaded, the Plaintiff might *(c)* pray, that it might be inſpected by the Court, if any ſuch there was; and upon this Plea the Court held the Plaintiff might have prayed Oyer of the Record pleaded, and for want of Oyer might have ſigned Judgment, which is the quickeſt Method of proceeding.

(c) As in Dyer 227.

12. What ſhall be ſaid a Plea in Bar or in Abatement; and therein of the Concluſion proper to each Plea.

2 Rol. Rep. 64. Lev. 312. Mod. 244. 2 Sand. 128. If a Defendant pleads Matter in Abatement, and concludes in Bar, this ſhall be eſteemed a Plea in Bar, and the Court will give final Judgment

ment thereupon; becauſe by pleading to the Action the Writ is admitted to be good, and he puts the whole Matter upon his Plea. §

§ In the Caſe of *Medina* and *Stoughton*, 1 Ld. Raym. 593. *Holt* ſaid, that if a Man pleads Matter which goes in Bar, but *begins and concludes* his Plea in Abatement, it will be a Plea in Abatement; for it is the Beginning and Concluſion that make the Plea. See 1 Sid. 189, 190. But if he begins in Bar, though he concludes in Abatement; or concludes in Bar, though he begins in Abatement, it will be a Plea in Bar. *Vide* alſo 1 Ld. Raym. 694.

* So if a Man pleads in Bar, and concludes in Abatement, this ſhall be eſteemed a Plea in Bar; becauſe he could have no Writ, if he could have no Action; and where there could be no Action, the Diſpute about the Writ would be inſignificant. †

* Page 50

Show. Rep. 4. but *vide* 6 Mod. 103. Lutw. 34, 36. 10 H. 7. 11.

† See *infra*.

A Plea in Abatement may be good, though it contains Matter in Bar; but this is to be underſtood of ſuch Pleas as may be pleaded either in Diſability or in Bar; as Alienage, Outlawry, *&c.* 6 Mod. 244.

If a Matter, which may be pleaded either in Abatement or Bar, be pleaded in Abatement only, if the Plaintiff replies or demurs in Bar, this will be a Diſcontinuance; becauſe the Plaintiff does not maintain his Writ, and the Defendant may have other Matter in Bar, of which he would hereby be excluded. Lev. 312. Comb. 479. 6 Mod. 236. Lucas's Rep. 112.

But if the Defendant begin ſuch Plea in Bar, and conclude in Abatement, or pleads in Abatement, and concludes in Bar, there the Plaintiff may reply or demur to it, either as a Plea in Abatement or in Bar; and if he demurs, or pleads to it as a Plea in Bar, then the Judgment is final; for he has cloſed with the Defendant to put the Plea to the Judgment of the Court, as a Bar to the Action. Vent. 136. Lutw. 36. 3 Mod. 281.

But if he demurs, or replies in Abatement, as he may, then the Judgment is *Quod defendens reſpondeat ouſter*; for then only the Writ is put in Judgment before the Court; and the Plaintiff, by putting the Writ in Judgment only to the Court, has waived the Benefit of putting that Matter in Judgment to the Court as a Plea to the Action; and if the Judgment were not in Abatement, it would not be purſuant to the Defendant's Prayer. 3 Lev. 120. 6 Mod. 103. Mod. 244.

Every Plea in Abatement is either to the Writ or Count; if the Action is brought by Original, then the Plea is *Petit judicium de brevi*, and it muſt conclude in the ſame Words; if it is to the Declaration, then it muſt be *Petit judicium de billa & narratione*, for *Billa* and *Narratio* are the ſame. ‡ 5 Mod. 132. ſaid *Arguendo*.

‡ *De narratione* may be now moſt proper, as by *Bill* may be underſtood the *Bill* in *B. R.*

It is ſaid to be the Concluſion of a Plea, and not the Matter of it, that makes a Plea in Abatement; ſo that ſhould a Man plead a Plea, that for the Matter of it might have been pleaded in Bar, and concludes *Petit quod breve caſſetur*, it would be but a Plea in Abatement, and the Judgment would be no other than a *Reſpondeas Ouſter*; ſo *vice verſa* a Plea in Abatement, pleaded in Form of a Plea in Bar, would be a Plea in Bar, though an ill one. Lucas's Rep. 112.

If a Dilatory Plea be pleaded, and the Plaintiff take Iſſue upon it, he may conclude with a *Petit judicium & damna*, becauſe there final Judgment ſhall be; but if a Dilatory Plea be pleaded, which the Plaintiff does not deny, but confeſſes and avoids, he muſt conclude in Maintenance of his Writ; as if the Defendant plead an Attainder in Diſability of the Plaintiff, and he pleads a Pardon, he muſt not conclude with a *Petit judicium* & (*a*) *damna*, but in Maintenance of his Writ. 6 Mod. 236. *per* Holt.

(*a*) 3 Mod. 281. S. P.

If there are four Defendants, and after ſeveral Continuances three of them plead the Death of one of them in Abatement, *viz. Petunt judicium* 3 Lev. 120.

de

de brevi & quod breve illud caſſetur; this is ill in its Concluſion, and ſhould have been *Petunt judicium ſi Curia ulterius procedere vult.*

Mod. 30. pl. 99. Where the Matter of Abatement appears on the Face of the Record, the Plea ſhall begin and end with a *Petit judicium de brevi*; but where the Matter is *debors*, the Defendant ſhall only end his Plea with a *Petit judicium.*

*Page 51

*13. Pleas in Abatement how reſtrained.

As Pleas in Abatement enter not into the Merits of the Cauſe, but are merely dilatory, the Law has laid the following Reſtrictions on them:

1. By the Statute 4 & 5 *Annæ*, *cap.* 16. for an Amendment of the Law, no dilatory Plea is to be received, unleſs on Oath, and probable Cauſe ſhewn to the Court.

Hetl. 126. 2 Sand. 40, 41. 2. No Plea in Abatement ſhall be received after a *Reſpondeas Ouſter*; for then would they be pleaded *in infinitum.*

Vide the Diviſion *Imparlance.* 3. They are to be pleaded before Imparlance.

Vide the next following Diviſion. 4. When Iſſue is joined on them, if found againſt the Defendant it ſhall be peremptory.

Salk. 2. pl. 5. 5. Nothing ſhall be pleaded in Abatement of a *Sci. Fa.* upon a Judgment that was pleadable in the original Action; for it would be unreaſonable he ſhould diſable the Plaintiff from having Execution, ſince he admitted him able to have his Judgment.

Cro. Jac. 82. 6. Though a Plea in Bar, being certain to a common Intent, is good, every dilatory Plea or in Abatement muſt be good to every Intent.

Hob. 250. Carth. 8, 9. 7. The Defendant ſhall not plead in Abatement two Outlawries, or two Excommunications; Duplicity being a Fault in Abatement as well as in Bar.

2 Lutw. 1181. Hob. 19. 8. A Plea in Abatement muſt be put in within four Days after the Return of the Writ; becauſe the Perſon coming in by the Proceſs of the Court ought not to have Time to delay the Plaintiff. §

§ Unleſs returnable the laſt Day of the Term, and then within the firſt four Days in the next Term.

Carth. 363. Salk. 4. pl. 9. 6. pl. 14. 2 Ld. Raym. 869. 7 Mod. 97. 9. In Pleas in Abatement, which relate to the Perſon, there is no Neceſſity of laying a *Venue*, all ſuch Pleas being to be tried where the Action is laid.

14. Of the Judgment on a Plea in Abatement, and how far peremptory.

Yelv. 112. Vent. 22. 2 Show. 42. pl. 29. The Judgment for the Defendant on a Plea in Abatement is *Quod breve* or *Narratio caſſetur*, and for the Plaintiff a *Reſpondeas Ouſter* ‖; but if Iſſue be joined on a Plea in Abatement, and it be found for the Plaintiff, it ſhall be (*a*) peremptory againſt the Defendant, and the Judgment ſhall be *Quod recuperet*; becauſe the Defendant chuſing to put the whole Weight of his Cauſe upon this Iſſue, when he might have had a Plea in Chief, is an Admittance that he had no other Defence.

(*a*) Not peremptory on Indictments for capital Offences. 2 Hawk. P. C. 334.

‖ If the Plaintiff has demurred.

Alſo

Alſo if the Defendant (*a*) demurs in Abatement, the Court will give final Judgment, becauſe there can be no Demurrer in Abatement; for if the Matter of Abatement be *dehors*, it muſt be pleaded; if intrinſic, the Court will take Notice of it *ex officio*. Salk. 220. pl. 7. 6 Mod. 198.

(*a*) But a Demurrer in Abatement to an Indictment for a capital Offence or Appeal of Death ſhall not conclude the Party, but he ſhall have Leave to anſwer over to the Offence. 2 Hawk. P. C. 334.

If there be two Defendants, and they plead two ſeveral Pleas in Abatement, and there be Iſſue to one, and Demurrer to the other, if the * Iſſue be found for the Defendant the Court will not proceed on the Demurrer; *& ſic vice verſa*; for in both Caſes, the Writ being once abated, it would be impertinent to judge whether it ought to abate on the other's Plea. Hob. 250. * Page 52

If on a Plea in Abatement a *Reſpondeas Ouſter* is awarded, and afterwards the Defendant pleads in Chief, and there is a Verdict for the Plaintiff; yet if the Plea in Abatement does not appear to have been entered on the *Niſi prius* Record, Judgment will be arreſted; for it being entered on the Plea Roll (which was in Court) it muſt be mentioned in the *Niſi prius* Roll, otherwiſe it does not appear that it was a Verdict in the ſame Cauſe. Carth. 447. 5 Mod. 399. Ld. Raym. 329.

15. Foreign Plea.

A (*b*) Foreign Plea is when the Defendant pleads ſuch Plea as carries the Cauſe out of the County that it is laid in, by ſhewing that the Matter alledged is not as to it's Trial within the Juriſdiction of that Court. 2 Lil. Reg. 299. Carth. 402.

(*b*) Muſt be ingroſſed on Parchment, and ſigned by Counſel. 2 Lil. Reg. 299.

As this Plea is merely dilatory, and ouſts the Court of its Juriſdiction, it hath been held, even before the Statute of 4 & 5 *Anne*, *c.* 16. that it muſt be on Oath, and (*c*) before Imparlance; and if the Defendant refuſes to make Oath † of the Truth of his Plea, the Plaintiff may ſign Judgment as upon a *Nihil dicit*. Lit. Rep. 236. Style 225, 435. Sand. 97.

(*c*) Vent. 180.

† He muſt ſwear the Plea is true in Subſtance and Matter of Fact.—To ſay it is a *true Plea* may be evaſive, and will not do. Fort. 341. Stra. 705.

If a Defendant in a Corporation Court pleads a foreign Plea, which is collateral, as in Debt upon a Bond, if he pleads a Releaſe made in a Place out of the Juriſdiction of the Court, it need not be received without Oath; but if in Covenant, or Debt for Money to be paid at another Place, he pleads Payment accordingly, or Covenants performed in the Place limited, which was out of their Juriſdiction, it ought to be received without Oath. Hetl. 126. Lit. Rep. 236. S. C. *verbatim*.

If there be a Cauſe removed from *Canterbury* into *B. R.* by *Habeas Corpus*, and the Plaintiff declares here upon a Demiſe in *London* of a Houſe in *Canterbury*; if the Defendant pleads an Entry and *Ouſter* in *Canterbury*, ſo that this cannot be tried here; this is not a foreign Plea, becauſe it ariſes naturally upon the Caſe; ſo if Matter ariſe within two Counties, and the Plaintiff lays it in one, 'tis not a Foreign Plea for the Defendant to plead any Matter in the other. Paſch. 26. Car. 2. in *B. R.* Browne—Mod. 118. S. C.

In real Actions in (*d*) *London* if a (*e*) Foreign Plea be pleaded, it ſhall 3 H. 4. 12.

(*d*) How Foreign Pleas in *Wales* ſhall be tried, *vide* the Statute 34 & 35 H. 8. c. 26. (*e*) This is within the Equity of the Statute of *Glouc.* c. 12. which *vide* expounded 2 Inſt. 324-5. which extends to real Actions only wherein Voucher lies, and not to perſonal. 2 Leon. 37. Sand. 98.

be

be ſent into the Common Pleas to be tried; but otherwiſe it is in Perſonal Actions.

5 Mod. 335. § But that Defendant is privileged, as an Officer of a Court, &c. requires an Oath. Forteſcue 341.

Antient Demeſne, and all Pleas of Privilege §, are Pleas to the Juriſdiction; but they are not foreign, and therefore they are to be received without an Oath.

Stile 225. *Dudney* v. *Collyer.*

If a Perſon be ſued in an Inferior Court on an Obligation conditioned to pay Money out of the Juriſdiction of ſuch Court, and the Defendant pleads Payment according to the Condition; this is not ſuch a Foreign Plea as need be on Oath.

So if in Covenant brought in *London* for Payment of a certain Sum of Money on the Return of a Ship, the Defendant pleads, that the Ship returned to ſuch a Place in *Cornwal*; and thereupon the Plaintiff * demurs; and adjudged, that this Plea is not good; for the Matter being tranſitory, the Defendant cannot oblige the Plaintiff to change his Action, but muſt plead to it in ſuch Place as he has laid it; and had the Matter been local, then it would have amounted to a foreign Plea, which muſt have been put in on Oath.

* Page 53

Sid. 234. *Collins* v. *Sutton*; but *vide* Mod. 81.

Vent. 180. *St. Aubin* v. *Cox.*

But where a Prohibition was prayed for to the Court of the *Compter* in *Wood-ſtreet*, *London*, to an Action of Debt there commenced, for that the Defendant, had pleaded before any Imparlance, that the Cauſe of Action did ariſe at a Place out of their Juriſdiction, and offered to have ſworn his Plea, and they refuſed to accept this Plea; and upon this Matter a Prohibition was granted; for (*a*) inferior Courts have not Cognizance of tranſitory Things which ariſe in Places out of their Juriſdiction; but then it is not ſufficient to ſurmiſe ſuch Matter for a Prohibition; but a Plea to that effect muſt be tendered in the inferior Court, and that before Imparlance, and it muſt be on Oath, and then, if refuſed, a Prohibition ſhall be granted, or upon ſuch Refuſal a Bill of Exceptions may be made.

(*a*) For this *vide* Title *Courts*, Letter (D).

Carth. 407. 5 Mod. 335. S. C. *Chumley* v. *Broom.*

In Debt brought in *B. R.* the Plaintiff laid the *Viſne* in ſuch a Place within the County Palatine of *Cheſter*, which County was alſo in the Margin of the Declaration; the Defendant without Imparling pleaded by Attorney, that he is, and at the Time of the Action brought was, reſident at the ſaid Place within the ſaid County; and ſo prayed Judgment, if the Court of *B. R.* ought to hold Plea of this Matter. The Plaintiff taking this to be a foreign Plea rejected it, as not being on Oath, and ſigned Judgment: But *per Holt* C. J. a foreign Plea is where the Action is carried out of the County where it is laid, which in this Caſe was not done; ſo that this is only a Plea to the Juriſdiction of the Court, which is never ſworn; ſo the Judgment was ſet aſide.

6 Mod. 146. *Sparks* v. *Wood.*

In Debt brought in *London*, a Prohibition was moved for, and ruled *niſi*, upon Suggeſtion, that the Defendant had tendered for Plea below, that the Cauſe did ariſe out of their Juriſdiction, and offered to make Oath of the Truth of his Plea; and it was ſhewn, that he tendered his Plea after the Court was up; whereas it ſhould be *in propria perſona*, and in Court; and though an *Affidavit* was offered in *B. R.* of the Truth of his Plea; and one *Turner*'s Caſe was quoted, where a Prohibition had been granted upon ſuch an *Affidavit* here above without Oath of it below; yet *per Powel*, *Gould*, and *Powis*, *abſente Holt*, the Rule was diſcharged; for in all Pleas that ouſt a Court of Juriſdiction, whether inferior or ſuperior, there muſt be Oath in that very Court of the Truth of the Plea.

Peer Williams 476. pl. 135.

If one be ſued in an inferior Court for a Matter out of the Juriſdiction, the Defendant may either have a Prohibition from one of the Common

Common Law Courts of *Weſtminſter Hall*; or in regard this may happen in a Vacation, when only the Chancery is open, he may move that Court for a Prohibition; but then it muſt appear by Oath made, that the Fact did ariſe out of the Juriſdiction, and that the Defendant tendered a foreign Plea before Imparlance, which was refuſed; and if a Prohibition has been granted out of Chancery *improvide*, and without theſe Circumſtances attending it, the Court will grant a *Superſedeas* thereto.

If it appear on the Face of the Declaration, that the Matter is out of the Juriſdiction of the Court, then a Prohibition will be granted without Oath of having tendered the foreign Plea; and in theſe Caſes Equity imitates the (*a*) Common Law. Peer Williams 447.

(*a*) In a Motion for a Prohibition to an Eccleſiaſtical Court, as to more than appears on the Face of the Libel, there muſt be an Affidavit of the Truth of the Suggeſtion. 2 Salk. 549. pl. 8.

* On a Rule to ſhew Cauſe why an Attachment ſhould not be granted againſt the Mayor of *Marlborough*, for refuſing to accept the Defendant's Plea in his Court, it was held not to be ſufficient for a Defendant in a Court below to bring his Plea into Court, and offer to make Oath of the Truth of it; but that he muſt tender his Plea with an *Affidavit* annexed of the Truth thereof, and that this muſt be done before a general Imparlance; but that he might have prayed a ſpecial Imparlance, and then have come to the next Court and pleaded: It was alſo held, that the proper Way of proceeding was not by Attachment, but that a Prohibition ſhould have been moved for; and ſo the Rule for an Attachment was diſcharged. * Page 54 Hil. 12 G. 2. in *B. R. Vokens* v. *Cull.*

(G) Of Pleas in Bar and in Chief: And herein,

1. Of the General Iſſue, and how formed.

ISSUE is thus defined by my Lord *Coke*, a ſingle, certain and material Point iſſuing out of the Allegations and Pleas of the Plaintiff and Defendant, conſiſting regularly of an Affirmative and Negative, to be tried by twelve Men; and is either General or Special. Co. Lit. 126.

The General Iſſues were contrived in ſuch Words as were moſt proper to deny the whole Fact in the Declaration; as in a Charge of Treſpaſs, the General Iſſue is (*b*) Not guilty, in Debt that he owes nothing; (*c*) if the Action is grounded on a Specialty, *Non eſt factum*, or that it is Not his Deed; for the Debt being grounded on a Specialty, he admits the Debt, unleſs he denies the Deed; for the Seal continuing, it muſt be diſſolved *eo ligamine quo ligatur.*

(*b*) That Not guilty is a good Plea to any Misfeaſance whatſoever. Cro. Eliz. 257. 3 Mod. 324. Skin. 280.

(*c*) Cro. Jac. 377, 531. to an uſurious Bond or Sheriff's Bond *Non eſt factum* cannot be pleaded, but muſt be avoided by ſpecial Pleading. Hob. 72. & *vide* Titles *Sheriff* and *Uſury*.

An Iſſue being taken generally referreth to the Count, and not to the Writ; as in Account, the Writ chargeth him generally to be his Receiver, the Count chargeth him ſpecially to be his Receiver by the Hands of *T.* The Defendant pleadeth, that he was never his Receiver in Manner Co. Lit. 126. a.

ner and Form, &c. this ſhall refer to the Count, ſo as he cannot be charged but by the Receipt by the Hands of *T*.

Co.Lit.126. a. An Iſſue ſhall not be taken on a Negative pregnant, which implieth another ſufficient Matter; but upon that which is ſingle and ſimple, as *Ne dona pas per le fait* implies a Gift by Parol, and therefore the Iſſue muſt be *Ne dona pas modo & forma*.

Co.Lit.126. a. Some Iſſues be good upon Matter affirmative and negative, albeit the Affirmative and Negative be not in preciſe Words; as in Debt for Rent upon a Leaſe for Years, the Defendant pleads, that the Plaintiff had nothing at the Time of the Leaſe made; the Plaintiff replieth, that he was ſeiſed in Fee, &c. this is a good Iſſue.

Co.Lit.126. a. 33 H. 6. 21. Where the Iſſue is joined of the Part of the Defendant, the Entry is *Et de hoc ponit ſe ſuper Patriam*; but if it be of the Part of the Plaintiff, the Entry is *Et hoc petit quod inquiratur per Patriam.*

Co.Lit.126. a. There be ſome negative Pleas which be Iſſues of themſelves, whereunto the Demandant or Plaintiff cannot *(a)* reply, no more than to a General Iſſue, which is *Et prædictus A ſimiliter*; as if the Tenant

*Page 55 * do vouch, and the Demandant counterplead, that the Vouchee or any of his Anceſtors had any Thing, &c. whereof he might make a Feoffment, he ſhall conclude, *Et hoc petit quod inquiratur per patriam & prædictus tenens ſimiliter*; ſo in a Fine pleaded by the Tenant, &c. the Demandant may ſay, *Quod partes finis nihil habuerunt*, and *Hoc petit quod inquir' & prædict' tenens ſimiliter*; and ſo in a Writ of Dower the Tenant pleads, *Unques ſeiſe que dower*, he ſhall conclude, *Et de hoc ponit ſe ſuper patriam & prædict' petens ſimiliter.*

(a) The Reaſon is, that it would be inconvenient to go on to a Replication, becauſe to reply generally would leave it too large and comprehenſive, and to reply any particular Kind of Eſtate would be too narrow, and conſequently immaterial. Will. Rep. 259.

Co.Lit. 126. Sand. 338. Lutw. 623, 1139. Comb. 86. Every Iſſue conſiſts of an *(b)* Affirmative and Negative; and an Iſſue being once well tendered muſt be accepted, and cloſes the Pleadings.

(b) A Diſtinction was thus taken by Counſel, *viz.* that where an Affirmative came after a Negative, there Iſſue ought not to be joined, but ought to be left on the other Side; but where the Affirmative was firſt and the Negative came after, there it ought to be joined. But *Holt*, Ch. J. ſaid he had never heard of this Diſtinction, and therefore gave but little Regard to it. Carth. 88.

Cro. Eliz. 754-5. *Huiſh* v. *Phillips*. In an *Audita querela*, to avoid the Execution of a Recognizance, the Plaintiff ſets forth, that it was defeazanced upon Payment of divers Sums of Money at certain Days, and that he was at the Place appointed and tendered the Money, and that the Defendant was not there to receive it; the Defendant pleaded *(c)* *Proteſtando*, that the Plaintiff was not there to pay it; and that he was there ready to receive it, *abſque hoc*, that the Plaintiff was ready to pay it; which being ſpecially demurred to, the Court held the Plea naught; and that there being an expreſs Affirmative and Negative, there ſhould have been no Traverſe; for ſo they may traverſe one upon another *ad infinitum.*

(c) A Proteſtation availeth not the Party that taketh it if the Iſſue be found againſt him; and therefore, if the Iſſue be found for a Villein, he is infranchiſed for ever; and yet in ſome ſpecial Caſes, albeit the Iſſue be found againſt him that maketh the Proteſtation, yet he ſhall take Benefit of his Proteſtation; as if a Man entereth into Warranty, and taketh by Proteſtation the Value of the Land, albeit the Plea be found againſt him, yet the Proteſtation ſhall ſerve him for the Value. Co. Lit. 126. a.

Lucas's Rep. 299. *vide* Title *Barratry*. The Reaſon of joining Iſſue is, that the Party may come prepared to defend one ſingle Point; which holds in all Caſes, except in Barratry; and even in that Notice muſt be given of the Point the Proſecutor intends to proceed on.

Raym. 50. Keb. 125, 164. In an Action of falſe Impriſonment, the Defendant juſtifies by Force of a *Latiat* out of *B. R.* by Force of which he took him; the Plaintiff

tiff replies, that he did it *de injuria ſua propria, &c.* It was moved, that this was naught after a Verdict, and not helped; but the Court held it well after a Verdict; but that upon Demurrer it would be naught, as being multifarious, jumbling Matters of Record and Matters of Fact together. *Beſly* v. *Walker.*

An Action of Debt was brought upon a Recovery in the Court of *Norwich*; the Defendant ſhews, that the Court is holden by Cuſtom before other Perſons, *abſque hoc*, that the Plaintiff ſuch a Day recovered *ſecundum conſuetudinem, &c.* upon which it was demurred; and in Defence of the Plea it was ſaid, that it is not the Record that is put in Iſſue, but the Cuſtom only, and that may well be traverſed; for which were cited *Hob.* 244. *Hutt.* 20 1 *R.* 3. 9. But the whole Court held the Plea pregnant and inſufficient; for he has made the Day Parcel of the Iſſue, which he ought not to have done, but have ſaid only (*a*) *Modo & forma*; and they held clearly, that the Cuſtom * to hold Courts might well have been traverſed, if that Point had been ſingly brought into Iſſue; but here Matter of Record is mixed with Matter of Fact, which is ill on a general Demurrer; and therefore Judgment was given for the Plaintiff. Lev. 193. Sid. 302. 2 Keb. 107, 122. S. C. *Dring* v. *Repaſs.* *Page 56

(*a*) Where *modo & forma* are of the Subſtance of the Iſſue, and where but Words of Form, this Diverſity is to be obſerved; where the Iſſue taken goeth to the Point of the Writ or Action, there *modo & forma* are but Words of Form; but otherwiſe it is where a collateral Point in Pleading is traverſed; as if a Feoffment be alledged by two, and this is traverſed *modo & forma*, and it is found the Feoffment of one, there *modo & forma* is material; ſo if a Feoffment be pleaded by Deed, and it is traverſed, *abſque hoc, quod feoffavit modo & forma*, upon this collateral Iſſue *modo & forma* are ſo eſſential, that a Jury cannot find a Feoffment without Deed. Co. Lit. 281. b.

2. Immaterial and informal Iſſues, and where aided.

Here the general Rule is, that where the Iſſue is immaterial, a Verdict will not aid it; but where it is only informal, it is helped. *Vide* Title *Amendment.*

An immaterial Iſſue is, where what is immaterially alledged by the Pleadings is not traverſed, but an Iſſue taken on ſuch a Point as will not determine the Merits of the Cauſe; an informal Iſſue is, where it is not traverſed in a right Manner. Carth. 371. Lev. 32. 2 Mod. 137.

A Verdict cannot help an immaterial Iſſue, becauſe what is alledged in the Pleadings is not put in Iſſue; or if it be, it is not deciſive between the Parties, and ſo the Verdict is no good Foundation for the Judgment; and if what is material in the Pleadings be not put in Iſſue, it is not made neceſſary to be proved on that Trial; but if it be not deciſive, then what is neceſſary to be proved on the Trial will not in all Caſes be a Foundation for the Judgment; for the Courts in theſe Caſes are Judges on what Point they ought to go to Iſſue, ſo as to be a legal Charge by the Plaintiff, or Diſcharge by the Defendant; ſince it is the Province of the Judges to ſettle the Matter of Law, and the Jury the Matter of Fact. Cro. Eliz. 227. Brown. 219. Carth. 371. 2 Rol. Rep. 117. Cro. Jac. 580.

If the Plaintiff declares upon a Promiſe to find the Plaintiff, his Wife and two Servants, with Meat and Drink for three Years, upon Requeſt; and the Defendant pleads, that he promiſed to find the Plaintiff and his Wife with Meat, *&c. abſque hoc*, that he promiſed to find, *&c.* for two Servants, *&c.* and the Plaintiff replies, that he did promiſe to find, *&c.* for three Years next following, *& hoc petit &c.* and thereupon a Verdict is found for the Plaintiff; yet he ſhall not have Judgment; for the Promiſe in the Replication is not the ſame with that in the Declaration, which was traverſed by the Defendant; and ſo there is no Iſſue joined, and therefore is not helped by the Statute. § 3 Leon. 66. *Kirbee* v. *Leers.* 2 Leon. 195. S. C. cited. Godb. 56. S. C. cited.

§ If the Fact was as pleaded by the Defendant, the general Iſſue would have been the proper Plea, and the *modo & forma* would have been material.

Cro. Jac. 585. *Sandbank* v. *Turvy*. Hob. 113. Cro. Car. 593. S. P. adjudged.

If in Debt on a Bond conditioned for the Payment of 105 *l.* at a certain Day and Place, the Defendant pleads, that at the Day and Place he paid *prædict'* 100 *l. quas ſolviſſe debuit ſecundum formam & effectum conditionis*; and the Plaintiff replies, *Quod non ſolvit prædict'* 105 *l. &c.* and a Verdict is found *quod non ſolvit* the ſaid 105 *l.* yet the Plaintiff ſhall not have Judgment; for *prædict'* 100 *l.* ſhall not be intended the 105 *l.* and ſo they meet not, and there is no Iſſue.

Cro. Car. 79, 93. *Oxford* v. *Rivet*, adjudged by three Judges againſt two, who held there was no Iſſue, and ſo the Verdict void and not aided by the Statute of Jeofails.

If in a *Sci. Fa.* upon a Judgment againſt the Adminiſtratrix of *J. S.* the Defendant pleads, that the ſaid *J. S.* made *B.* within Age his Executor, and that Adminiſtration *durante minore ætate* of the ſaid *B.* was committed to the Defendant, and that ſuch a Day the ſaid *B.* attained the Age of Seventeen, and then refuſed to be Executor, *&c.* and that when the ſaid *B.* attained his ſaid Age the Defendant had fully adminiſtred, *&c.* And the Plaintiff replies, that at the Time the ſaid *B.* came to his ſaid Age *devaſtavit diverſa bona, &c.* and the Defendant rejoins, *Quod ipſe non devaſtavit, &c.* and thereupon Iſſue was joined, and found for the Defendant; ſhe ſhall have Judgment; for the Devaſtation muſt be intended by the Adminiſtratrix, and the Plaintiff ſhall not avoid the Verdict by an Exception to his own Replication.

Hetl. 35. Lit. Rep. 52. S. C.

*Page 57 Rol. Rep. 86.

* In Treſpaſs the Defendant pleads an Accord between the Plaintiff and *J. S.* of the one Part, and the Defendant of the other Part; the Plaintiff replies, *Quod non habetur talis concordia* between the Plaintiff and Defendant, *qualis* the Defendant had alledged; and on Iſſue joined a Verdict for the Plaintiff; yet he ſhall not have Judgment; becauſe the Plaintiff does not traverſe the ſame Concord that is ſet out in the Defendant's Bar, but puts another Concord in Iſſue, not alledged in the Defendant's Bar, between the Plaintiff and Defendant only, and the Court cannot be certain which is proved on the Trial; and though it may be ſaid in this Caſe, that either may bar the Action, yet only one Thing is to be put in Iſſue; and if it ſhould be otherwiſe, there would be no Correſpondence between the *Probata* and *Allegata*.

Cro. Car. 316, 317. *Parker* v. *Taylor*. Sid. 290. S. C. cited.

In Debt on a Bond conditioned for the Payment of 8 *l.* on a certain Day, the Defendant pleads Payment on the Day in the Condition, *Et de hoc ponit ſe ſuper patriam, & prædict'* the Plaintiff *ſimiliter*; and found for the Plaintiff; here the Defendant has cloſed the Iſſue on the Plaintiff by the *Hoc ponit ſe ſuper patriam*; yet the Defendant cannot take Advantage of the Informality of his own Plea, and it is waved on both Sides when they go to Iſſue on the Subſtance of it.

Sid. 341. Cro. Jac. 599. S. P. adjudged. Rol. Rep. 47. S. P. adjudged. Stile 150, 198. *Vide* Hard. 40. S. P. cited. Vent. 70. S. P. ſaid to have been adjudged. 8 Co. 66.

But if in Treſpaſs the Defendant pleads a ſpecial Juſtification, and the Plaintiff replies *de injuria ſua propria abſque tali cauſa*, there though the Iſſue is found for the Plaintiff, yet it is wrong after Verdict, becauſe the *Injuria ſua propria* does no more than affirm the Declaration, and does not confeſs or deny the Bar; and therefore the Giſt of the Bar is not put in Iſſue at all, but rather ſtands by the Replication ſince the Cauſe is not traverſed; for ſaying it was *de Injuria ſua propria* is no more than ſaying, that notwithſtanding the Cauſe mentioned in the Bar the Defendant committed the Injury, which the Bar being a ſufficient Excuſe cannot be; but it does not in the leaſt put the Bar in Iſſue. ‡

‡ The Poſition in this Paragraph is too general.——There are many Caſes where the general Replication with the general Traverſe is ſufficient. Many where it is not. *Vide* 5 Com. Dig. 87, 112. Id. 319, *&c.* 325.

If in an *Aſſumpſit* for Wares ſold, the Defendant pleads *quod tempore quo &c.* he was an Infant, and the Plaintiff replies they were for Neceſſaries, *& hoc petit quod inquiratur per Patriam, &c.* and thereupon Iſſue is joined, and a Verdict found for the Plaintiff; though this Traverſe is informal, becauſe the Plaintiff ought not to have cloſed the Iſſue, but to have given the Defendant an Opportunity of rejoining, that there might have been a proper Negative to his Affirmative; yet ſince the Matter of his Replication is put in Iſſue, *viz.* whether they were Neceſſaries or not, the Defendant has waved all Objections to the Form, and by ſuch Waver it appears that he is not any ways injured by not rejoining, and it being found that they were Neceſſaries, the Plaintiff ought to prevail. Sid. 341-2. *Burton* v. *Chapman.*

In Debt on a Bond conditioned for the Payment of 60*l.* on the 25th of *June*, the Defendant pleads Payment on the 20th of *June ſecundum formam & effectum conditionis, & ſur ceo* Iſſue is joined, and the Verdict finds *quod non ſolvit* 60*l.* at the 20th; the Plaintiff ſhall not have Judgment, for the Iſſue is *dehors* the Matter of the Condition, and ſo void, and it might have been paid the 25th, though it was not paid the 20th, ſo that it does not appear the Condition was broken; but where the Iſſue is deciſive between the Parties, though it be not ſo apt, yet this ſhall be cured after a Verdict. Cro. Jac. 435. *Helms* v. *Brocket.*

As in Replevin the Defendant avows that *Ellen Enderby* was ſeiſed in Fee, and took *Pigott* to Huſband, and had Iſſue by him *Thomas*; that *Ellen* and *Thomas* granted a Rent-Charge for which he diſtrains; the Plaintiff replies, that one *Fiſher* being ſeiſed in Fee gave the Land to *J. Enderby* in Tail, who had Iſſue *Ellen*, that *J. Enderby* died and *Ellen* entered, and being ſeiſed in Tail took *Pigott* to Huſband, and * had Iſſue *Thomas*, who is dead, who granted, *&c. abſque hoc*, that *Ellen* was ſeiſed in Fee; tho' this was an informal Iſſue, for the Plaintiff ought to have traverſed that *Thomas* the Grantor was ſeiſed in Fee; yet it is a deciſive Iſſue, for it is allowed on both Sides that *Thomas* was in by Deſcent from *Ellen*; and if *Ellen* was ſeiſed in Fee, *Thomas* was ſo too, and conſequently had good Right to make the Grant. Cro. Jac. 44. Yelv. 54. *Pigott* v. *Pigott.* * Page 58.

If in Debt upon a ſingle Bill the Defendant pleads Payment, without an Acquittance, and thereupon Iſſue is joined, and found for the Plaintiff, he ſhall have Judgment; for the Payment without an Acquittance is no Plea to a ſingle Bill; yet becauſe Iſſue was joined upon an Affirmative and Negative, and Verdict for the Plaintiff, he ſhall have Judgment; adjudged upon a Writ of Error *in Camera Scaccarii*, and the firſt Judgment affirmed accordingly. 5 Co. 43. *Nichol's* Caſe. Moor 692. S. C. Cro. Eliz. 455. S. C. 3 Bulſ. 301.

In an Action of Debt, if Not Guilty be pleaded, and there be a Verdict for the Plaintiff, it ſhall be aided by the Statute; becauſe being an ill Plea, and a falſe one, the Plaintiff ought to have his Judgment, both for the Badneſs of the Plea, and for its Falſhood; but if the Verdict had been for the Defendant, yet the Plaintiff ſhould have Judgment; becauſe the Declaration is not anſwered by the Plea. Noy 58. Cro. Eliz. 773. 2 Jon. 184.

So if in an *Aſſumſit* the Defendant pleads Not guilty, and thereupon Iſſue is joined, and found for the Plaintiff, he ſhall have Judgment; though this is an (*a*) improper Iſſue in this Action, yet becauſe there is a Diſceit alledged, Not guilty is an Anſwer thereto; and it is but an Iſſue mis-joined, which is aided by the Statute. Cro. Eliz. 470. *Carbyn* v. *Brown.*

(*a*) Where in Debt againſt an Executor upon the Bond of his Teſtator the Defendant pleaded *Non eſt factum.* Hard. 458.

If in Debt againſt *A.* as Executor of *B.* the Defendant pleads, that *B.* died inteſtate, and that Adminiſtration of his Goods was committed to *C.* and the Plaintiff replies, that before the ſaid Adminiſtration granted Hob. 49. *Kable* v. *Oſbaſton.*

divers Goods, &c. came to the Hands of the Defendant, which as Executor to the ſaid *B. adminiſtravit ſeu aliter ad uſum ſuum proprium diſpoſuit & convertit*, &c. and thereupon in the Disjunctive Iſſue is joined, and found for the Plaintiff, he ſhall have Judgment; for the Point in Iſſue is directly found, and ſo it is within the Statute; and this alſo is no improper Iſſue; for whether he adminiſtred or converted to his own Uſe, both muſt be as Executor.

Hob. 113. If in Replevin the Defendant avows for Damage-feaſant, and the Plaintiff replies, that he was ſeiſed in Fee of a Meſſuage and certain Land, and that *J. S.* was ſeiſed of another Meſſuage and Land, and that they two, and all thoſe whoſe Eſtate, &c. had Common, &c. in the Place where, &c. and conveys to himſelf the other Meſſuage and Lands for Years, and ſo juſtifies, &c. and the Defendant traverſes the Preſcription, and it is found for the Plaintiff; though the Preſcription thus confeſſed for ſeveral is groſsly faulty, and (*a*) the Iſſue thereupon confuſed, yet after Verdict it was ſaved by the Statute.

(*a*) If in Debt upon an Obligation the Defendant pleads the Statute of Uſury, & *quod corrupte agreat' fuit*, &c. & *quod querens corrupte recepit*, the Uſury and Iſſue is taken upon both, and found for the Defendant, he ſhall have Judgment; though this Iſſue is double, the one Part material and the other not. Moor 574. pl. 780. If in Debt for Rent the Defendant pleads *Nil hab' in Tenementis*, and the Plaintiff replies *quod hab' bonum & ſufficientem ſtatum*, &c. but does not ſhew what in particular, and thereupon Iſſue is joined, and found for the Plaintiff, he ſhall have Judgment; for though the Iſſue is informal, yet the Subſtance of the Matter is found, *viz.* that he had an Eſtate, &c. *Glaſs* v. *Gill*, Yelv. 227. Cro. Jac. 312. & *vide* 2 Bulſ. 41.

If in an Action of (*b*) Covenant the Plaintiff aſſigns a Breach, that the Defendant was not ſeiſed in Fee, & *ſic infregit conventionem*; and
* Page 59 * the Defendant pleads *Non infregit conventionem*; and thereupon Iſſue is joined, and a Verdict for the Plaintiff, he ſhall have Judgment; for this is but an informal Iſſue.

Sid. 289. Lev. 183. *Walſingham* v. *Comb.*

(*b*) So where the Covenant is to repair, and the Plaintiff aſſigns the Breach, that the Defendant ſuffered the Houſes to be ruinous, & *ſic non reparavit*, and the Defendant pleads that he did not ſuffer them to be ruinous. Moor 399. Cro. Eliz. 457, 2 Leon. 116.

Sid. 444. Vent. 70. 2 Keb. 623. In an Action of Aſſault and Battery, the Defendant pleads, that the Plaintiff neglected his Service, *per quod moderat caſtigavit*; the Plaintiff replies, *Quod non moderate caſtigavit*; and the Iſſue was found for the Plaintiff; though this be an informal Traverſe, being rather a Traverſe of the Chaſtiſement than of the moderate Manner of doing it, and the right Traverſe ſhould have been *De injuria ſua propria abſque tali cauſa*, yet after Verdict it is good; becauſe the Jury have aſcertained that he did not beat him moderately.

If an Iſſue be on a Point that is impoſſible in Subſtance and Nature of the Thing, it is not cured by the Verdict; but if it be only impoſſible in the Manner and Form of it, a Verdict will cure it; for where the Subſtance is impoſſible, no Verdict can cure it, becauſe it cannot make that true which cannot poſſibly be; but where it is only impoſſible in the Manner of it, there the Thing which is poſſible may be found to be or not, and the Manner which is impoſſible totally rejected; (*c*) as if an Action of Aſſault and Battery be brought, and the Defendant juſtifies by conveying to himſelf an Eſtate by Copy of a Parcel of the Manor of *C.* whereof *D.* is ſeiſed, and that the Plaintiff came upon it, and that he laid his Hands *molliter*; the Plaintiff replied, and conveyed to himſelf an Eſtate by Copy of another Parcel of the Manor, and that *D.* Lord of the Manor, had for himſelf and Tenants a Way over the Defendant's Piece of Land; Iſſue is joined, and Verdict for the Plaintiff; this is a void Preſcription, a Copyholder being originally but a Tenant at Will, could not preſcribe at Will, but in the Name of

(*c*) Hob. 112, 113. Moor 867. *Tſher* v. *Salter.*

the

the Lord, for an Eaſement; and for an Eaſement out of the Manor he could not preſcribe in the Lord's Name, but muſt lay it by Cuſtom as the *Lex loci*; but being laid here by way of Preſcription it is in its own Nature void; and the Verdict could not make that which was repugnant to the Nature of the Thing to be true or falſe, and by Conſequence could not help it.

But in Debt on a Bond conditioned for the Payment of 100*l.* on 31 *September*, and Defendant pleads Payment at the Day, and it is found againſt him, the Plaintiff ſhall have Judgment; becauſe the Payment is what is material, and the Day is impoſſible and altogether idle and void; for not being paid before the End of that Month the Obligation is abſolute. Cro. Car. 78. Jon. 140. Latch 158. Noy 85. *Purchaſe* v. *Jegon.*

If in Treſpaſs Iſſue is taken, that the Prebend of *A.* and all his Predeceſſors, *&c.* had uſed Time out of Mind to keep a Shepherd, for the better keeping together their Sheep feeding in the ſaid Paſture from the Sheep of *T.* Earl of *S.* and the Iſſue is found for the Plaintiff accordingly; though it is ſenſeleſs and impoſſible that the Sheep of the Prebend, *&c.* Time out of Mind could be kept from the Sheep of the Earl of *S.* being but one Man's Life, yet the Plaintiff ſhall have Judgment; for the Subſtance of the Iſſue is the keeping the Sheep of the Prebend, *&c.* and the other Part is but a Conſequence thereof, that thereby they were kept from the Sheep of the ſaid Earl. Hob. 117. *Napper* v. *Jaſper.*

In Debt upon a Bond againſt an Adminiſtrator brought in *Hill. Term.* 22 *Jac.* the Defendant imparled; and in *Eaſter Term.* 1 *Car.* the Defendant pleaded a Judgment upon a Bond dated *anno quinto Regis nunc*, where it ſhould have been *Regis Jac.* and that he had not Aſſets *ultra* to ſatisfy that Judgment; and thereupon the Plaintiff joined Iſſue, that the ſaid Recovery was by Fraud and Covin; and it was found for the Plaintiff; though it was impoſſible there could be a Bond *anno quinto Regis Caroli*, which was not then come, yet the Plaintiff, having a good Declaration, had Judgment. Cro. Car. 25. *Knight* v. *Harvey.*

* Covenant on a Conveyance of Lands, where the Vendor covenants, that he was ſeiſed in Fee, and aſſigns a Breach, that he was not ſeiſed in Fee, and ſo had not performed his Covenant; the Defendant pleads that he had not broken his Covenant; and on the Iſſue ſo joined a Verdict was for the Plaintiff: And it was moved in Arreſt of Judgment, that this was not any Iſſue, it conſiſting only of two Negatives, *viz.* that he was not ſeiſed in Fee, and ſo had not performed his Covenant on the Plaintiff's Part, and that he had not broken his Covenant on the Defendant's Part; alſo that the Pleading is too general, for that he ought to anſwer particularly in Covenant to the Breach aſſigned; and it was ſaid, that though in Actions founded upon Tort the Declaration, being ſpecial, may be anſwered generally, yet in Actions founded on a Contract a ſpecial Declaration muſt be anſwered ſpecially. The Court at firſt doubted, but afterwards gave Judgment for the Plaintiff; for it is an Iſſue, though argumentative and informal; for if he had not broken his Covenant he was ſeiſed in Fee, and if he was not ſeiſed in Fee, he had broken his Covenant; that it is not wholly immaterial, and informal Iſſues are cured by 32 *H.* 8. *c.* 30. after Verdict, though immaterial are not. * Page 60 Lev. 183. Sid. 289. 2 Keb. 10, 13, 47. S.C. Trin. 18. Car. 2. between *Walſingham* v. *Coombe.*

3. Of ſpecial Pleas; and therein of Pleas amounting to the General Iſſue, and of Matters which may be pleaded or given in Evidence.

The Defendant is at Liberty to plead the General Iſſue, or traverſe any material Point of the Declaration; but (*a*) he cannot plead a Plea that

(*a*) Pleading that amounts

to the general Issue is not to be allowed; and when such Plea is pleaded, it is a good

that amounts to the General Issue; for Pleas which amount to the General Issue are only Facts on which the Issue may be turned in Evidence, and therefore are not Issues of Fact, to be referred to the Court, but Matters of Evidence to be determined by a Jury, and consequently not good Pleas; because they draw to the Examination of the Court what is proper to be determined by a Jury.

Cause of a special Demurrer since 27 Eliz c. 5. and before it, of a general one. 10 Co. 95. a. The Reason of pressing the General Issue is not for Insufficiency of the Plea, but not to make long Records when there is no Occasion. Hob. 127. A Plea which amounts to the General Issue is only Matter of Form, Rol. Rep. 112-3. and therefore must be specially shewn as Cause of Demurrer. Cro. Car. 157.

3 Mod. 166. Where the Defence consists in Matters of Law, there the Defendant may plead specially; but where it is purely Fact, the General Issue must be pleaded; and in all Actions the Defendant may shew any Matter to the Court why the Action does not lie; and this being Matter of Law is proper to be shewn to the Court, and not to the Jury; for being Questions of Law, the Judges are to determine whether they discharge or bar the Plaintiff's Action; but such Bars or Matters produced by the Defendant may be traversed by the Plaintiff, whether they are true or not, which subsequently draws them to the Examination of a Jury.

5 Mod. 252. 2 Salk. 580. pl. 1. Hob. 174. Whatever therefore makes the Fact complained of to be lawful is Matter of Justification, and to be shewn to the Court; because the Court are Judges how far the Fact, if done, was lawfully done; and therefore on Not guilty in Trespass the Defendant cannot shew a Licence to prove there was no Trespass; because though the Licence makes it no Trespass, yet he shews that Licence to an improper Jurisdiction, *viz.* to the Jury who are not proper Judges of the Law.

So if the Defendant shews a Release of a Debt to a Jury, it is no Evidence; because, though the Release makes it to be no Debt, he

* Page 61 * shews it to an improper Jurisdiction; but though a Man must shew all Matters to the Court that confirm the Fact complained of, and discharge it, yet where any Thing goes in Denial of the Fact, thee it must be given in Evidence on the General Issue; because whatever denies that Cause of Complaint is Matter proper to be exhibited to the Jury, who are Judges whether the Fact was, or not; and therefore Actions of Trover and *Assumpsit*, which are modern Inventions to get rid of the Law-Wager, which lay in the antient Action of Debt and Detinue, were so formed, that almost every Thing may be given in Evidence (on the General Issue.)

Vide Title *Trover & Coversion.* As in Trover the Plaintiff declares of the Property of the Goods and Chattels, and that they came by finding to the Defendant; whatever Matters alledged that confess Property in the Plaintiff will intitle him to his Damages, and whatever denies it is on the General Issue; and therefore levying by Distress, Releases, and the like, which were anciently in this Action, are now given in Evidence; because they disarm the Property of the Plaintiff on which his Action is founded

Vide Title *Assumpsit.* So in *Assumpsit* the Action is formed on a Contract, and the Trespass to the Plaintiff is the Non-performance of it; and though the Issue be *Non Assumpsit* instead of the old Issue Not guilty, yet on this Issue every Thing may be given in Evidence which disaffirms the Contract, for that goes to the Gist of the Action; since if there be no Contract to be performed at the Commencement of the Action, there can be no Trespass for the Non-performance of it: And therefore a Release goes to the Gist of this Action; for it shews there was no Action at the Time this Action was commenced; for as in Trover he must have a Right to the Thing,

so

ſo in *Aſſumpſit* he muſt have a Right to the Thing declared on; therefore every Thing that ſhews the Contract to be void, as Non age, or more Money loſt at Play than the Statute allows, may be given in Evidence on the General Iſſue.

But Matters of Law, which do not go to the Giſt of the Action, but to the Diſcharge of it, even in theſe new framed Actions, are to be pleaded, as the Statute of Limitations; ſo if a leſſer Sum be paid before the Time; becauſe that is not a Performance which deſtroys the Being of the Action, but a collateral Agreement that deſtroys the Performance of it. Carth. 387. Salk. 278. pl. 1.

If Matter be pleaded which amounts to the General Iſſue, yet if there be alſo a ſpecial Matter of Juſtification joined in the ſame Plea, the Plea is good. 3 Lev. 41.

In Trover the Defendant pleaded a Sale in a Market overt, and thereby juſtified the Converſion; and ruled that a *Nihil dicit* ſhould be entered, if he did not plead the General Iſſue, for that it amounted to it; and in another (*a*) Caſe in Trover the Defendant pleaded another Plea amounting to the General Iſſue; and the Court doubted, whether they ſhould compel him to plead the General Iſſue, or award a Writ of Inquiry; but reſolved at laſt to award a Writ of Inquiry. Cro. Jac. 165. (*a*) Cro. Jac. 319.

In an Action on the Caſe of a Commoner for digging Pits, the Defendant juſtified that he was Lord of the Soil and dug for Coals, doing as little Damage as he could, and that he left ſufficient Common; and on Demurrer adjudged againſt him that it amounted to the General Iſſue. § Sid. 136.

§ For the Action charged him as a Wrong-doer, which he was not, and which was the Tenor of his Plea, and that amounted to the General Iſſue only.

In Treſpaſs if the Defendant pleads Property in a Stranger or himſelf, it amounts to the General Iſſue; otherwiſe in Replevin, in which Caſe it may be pleaded in Bar or Abatement; but where in Treſpaſs the Plaintiff declared that the Defendant broke his Cloſe and took *quædam averia, &c.* the Defendant pleads the Cattle were his own, and that *J. S.* took them from him, and put them in the Plaintiff's * Cloſe by his Aſſent, and that he took them, *&c.* and held a good Plea; for the Plaintiff does not declare that the Property of the Goods is in him; and when the Defendant's Beaſts are taken from him by Wrong, he may juſtify Retaking them wherever he finds them. Vent. 249. 2 Lev. 92. Cro. Eliz. 329. * Page 62

Where the Matter of the Plea confeſſes the Cauſe of Action but avoids it, the Defendant may plead ſpecially, though he might have given it in Evidence; otherwiſe where the Matter of the Plea does not avoid but deny, as in *Aſſumpſit*, the Statute of Gaming may be pleaded, though it might be given in Evidence on the General Iſſue. Cro. Eliz. 871. Salk. 344. pl. 2. Ld. Raym. 87. Comyns 4. pl. 4. 5 Mod. 175. Carth. 356. Holt 328. pl. 2. 12 Mod. 96.

In Treſpaſs for taking his Horſe, the Defendant pleads that the Horſe was the Horſe of *J. S.* and that the Plaintiff took and impounded him, and that he the Defendant took him by Replevin, *&c.* this amounts to the General Iſſue, for it does not ſo much as admit a Poſſeſſion in the Plaintiff; for the taking and impounding gave him no Poſſeſſion, becauſe the Horſe was thereby in the Cuſtody of the Law, ſo no Colour of Action left to the Plaintiff. Salk. 394. pl. 2.

In *Aſſumpſit* the Defendant pleaded *Quod ipſe performavit omnia ex parte ſua performand'*; and this was held to amount to the General Iſſue; *ſed Q.* for the *Aſſumpſit* is admitted, ſo that this is but a Diſcharge. Salk. 394. pl. 3. 2 Ld. Raym. 968.

If

5 Co. 119. resolved *per Curiam.* 2 Inſt. 483. S. P.

If a Man executes a Deed by (*a*) *Dureſs* he cannot plead *Non eſt factum*, for it is his Deed, though he may avoid it by ſpecial Pleading, Judgment, *Si actio, &c.*

(*a*) In a Plea of *Per minas* the very Manner of it, as whether for Fear of Life, Member, or Impriſonment, ought to be ſpecially laid. *Vide* Keb. 516. ||.

|| Alſo *vide* Cl. Aſſ. 72. 2 Inſt. 483. But Menace of Battery is not ſufficient to avoid a Deed. 2 Inſt. 483.——Nor Menace of burning his Houſes. 2 Inſt. 483.——Or taking or deſtroying his Goods; for he may recover Damages for them. 2 Inſt. 483.———To this Plea Plaintiff may repiy, that it was voluntary, and not *Per minas*. Cl. Aſſ. 72.

Hob. 72. *Humberton* v. *Howgil.*

Upon an Iſſue *Feoffavit vel non*, the Jury found a Feoffment, but a covinous one, and the Court was of Opinion, that upon this Iſſue a covinous Feoffment was a Feoffment, and that if the Party would have taken Advantage of the Covin, he ought to have done it by ſpecial Pleading; it is there likewiſe ſaid, that a *Non eſt factum* cannot be pleaded upon the (*b*) Statute of Uſury or Sheriff's Bonds, the Reaſon of which is, that theſe Things have the Appearances of Feoffments and Bonds, though they want the Validity.

(*b*) Though the Statutes relating to Sheriff's Bonds and uſurious Bonds are penned in very ſtrong Terms, yet the Bonds are void only as to their Efficacy; for in theſe Caſes the Defendant cannot plead *Non eſt factum*, but muſt avoid them by ſpecial Pleading. Dyer 375. b. Cro. Eliz. 915. Hob. 72, 166.

6 Mod. 218.

It is ſaid by my Lord Chief Juſtice *Holt*, that all the ſpecial *Non eſt factums*, in caſe of *Eſcrow* and *Razure*, are impertinent, for thereby the Defendant brings all the Proof upon himſelf; whereas if he had pleaded *Non eſt factum* generally, he would turn the Proof of whatever is neceſſary to make it his Deed upon the Plaintiff. †

†*Sed qu.* As to the Caſe of an *Eſcrow*; for it is his Deed, though perhaps delivered to another on Condition? Indeed in pleading an *Eſcrow* ſome are of Opinion it ſhould conclude, and *ſo not his Deed*. *Vide poſt.* 89.

Vent. 2.

In Debt upon a Leaſe for Years the Defendant may plead Entry into Part, upon which follows Suſpenſion, and it does not amount to the General Iſſue.

Dyer 121. Doct.pl.203.

In every Action on the Caſe for a Miſdemeanor the Defendant may plead generally Not guilty, or traverſe the Point of the Writ, as *Ne forga pas*, *Non ejecit*, *Nan rapuit*, *Non manutenuit*, &c.

22 H. 6. 37. Doct.pl.204.

But in Treſpaſs *Non depaſcit herbas* is no Plea, but he ought to plead Not guilty, the other being only argumentative.

40 E. 3. 15. Doct.pl.205.

In Dower the Tenant pleads, that the Huſband of the Demandant was only Tenant for Life, the Remainder in Tail to his Son; and this was held an ill Plea, it amounting to the General Iſſue *Ne unques ſeiſe que dower*.

Hob. 127. Sir *Henry Warner* v. *Wainsford.*

In Debt againſt an Adminiſtrator the Defendant pleads, that the Inteſtate was indebted to him by Bond 80*l.* and that Goods to that Value *& non ultra* came to his Hands, which he detains for his Debt; and on Demurrer it was objected, that it amounted to the General Iſſue of *Plenement adminiſter*; but the better Opinion of the Court was, that this is no Cauſe of Demurrer, for the Plea is (*c*) ſufficient;

* Page 63 *

(*c*) That it is a good Plea, and ſafer § than pleading the General Iſſue. Noy 106. Winch 19. Cro. Car. 157. Cro. Jac. 165. Leon. 178. Hob. 218. Like Point, *& vide* Raym. 230.

§ *Qu.* If it is ſafer, and if there is any Doubt as to giving ſuch a Retainer in Evidence on *Plene adminiſtravit*? We here ſuppoſe the Repreſentative's Debt to be of as high a Nature as the Debt ſued for, and that the Defendant is legal Repreſentative.

and

and beſides, it is ſome Matter in Law which hath been allowed always to be pleaded ſpecially, and not left to a Jury; and the Reaſon of preſſing a General Iſſue is not for Sufficiency of the Plea, but not to make long Records when there is no Cauſe, which is Matter of Diſcretion; and therefore it is to be moved to the Court, and not to be demurred upon.

In an Action on the Caſe by a Commoner the Plaintiff declared, that the Defendant had incloſed the Places in which the Plaintiff had a Right of Common, and likewiſe had put his Cattle in thoſe Places, by which he could not *in tam amplo & beneficiali modo* enjoy the ſame; the Defendant pleaded, that he put his Cattle in rightfully, and that the Plaintiff had Common enough; and on Demurrer it was held, that the Plea was the ſame as Not guilty, and therefore amounted to the General Iſſue; yet the Court likewiſe held, that for that Reaſon alone the Plaintiff had no Cauſe of Demurrer; for that the Defendant may well diſcloſe the Matter of Law in Pleading, which is a much cheaper Way than to have a ſpecial Verdict; and that this is on the ſame Reaſon of giving Colour; but if the Matter by which the Defendant juſtifies be all Matter of Fact, and proper for the Trial of a Jury, then the Defendant ought to plead the General Iſſue. 2 Mod. 274. *Birch* v. *Wilſon.*

In Aſſault and Battery at *Maidſtone in Com' Kent* the Defendant pleads, that he is poſſeſſed of a Houſe in *D.* and that the Plaintiff with another Woman came to his Door, and the other Woman endeavoured to turn him out of Poſſeſſion, and thruſt him down, and that in his Fall he threw down the Plaintiff againſt his Will and fell upon her; *abſque hoc*, that he is guilty of a Battery at *Maidſtone* or any other Place *extra, &c.* Plaintiff demurs, 1*ſt*, (*a*) Becauſe the Defendant has traverſed the Place without alledging any ſuch local Juſtification as to make it material. 2*dly*, Becauſe the Plea amounts to the General Iſſue. *Per Cur':* The Juſtification, if we may call it ſo, is local; but the Plea does amount to the General Iſſue; but we are not bound to give Judgment for the Plaintiff upon that, though he do aſſign it as Cauſe of Demurrer; it is a diſcretionary Thing, and we may allow of a Plea that does amount to the General Iſſue, if it contain any Thing that may breed a Scruple in the *Lay Gents*; and therefore they adviſed the Parties to compound the Matter. Paſch. 29. Car. 2. in *C. B. Nicholls* v. *Jeames.* (*a*) For this *vide* Cro. Eliz. 705.

An Action on the Caſe was brought upon a Bill of Exchange, to which the Defendant pleaded, that after the Acceptance of the Bill he gave a Bond in Diſcharge thereof; and upon Demurrer to this Plea it was objected, that it amounted to the General Iſſue; for, the Debt upon the Bill being extinguiſhed by the Bond, the Defendant ought to have pleaded *Non aſſumpſit*, and to have given the Bond in Evidence; and the Court ſeemed to be of that Opinion; but by Conſent the Defendant pleaded the General Iſſue. 5 Mod. 314. *Hackſhaw* v. *Clerk.*

By the Statute of Bankrupts a Liberty of pleading *Generally* is given to the Bankrupt, and thereby he may avoid the Hazard of pleading *Specially*; but then he muſt take upon himſelf the Proof of his Conformity to the Statute in every particular; or if he thinks fit to plead the Matter ſpecially, then he muſt ſet forth every Point; and by it he has this Advantage againſt the Plaintiff, that he muſt reply to one Particular only, upon which Iſſue muſt be taken; but where he pleads the Matter ſpecially, but does not ſet forth the Whole, Judgment muſt be given againſt him; for by the Act it is to be pleaded as that the whole Merits may be tried. † Wil. Rep. 258.

† The Statute alluded to in the Text is 4 Ann. c. 17. which is expired; yet by Stat. 5 Geo. 2. c. 30. a *general* Plea is given to Bankrupts ſued, *i. e.* That the Cauſe of Action accrued before he became a Bankrupt, *vide* the Statute. But in the Caſe of *Paris* v. *Salkeld.* E. 2 Geo. 3. 2 Wilſ. 139. 'tis ſaid that ſuch Plea is ill, and

* Page 64 * In Treſpaſs for taking three Cows at *Beomiſter* in *Dorſetſhire*, the Defendant pleaded ſpecially, that the Biſhop of *Sarum* was ſeiſed in Fee of the Hundred of *Beomiſter* in the Right of his Biſhoprick, and that he and all his Anceſtors, Time out of Mind, had a Hundred Court of all perſonal Actions under 40*s.* and of Replevin within the ſaid Hundred from three Weeks to three Weeks; and that the Biſhop, and all thoſe whoſe Eſtates, *&c.* had uſed Time out of Mind by their Steward of the ſaid Hundred, upon Complaint made, *&c.* to replevy Cattle unjuſtly taken at any Place within the ſaid Hundred, and that the Biſhop had demiſed the ſaid Hundred unto *Carleton Whitelock*, Eſq; for three Lives, by virtue of which he was ſeiſed, *&c.* and that the Plaintiff and *T. S.* took thoſe Cows, being the Cows of one *E. G.* at *Beomiſter* within the ſaid Hundred, and impounded them there, and thereupon the ſaid *E. G.* complained to *Henry Samways*, Steward of the ſaid *Carleton Whitelock* of his Hundred Court aforeſaid, of the unjuſt taking the ſaid three Cows; and that thereupon the ſaid Steward made his Precept to the Bailiff of the ſaid Hundred, *&c.* to replevy thoſe Cows; by virtue whereof the Defendants took them and delivered them to the ſaid *E. G.* And on a ſpecial Demurrer to this Plea, for that it amounted to the General Iſſue, it was adjudged that the Plea, in the Form it was drawn, did amount to the General Iſſue, for that the Defendants had not admitted by their Plea ſo much as a Poſſeſſion of the Cows in the Plaintiff at the Time of the Taking, *&c.* for they ſay the Cows were then impounded, which is the Cuſtody of the Law, and not of the Party, ſo that the Defendants by their Plea had not given any Colour of Action whatſoever to the Plaintiff.

Carth. 380. 5 Mod. 252. *Hallet* v. *Byrt.*

If there are three or more Partners, and an Action is brought againſt two of them, and they plead the Partnerſhip, this amounts to the General Iſſue. §

Carth. 63. *per Holt* and two other Judges.

§ The Text is equally erroneous, as I conceive the Reporter, *Carthew*, to be, no ſuch Plea of Partnerſhip being pleaded. The Defendants pleaded the General Iſſue of Not guilty; and though in *Carth.* it is ſaid that Judgment was given for Plaintiff, yet *Salk.* and all the other Reporters of this Caſe, who are numerous, expreſsly ſay, Judgment was given for Defendants, by reaſon of all the Partners not being made Defendants. It was to be ſure argued that ſuch Matter ought to have been pleaded in Abatement, if Defendants meant to take Advantage of ſuch Matter; but then it was doubted whether it was pleadable in Abatement, it only amounting to the General Iſſue. *Vide* 2 Salk. 440.—*N. B.* This Caſe in *Carthew* was againſt *Jome* of the Owners of a Ship, for Damage to Goods.

Skin. 362. pl. 5. *per Holt.*

In many Caſes, though a Man plead a Thing which may be given in Evidence, yet this ſhall not amount to a General Iſſue; as where the Plea goes by Way of Confeſſion and Avoidance; as in Treſpaſs where the Defendant acknowledges the Plaintiff to have a good Cauſe of Action, unleſs for the Matter which the Defendant has pleaded in his Plea; in ſuch Caſe ſuch Plea ſhall not amount to a General Iſſue.

2 Inſt. 316.

In an Appeal of Maihem if the Defendant plead Not guilty, he cannot give in Evidence that it was *Se defendendo*, but ought to have pleaded it by Way of Juſtification in Bar of the Action.

3 Leon 94. *Roſſe*'s Caſe.

In Treſpaſs brought by *R.* for breaking his Cloſe and beating of his Servant, and carrying away his Goods; upon Not guilty pleaded the Jury found this ſpecial Matter, *viz.* that Sir *F. B.* Chancellor of *England*, was ſeiſed, and leaſed to the Plaintiff and one *A.* which *A.* aſſigned his Moiety to one *C.* by whoſe Command the Defendant entred: And it was moved in Arreſt, *&c.* that this Tenancy in Common betwixt the Plaintiff and him, in whoſe Right the Defendant juſtifies, could not be given

---

and that it ought to alledge that the Bankrupt hath *conformed*, *&c.* or it is bad, ſo held on Demurrer to ſuch *general* Plea as above.

given in Evidence; ſo it could not be found by Verdict, but ought to have been pleaded ſpecially; but the whole Court was againſt that, and held, that it might be given in Evidence. ‖

‖ There are ſeveral Caſes where one Tenant in Common may maintain Treſpaſs againſt another, and where Tenancy in Common cannot be pleaded in Bar, nor be an Anſwer on the Trial, too numerous and prolix here to ſpecify, therefore *vide* Co. Lit. 199. b. 200. a. b.

In Debt for Rent, if the Leſſor has nothing in the Land, the Leſſee may plead, that the Leſſor *Non demiſit*, and give in Evidence the other Matter. ‡ Co. Lit. 47. b. In Debt for Rent the Defendant may plead *Nil debet*, and give in Evidence *Nil habuit in tenementis*, *per* Holt, Ch. J. Or on ſuch Plea may give Eviction in Evidence. Comb. 238.

‡ But if the Leaſe be by Deed indented, both Parties are concluded. Co. Lit. 47. b.

In Waſte the Defendant may plead *Nul waſt fait*, and give the Lopping of Trees in Evidence. Dyer 92. a. pl. 16.

But if Waſte be aſſigned in Houſes, and the Defendant pleads *Nul waſt*, he cannot give in Evidence that the Houſes were repaired before the Action brought, but ought to have pleaded it ſpecially; for having * Page 65 once committed Waſte, he ought to diſcharge himſelf by ſhewing the ſpecial Matter to the Court, which would have been a good Bar. Dyer 276. a. pl. 51.

In an Action brought againſt *Jacob* a *Goldſmith*, upon a Bill of Exchange drawn by the Lord *Chandos* on the ſaid *Jacob* for 112 Guineas, which was accepted by him, the Defendant pleaded in Bar, that after the 29th of *September* 1664, and before the making that Bill of Exchange; *viz.* on ſuch a Day the ſaid Lord *Chandos* and the Plaintiff *Huſſey* played together with Dice, at a certain Play, called Hazard, upon Tick and Credit, without ready Money, and that the Lord *Chandos* then and there at one Time and Meeting loſt to the Plaintiff the ſaid 112 Guineas upon Tick, and that for the Security of the Payment of the ſaid Guineas loſt as aforeſaid the ſaid Lord *Chandos*, on the Day and Year in the Declaration, *&c.* made the ſaid Bill of Exchange, and directed it to the Defendant, requeſting him to pay, *&c.* and that the Defendant did accept of the ſaid Bill and aſſume upon himſelf, as the Plaintiff had declared, *Quorum præmiſſorum prætextu & vigore ſtatuti in eo caſu edit' & provis'*, the ſaid Bill of Exchange ſo by him accepted, and the Acceptance thereof, and the Promiſe of the ſaid Defendant ſo as aforeſaid made, *devenerunt & fuerunt & modo ſunt vacua & nullius vigoris in lege & hoc, &c.* To which the Plaintiff demurred, and ſhewed for Cauſe, that it amounted to the General Iſſue. *Sed per Cur'*: The Plea is good, both as to the Matter and Form, and that it did not amount to the General Iſſue; and 'tis not a Rule, that becauſe ſuch a Matter may be given in Evidence, therefore it ought not to be pleaded ſpecially; for it often happens to be in the Election of the Defendant, either to plead it ſpecially or not, as he ſhould be adviſed; as for Inſtance, the Pleading a Releaſe, Coverture or Infancy, in an *Aſſumpſit* is certainly good; and yet thoſe Things might be given in Evidence upon *Non Aſſumpſit* pleaded; however the Defendant ſometimes may not be willing to put ſuch Matters of Law to the Judgment of the Jury, or perhaps may deſign to ſave the Coſts of a ſpecial Verdict. Carth. 356. 5 Mod. 175. Salk. 344. pl. 2. Ld. Raym. 87. Comyn. 4. pl. 4. 5 Mod. 175. Carth. 356. Holt. 328. pl. 2. 12 Mod. 96. *Huſſey* v. *Jacob*.

In Debt for Rent, upon *Nil debet* pleaded, the Statute of Limitations may be given in Evidence, for the Statute has made it no Debt at the Time of the Plea pleaded, the Words of which are in the preſent Tenſe: But in caſe on *Non Aſſumpſit* the Statute of Limitations cannot be given in Evidence, for it ſpeaks of a Time paſt, and relates to the Time of making the Promiſe. Salk. 278. pl. 1. ruled by Holt at *Hertford* Aſſizes.

4. Of

4. Of ſham Pleas, and the Conſequence of falſe Pleading.

The Pleading a ſham Plea, or ſuch a one as the Party knows to be falſe, is a great Abuſe on the Juſtice of the Court; and ſuch Pleas have not only been ſet aſide with Coſts, but the Parties cenſured, and otherwiſe puniſhed according to the Diſcretion of the Court.

Sand. 316. *Smith* v. *Yeomans.* If it appears judicially to the Court, on the Defendant's own ſhewing, that he hath pleaded a falſe Plea, this is a good Cauſe of Demurrer; as where the Defendant brought an Indenture into Court, and pleaded that it contained no Covenants, and on Inſpection it appeared to contain ſeveral, Judgment was given againſt him.

2 Inſt. 215. Vent. 213. It hath been holden, that pleading a falſe Plea is within the Statute of *Weſtm.* 1. (3 *Ed.* 1.) *cap.* 29. which my Lord *Coke* ſays was made in Affirmance of the Common Law.

2 Inſt. 215. If therefore, ſays he, a Serjeant, or an Apprentice of the Law, in pleading a Matter of Fact iſſuable for his Client, alledge the ſame to be done at a Town in ſuch a County, where indeed he knoweth there *Page 66 * is no ſuch Town, of Purpoſe to delay Juſtice, *et a' enginer la court*, this is a Deceit within the Statute, and hath been ſo holden.

2 Inſt. 215. And if the Client would have the Attorney plead a falſe Plea, he ought not to do it, for he may plead *Quod non ſum veraciter informatus & ideo nullum reſponſum*, and that ſhall be entered in the Roll to ſave him from Damages in a Writ of Deceit; and if an Attorney ought not wittingly to plead a falſe Plea, *a fortiori* (*a*) a Serjeant or Apprentice ought not to do the ſame.

(*a*) Though Counſel are obliged to be faithful to their Clients, yet not to manage their Cauſes in ſuch a Manner, as Juſtice ſhould be delayed or Truth ſuppreſſed. Vent. 213. *per* Hale.

Cro. Jac. 64. *Davis* v. *Clerk.* In Debt upon an Obligation the Defendant pleaded *Non eſt factum*, and afterwards *Relicta verificatione* confeſſed the Action, and the Judgment againſt him was *in Miſericordia*; and it was moved that it ſhould be *Capiatur*, † becauſe he once denied his Deed, and ſo ought to be fined to the King; and of this Opinion was *Gawdy*; but *Fenner* and *Williams* held otherwiſe, becauſe a Fine is not payable but where he denies his Deed, and it is found againſt him upon a falſe Plea, and the Jurors are troubled with the Trial thereof; there, for troubling the King's Courts, and for troubling the Country, and the Falſity of his Plea, he ſhall be fined and impriſoned; but when it is not found againſt him, but he relinquiſhes his Plea, he ſhall only be amerced, and accordingly the Judgment was affirmed.

† The *Capiatur pro Fine* is taken away, and other Proviſion made in Lieu thereof, by 5 W. & M. c. 12.

Co. Lit. 366. a. In Dower if the Tenant pleads Non-tenure for Part, and Detinue of Charters for the Reſidue, and theſe Pleas are found againſt the Tenant, the Demandant ſhall recover Damages for all the Time, from the Death of her Huſband, without any Defalcation, for which Reaſon the Tenant ought to be careful that he does not plead a falſe Plea.

Dyer 222. Doct. pl. 181. If an Obligation be made to pay Money at a certain Day and Place, Payment before the Day and at another Place is a good Diſcharge; yet in Pleading, if the Defendant ſays that he paid at the ſame Day and Place, according to the Obligation, the Iſſue will be found againſt him unleſs the Jury help him, which they are not obliged to do, his Plea not being in Strictneſs true. § In

§ If the Bond is conditioned to pay *on or before*, Payment before the Day, *ſcil.* ſuch a Day is good. *Anon.* T. 3 Geo. 3. 2 Wilſ. 173.——If Money is payable *at or before* ſuch a Day, and is paid before, it ſhould be pleaded paid at ſuch precedent Day; and Plaintiff may reply, not paid that Day, nor before, nor after. *Fletcher* v. *Hennington*, *P.* 33 Geo. 2. 2 Bur. 944.

In a Formedon if the Tenant pleads Warranty and Aſſets deſcended, and the Demandant takes Iſſue thereon, and the Iſſue is found for the Demandant that Aſſets did not deſcend, and thereupon the Demandant recovers; in this Caſe, although Aſſets afterwards deſcend, yet the Tenant ſhall never have a *Scire Fa.* on the ſame Judgment; for by his falſe Plea he hath loſt the Benefit of the Statute of *Gloceſter*, and of the Statute *De donis* in this Point. Co. Lit. 366. Doct. pl. 180.

If an Heir at Law pleads *Riens per diſcent*, which is found againſt him, there ſhall be a general Judgment of his Body and other Lands and Goods, becauſe of his falſe Plea. Doct. pl. 181. *Vide* Title *Heir and Anceſtor.*

In a Writ of Annuity againſt one as Heir to his Anceſtor the Defendant pleaded, *Non eſt factum patris ſui*, and found againſt him; whereupon it was moved that the Execution ought to be awarded of his proper Lands, and of his Lands deſcended, becauſe he had pleaded a falſe Plea: But *per Cur.* the Denying the Deed to be his Father's was not a falſe Plea in his Cognizance; and although it were falſe, yet being charged in reſpect of his Anceſtor's Deed, the Land of his Anceſtor ſhall only be taken in Execution, for that is the Cauſe of his Charge. Cro. Car. 436.

---

* (H) Traverſe: And herein, *Page 67

1. The Nature thereof.

A Traverſe is the Denial of ſome material Point alledged in the Pleadings, and which, if properly taken, cloſes ‡ the Iſſue. It may be taken to the Declaration, Bar, Replication, *&c.* and therefore, if properly taken to the Declaration, it deſtroys the Plaintiff's Action; if to the Bar, it deſtroys what is ſaid in Avoidance of the Action; and if to the Replication, what was ſaid in Avoidance to the Bar. Doct. pl. 344. 2 Lil. Reg. 586. Co. Lit. 282. Yelv. 195. ‡ In moſt Caſes it does not cloſe, but only offers the Iſſue; and if the Traverſe is material, Iſſue muſt be taken thereon by the adverſe Party: A Traverſe, properly ſo called, being by *abſque hoc*, or without that, that, *&c.* and concluding with a *Verification*. The Author may here, perhaps, mean a general Traverſe, or a poſitive Denial of the moſt material Fact alledged or pleaded by the oppoſite Party; in which Caſe, the Party ſo denying, concludes to the Country: But the common Acceptation of the Term is, where Iſſue is offered in the above-mentioned Form, the Party concluding with a Verification.——*N. B.* A general Traverſe *abſque tali cauſa* concludes to the Country.

But for the better Underſtanding the Nature of a Traverſe, § we ſhall in the firſt Place inſert ſome general Rules that have been laid down herein. § *Vide infra*, 73 & 77, *&c.*

And firſt it is laid down, that where a Matter is expreſsly pleaded in the Affirmative, which is expreſsly denied by the other Party, there a Traverſe is needleſs; becauſe in ſuch Caſe a ſufficient Iſſue is joined. 36 H. 6. 15. Cro. Eliz. 755. Lit. Rep. 15. ſame Rule. Vent. 101. ſame Rule laid down; and that if it were otherwiſe, they might traverſe one upon another *in Infinitum.*

As where in *Audita Querela*, to avoid the Execution of a Recognizance, the Plaintiff ſets forth that it was defeazanced upon the Payment of divers Sums of Money at certain Days, and that he was at the Place appointed, and tendered the Money, and that the Defendant was not there to receive it; the Defendant pleaded *Proteſtando*, that the Plaintiff was not there to pay it, and that he was there ready to receive it, *abſque hoc*, that the Plaintiff was ready to pay it, which being ſpecially demurred to, the Court held the Plea naught; and that there being Cro. Eliz. 754-5. *Huiſh* v. *Phillips.*

being an expreſs Affirmative and Negative, there ſhould have been no Traverſe.

2 Rol. Rep. 35. Hob. 71, 72. So if in an Aſſiſe the Defendant pleads a Feoffment by a Stranger, which he avers to be abſolute and without any Condition, and the Plaintiff replies that it was on Condition, this is ſufficient without any further Traverſe.

6 H. 7. 5, 6. Vent. 213. Lutw. 15. But this Rule, that there ſhall be no Traverſe where the Matter alledged by one Party is expreſsly denied by the other, muſt be underſtood of thoſe Caſes where the Denial makes a compleat Iſſue; for tho' the Matter contradicts, that is not ſufficient without an apt Iſſue is formed upon an Affirmative and Negative, as where the Death of a Man is poſitively alledged on one Part, and his Life by the other Party, here the Death ought to be traverſed §, otherwiſe no Iſſue is joined.

§ *Sed qu. de hoc*, unleſs the Traverſe conclude to the Country?

Hob. 103-4. A Traverſe therefore ſeems to be properly taken when the adverſe Party to the Declaration, Plea, Replication, &c. forſaking the General Iſſue ſets up a Title for himſelf, or ſets forth a particular Specification of his Caſe, with a Juſtification thereof, &c. with a Traverſe, (*a*) *Abſque hoc*, or Denial of the Matter alledged by the adverſe Party, or that the ſame is true in that (*b*) Manner and Form he hath alledged; and ſuch Specification is called an (*c*) Inducement to the Traverſe.

(*a*) That *abſque hoc*, ſo that without that, &c. are the proper Words of a Traverſe. Sand. 22. 2 Salk. 628. pl. 2. Ld. Raym. 349. (*b*) Where the Words *modo & forma* are only Words of Form and not of Subſtance, and the Diverſities therein, *vide* Co. Lit. 281. Doct. pl. 344. (*c*) Such Inducement is ſaid to be ſhewing of croſs Matter contrary to the Allegation of the adverſe Party, Dyer 365. pl. 33.

Sid. 301. Hence it is ſaid to be a Rule, that when any Thing pleaded ſpecially by the Defendant, is directly contrary to the Matter in the De-
* Page 68 * claration, ſuch Plea is not good without a Traverſe; yet it is in the Election of the other Party to wave the Advantage thereof or demur thereupon.

Cro. Car. 336. The Inducement to the Traverſe ought to be (*d*) ſufficient in Matter.

(*d*) Alſo it is ſaid to be a Rule, that nothing can be an Inducement to a Traverſe but ſuch a Thing as is traverſable. 2 Leon. 32. *per* Manwood. ‡

---

‡ And yet *qu.* if the Traverſe is of a material Point, whether any Traverſe can be taken on the Inducement? The Party need not admit the Truth of the Inducement, but may proteſt againſt it. the Effect of a *Proteſtation*, ſee *poſt.* 73. n.

3 Mod. 320. A Traverſe ought not to be taken but where the Thing traverſed is (*e*) iſſuable.

(*e*) That Matter of Law cannot be traverſed, Yelv. 200. nor where Part is Matter of Law, and Part Matter of Fact. 2 Mod. 55.

Cro. Jac. 221. Yelv. 151. *Bedell* v. *Lull.* And therefore where in Ejectment upon a Leaſe made by *E. J.* the Defendant pleaded, that before *E. J.* had any Thing to do, &c. *M. J.* was ſeiſed in Fee, after whoſe Death the Land deſcended to his Heir, and that *E.* entered and was ſeiſed by Abatement; the Plaintiff replied, and confeſſed the Seiſin of *M.* but ſaith, that he deviſed it in Fee to *E. J.* who entered; *abſque hoc*, that *E. J.* was ſeiſed by Abatement: And upon Demurrer this was held to be an ill Traverſe; for the Plaintiff had confeſſed the Seiſin of *M.* and avoided it by the Deviſe, and therefore ought not to have traverſed the Abatement; for having derived a good Title by the Deviſe of the Leſſor, 'tis an Argument that he entered lawfully, and

and it was that alone that was iſſuable, and not the Abatement; therefore it was ill to traverſe that, becauſe it muſt never be taken, but where the Thing traverſed is iſſuable.

The Traverſe is regularly to be taken to the (*a*) moſt material Point alledged by the other Party, and is not to be (*b*) multifarious, but to a ſingle Point. †

(*a*) 2 Sand. 5, 28. Rol. Rep. 235. *& vide infra.* (*b*) 3 Lev. 40, 41.

† Iſſue muſt be taken upon a *ſingle* Point; but it is not neceſſary that this ſingle *Point* ſhould conſiſt only of a ſingle *Fact*. *Per* Lord *Manſfield*, in the Caſe of *Robinſon* v. *Raley*. 1 Bur. 320.

But any Part of what the Defendant (*c*) makes his Title is traverſable; as if in Treſpaſs the Defendant alledge a Seiſin in Fee in *J. S.* and a Demiſe to himſelf; the Plaintiff may traverſe either the Seiſin in Fee, or the Demiſe, at his Election.

Hard. 317. (*c*) But a Defendant cannot traverſe a Matter not alledged in the Declaration. 2 Vent. 79. But if the Plaintiff aſſigns ſeveral Breaches, the Defendant may traverſe any of them. Salk. 138.

Alſo, when the Defendant traverſeth any Part of the Plaintiff's Count or Declaration in a *Quare impedit*, it ought to be ſuch Part as is inconſiſtent with the Defendant's Title, and being found againſt the Plaintiff doth abſolutely deſtroy his Title; if it doth not ſo, however inconſiſtent it be with the Defendant's Title, the Traverſe is not well taken.

Vaugh. 8.

It is laid down as a general Rule in all the Books which ſpeak of this Matter, that there cannot be a Traverſe upon a Traverſe, that Pleadings and Proceedings might not be endleſs; for if that were permitted each Party might go on traverſing *ad infinitum*.

But for the Exceptions to this general Rule *vide infra*.

An Iſſue joined upon an *Abſque hoc* ought to have an (*d*) Affirmative after it.

Co. Lit. 126. (*d*) Salk. 4. pl. 10.

S. P. admitted to be the general Rule; but the Court ſeemed to think, that where an *Abſque hoc* comprizes the whole Matter generally, as *abſque tali cauſa*, it may conclude *& de hoc ponit ſe ſuper patriam*; but where it only traverſes a particular Matter, as *abſque tali warranto*, *&c.* it ought to be averred. 7 Mod. 105. L. P.

In Aſſault and Battery the Defendant pleaded a Releaſe of all Actions, *&c.* The Plaintiff replied, that the Releaſe was gotten by Dureſs, *&c.* The Defendant rejoined, and ſhewed Cauſe why it was not gotten by Dureſs; *abſque hoc*, that it was voluntary, *Et hoc petit* * *quod inquiratur per patriam*; Upon this Iſſue the Cauſe was tried, and the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment that he ought not to conclude to the Country after a Traverſe; becauſe a Traverſe itſelf is negative, and therefore the Defendant ought to have joined Iſſue in the Affirmative; it was admitted that if Iſſue had been joined before the Traverſe it might have been helped by the Statute of Jeofails; but not being ſo in this Caſe the Judgment was arreſted.

3 Mod. 203. * Page 69

If the Defendant's Plea be in the Negative, the Plaintiff need not traverſe it, for a Negative cannot be traverſed; and therefore, if an Executor or Heir in Debt, for a Debt due by the Teſtator or Anceſtor of the Defendant, pleads no Aſſets, or *Riens per deſcent præter*, *&c.* the Plaintiff, without traverſing the *Præter*, may reply generally Aſſets *ultra*, without ſaying what, or where they are.

Palm. 511. 2 Mod. 50. But for this *vide* 8 Co. *Mary Shipley*'s Caſe, Cro. Car. *Dorcheſter* v. *Web*. Hob. 104. Yelv. 165.

But

But for the fuller Explication of this Matter we ſhall conſider more particularly:

2. In what Caſes a Traverſe is permitted.

Cro. Eliz. 80. Leon. 269. Moor 541, 915. Savil, Caſe 63.

It hath been held, on the 26 *H.* 8. *cap.* 3. for Payment of Tenths, and which enacts, *That after Default and Certificate made thereof to the Court, under the Seal of the Biſhop, the Benefice ſhall be void*, that the Party may traverſe ſuch Certificate; for herein the Biſhop acts only as an Officer, not as a Judge.

Rol. Abr. 362.

But if on a Trial of general Baſtardy, the Party be certified a Baſtard by the Ordinary, ſuch Certificate cannot be traverſed; for herein the Ordinary acts as Judge; alſo ſuch Certificate ſhall bind perpetually the Perſon certified a Baſtard though he was not Party to the Suit; as all Perſons are eſtopped to ſpeak againſt the Memorial of any Judicatory, becauſe the Act of the publick Judicatory, under which any Perſon lives, is his own Act; and were they not thus bound, there might be Contradiction in Certificates.

2 Mod. 10. *Whitrong* v. *Blaney.*

If upon a Judgment obtained by *A.* he ſues out a *Scire Facias*, upon which *J. S.* is returned Tertenant, he cannot traverſe this Return of the (*a*) Sheriff.

(*a*) That a Sheriff's Return of a Reſcous cannot be traverſed. Dyer 212. Cro. Eliz. 780.

Hawk. P. C. 142. *Vide* Title *Forcible Entry and Detainer.*

On the Statutes againſt Forcible Entries and Detainers it hath been holden, that one Juſtice of Peace may make a Record of a Forcible Detainer, and that ſuch Record is not traverſable; becauſe the Juſtice of Peace in making thereof acts not as a Miniſter, but as a Judge.

Carth. 74. but for this *vide* Hawk. P. C. 217, 219.

It hath been held, that Preſentments in the Quarter-Seſſions of the Peace, and even in *B. R.* are traverſable; and that if it be ſo in Courts ſuperior to the Leet, *a fortiori* it muſt be ſo in Preſentments at the Leet.

2 Hawk. P. C. 71. 2 Hawk. P. C. 134.

It is held, that wherever an Eſcape is finable, the Preſentment of it is traverſable; but where the Offence is amerceable only, there the Preſentment is of itſelf concluſive, ſuch Amerciaments being reckoned among thoſe *Minima de quibus non curat lex.* §

§ Yet there are Caſes where theſe are traverſable, or their Truth called in Queſtion.——Perhaps in all Caſes, by removing them into *B. R.* or by pleading to Actions brought on them for Recovery of the Amerciaments; or where there is a Diſtreis and Replevin.

But for this *vide* Title *Coroner*, Letter (D).

It is held by ſome Opinions, that an Inquiſition taken by the Coroner *ſuper viſum corporis* cannot be traverſed; alſo in reſpect to that high Credit that the Law gives to an Inquiſition found before a Coroner, it hath been held, that if an Inquiſition finds that a Perſon has * been ſlain, and that *J. S.* hath fled, he forfeits his Goods and Chattels; the Coroner's Inqueſt being of that Solemnity as not to be traverſable.

* Page 70

Rol. Rep. 226. 2 Rol. Abr. 299. Hard. 131. Raym 406.

The Probate of a Will is not traverſable; and herein it is ſettled, that the Eccleſiaſtical Courts having the Probate of Wills, they, as incident to ſuch Juriſdiction, have Power to determine all thoſe Matters that are neceſſary to the authenticating ſuch Teſtament; therefore if the Seal of the Ordinary appears, it cannot be ſuggeſted, or given in Evidence in the Common Law Courts, that the Will was forged, ‡ or

‡ This means as to the per-

or that the Teſtator was *Non Compos*, or that another Perſon was Executor; for of theſe they had proper Juriſdiction, and the Remedy muſt be by Appeal.

ſonal Eſtate only, for as to the real Eſtate, the

Probate in the Eccleſiaſtical Court hath not any Effect, and with reſpect to a Deviſe of Lands, it is every Day's Practice to conteſt in the Common Law Courts, &c. the Validity of a Deviſe, ſetting up Forgery, Inſanity, &c.

If the Ordinary refuſe a Perſon preſented to him for Cauſe, ſuch Cauſe is traverſable; and ſhall be tried by the Metropolitan if the Party be living, but if dead by a Jury; for though the Biſhop be Judge in examining, yet as his Proceedings are not of Record, the Cauſe of Refuſal is traverſable.

Dyer 254. Gouldſ. 351. 3 Leon. 199. 5 Co. 57. but *vide* Show. P. Caſes 88. 3. Lev. 313.

3. In what Caſes a Traverſe is neceſſary.

Herein it is laid down as a general Rule, that where the Matter alledged by the Defendant in his Plea is contrary to the Matter ſet forth in the Declaration, there muſt be a Traverſe or Denial of ſuch Matter ſet forth in the Declaration; ſo if the Replication contradicts the Matter alledged in the Plea, &c. (*a*) as where the Defendant alledges Seiſin in one from whom he claimeth, the Plaintiff cannot alledge Seiſin in another from whom he claimeth, without traverſing, confeſſing or avoiding the Seiſin alledged by the Defendant.

Lutw. 381.

(*a*) Cro. Eliz. 30.

So if it be alledged by the Defendant, that the Party died ſeiſed in Fee, and the Plaintiff alledges that he died ſeiſed in Tail, he muſt traverſe the Dying ſeiſed in Fee, (*b*) becauſe two Affirmatives cannot make an Iſſue.

5 H. 7. 11, 12. Doct. pl. 349. Dyer 312. b. S. P.

(*b*) Leon. 78. S. P.

The Omiſſion of a Traverſe where neceſſary is Matter of Subſtance; and therefore where in Treſpaſs for taking his Horſe the Defendant pleaded, that he was ſeiſed of ſuch Lands, and intitled himſelf to an Heriot; the Plaintiff replied that another Perſon was jointly ſeiſed with the Defendant, *Et hoc paratus eſt verificare*; and on Demurrer it was adjudged for the Defendant, becauſe the Plaintiff ought to have traverſed the ſole Seiſin.

2 Mod. 60. *Snow* v. *Wiſeman*; & *vide* Cro. Jac. 221. that the Plaintiff having ſaid enough in

his Caſe to avoid the Bar, if he had traverſed it alſo it would make his Replication naught. *Et vide* 1 Leon. 43-4. that a Traverſe is but Matter of Form, and the Want thereof ſhall not prejudice the other Party in Point of Judgment; but the Judges ought to judge upon the Subſtance, and not upon the Manner or Form of Pleading; & *vide* Title *Amendment and Jeofail.*

Where a Man confeſſes and avoids he needs not traverſe; but where in *Aſſumpſit* againſt the Defendant as Executor, he pleaded that the Teſtator made *J. S.* Executor, who proved the Will, and took upon him the Execution thereof, and concluded in Abatement; but becauſe he had not traverſed, *abſque hoc*, that he was Executor, or adminiſtered as Executor it was adjudged againſt him.

2 Mod. 168. *Singleton* v. *Bawtree.*

When a Maleſeazance is laid to the Defendant's Charge he ought expreſsly to traverſe it, and not to anſwer it by Argument; but in Waſte the Defendant may ſay it was ruinous, without anſwering expreſsly to the Waſte; ſo in Caſe of an Innkeeper, he may alledge a Robbery without traverſing it was by his Default.

Cro. Eliz. 281.

* In Debt for Rent, the Plaintiff declares on a Leaſe of four Acres of Land at 5*l.* Rent, and for Rent arrear he brought the Action; the Defendant pleads to Port *Nil debit*, and to the Reſidue he pleads, that the Leaſe was of the ſaid four Acres, and of one Acre more, and that

* Page 71 Sand. 206. Sid. 405. Raym. 175. 2 Keb. 467.

Lev. 263. *Salmon* v. *Smith.* before the Rent was arrear the Plaintiff entered into the fifth Acre: On which the Plaintiff demurs; and the Reaſon ſhewn on the Argument was, for that he did not traverſe, that he demiſed four Acres only. But on the other Side it was ſaid for the Defendant, that the Traverſe ought to come on the Plaintiff's Part, *viz.* he ought in his Replication to have maintained the Leaſe in the Declaration, and have traverſed, that he demiſed the fifth Acre. To which it was anſwered, that that would be a Departure from his Declaration, and therefore the Traverſe ought to have been on the Defendant's Part; for when he pleads another Leaſe than that upon which the Plaintiff declared, he ought to traverſe the Leaſe on which the Plaintiff declared, *viz.* to plead the Leaſe of the fifth Acree, *abſque hoc*, that he demiſed the four Acres only; and ſo held the Court, and gave Judgment for the Plaintiff.

Vent 211, 217. Sir *Ralph Bovey's* Caſe. Lutw. 381. S. C. cited. Latch 200. S. P. adjudged. *Et vide* Cro. Jac. 657. In an Action againſt a Sheriff for an Eſcape, the Plaintiff declared, that the Defendant being Sheriff of *Surry* voluntarily ſuffered *J. S.* whom he had in Execution to eſcape, the Defendant, proteſting that he did not let him voluntarily eſcape, pleads, that he took him upon a freſh Purſuit. To which it was demurred; becauſe he did not traverſe the voluntary Eſcape: and reſolved for the Defendant; it being impertinent for the Plaintiff to alledge it, and no ways neceſſary to his Action; and it being out of Time to ſet it forth in the Declaration, being a Matter that ought to come in in the Replication. And *per Hale* C. J. 'Tis like Leaping before one comes to the Stile; as in Debt upon a Bond the Plaintiff ſhould declare, that at the Time of Sealing and Delivery of the Bond the Defendant was of full Age, and the Defendant ſhould plead *Deins age*, without traverſing the Plaintiff's Allegation.

Lutw. 381. *Duppa & al'* v. *Stephens.* But in Debt by the Gentlemen Uſhers of the King for a Fee of 5*l.* due to them from one who had received the Degree of Knighthood, they declared, that Time out of Mind they uſed to receive a Fee of 5*l.* of every Perſon who voluntarily and without Compulſion had received the Degree of a Knight, *&c.* The Defendant pleaded, that he had taken the Degree in ſole Obedience to the King; but becauſe he had not traverſed *abſque hoc, quod def' recepit vel ſuſcepit Gradum Militar' voluntarie & ſine compulſione*, it was adjudged for the Plaintiff; for the voluntary Acceptance of Honour, without Compulſion, is of the Eſſence of the Action, and not like the aforeſaid Caſe of an Eſcape.

Dyer 66. b. pl. 15. In Account againſt one as Bailiff of a Manor ſuch a Year, it is a good Plea, that *J. S.* was his Bailiff that Year; but there he muſt traverſe that he himſelf was not.

Dyer 66. b. So in Eſcape againſt a Gaoler he may plead, that the Priſon was broke open by the King's Enemies, or that it was burnt by ſudden Fire; but then he muſt traverſe, that the Eſcape was not in other Manner, or as the Plaintiff hath alledged.

Poph. 67. If in Treſpaſs the Defendant intitles himſelf by the Feoffment of a Stranger, and the Plaintiff replies and maintains that the ſame Stranger did enfeoff him, this cannot be a good Iſſue *(a)* without a Traverſe of the Feoffment alledged to be made to the Defendant.

(a) That where the Parties in Pleading vary in the Eſtate alledged, or in the Quantity thereof, there ought to be a Traverſe. Yelv. 140.

* Page 72 Stile 150, 198, 210. * In Aſſault and Battery the Defendant pleads a ſpecial Plea, and juſtifies; the Plaintiff replies *de injuria ſua propria*; upon which Iſſue is joined, and a Verdict for the Plaintiff; but in Arreſt of Judgment it was

was held, that the Replication was not good, in not anſwering the ſpecial Matter pleaded, and traverſing *abſque tali cauſa*, ſo that an Iſſue might be joined on an Affirmative and Negative; and therefore the Court ordered a Repleader.

If in Covenant for Payment of Money the Defendant pleads, that he was at *Liſbon* in *Portugal* at the Day of the Payment of the Money which he had covenanted to pay, the Plaintiff may reply, that he was in *England*, without a Traverſe, *abſque hoc*, that he was in *Portugal*. Stile 373.

If Account be brought againſt two, and one of them pleads *Ne unques ſon receiver*; this is good without a Traverſe, that he and his Companion were Receivers. Godb. 43.

If in Treſpaſs for chaſing his Ewes, being great with Lamb, ſo as by driving them he loſt his Lambs, the Defendant juſtifies, that they were Damage-feaſant, and that therefore he drove them to Pound, *&c.* this is naught without a Traverſe ‡; for though he might take and drive them to Pound, yet this ſhould have been without any Prejudice to them, and was therefore a Matter traverſable. 3 Leon. 15.

‡ Inſtead of a Traverſe he ſhould have pleaded he drove the Ewes gently, doing as little Damage as he could, and there would not have been any Occaſion for a Traverſe; nor do I ſee what Traverſe could, properly, have been taken.

If there are two Preſcriptions, one pleaded by the Defendant by way of Bar, the other ſet forth by the Plaintiff in his Replication, without any Traverſe of that which is alledged in Bar, this is naught. 2 Leon. 209, that one Preſcription pleaded againſt another is not good without a Traverſe, *vide* Yelv. 217. 9 Co. 59. 2 Mod. 104. Carth. 116.

As where in Treſpaſs for cutting Oaks the Defendant pleads, that he was ſeiſed of a Meſſuage in Fee, and preſcribes to have *rationabile eſtoverium ad libit' capiend' in boſcis*; the Plaintiff replies, that the *locus in quo* was within the Foreſt, and that the Defendant and all thoſe, *&c. habere conſueverunt rationabile eſtoverium, &c. per liberationem foreſtarii*: And upon a Demurrer the Replication was held naught; becauſe the Plaintiff ought to have pleaded the Law of the Foreſt, *viz. Lex foreſtæ talis eſt*, or to have traverſed the Defendant's Preſcription, and not to have ſet forth another Preſcription in his Replication without a Traverſe. 2 Leon. 209, 210. *Ruſſel* v. *Broker*.

In Treſpaſs for pulling down his Hurdles in his Cloſe, the Defendant juſtified, that *J. S.* was Lord of the Manor of *D.* and that the ſaid *J. S.* and all thoſe whoſe Eſtate he had in the ſaid Manor, had had a free Courſe for their Sheep in the Place where, *&c.* and that the Tenant of the ſaid Cloſe could not there erect Hurdles without the Leave of the Lord of the Manor, and that the ſaid *J. S.* let to the Defendant the ſaid Manor, and becauſe the Plaintiff erected Hurdles without Leave, *&c.* in the ſaid Cloſe he threw them down, as it was lawful for him to do: The Plaintiff replied of his own Wrong, without Cauſe, *&c.* and it was held an ill Replication, becauſe the Plaintiff had not traverſed the Preſcription. 4 Leon. 16. *Ruiſbbrock* v. *Puſanies*.

4. Whether there may be a Traverſe upon a Traverſe.

It is laid down as a general Rule, that there cannot be a Traverſe upon a Traverſe; becauſe that in all Pleadings whereupon a Traverſe is Co. Lit. 282. Hob. 104. Hutt. 97. Sand. 20, 22. Vaugh. 62. 1 Jon. 216. Cro. Car. 105.

§ *Vide ante*, 67. n. properly taken, the Iſſue is cloſed § ; and therefore a Traverſe cannot be taken on a Traverſe, for a Traverſe muſt be a material Point ; and if to the Declaration it deſtroys the Plaintiff's Action ; if to the Bar, it * deſtroys what is ſaid in Avoidance of the Action ; and if to the Replication, what was ſaid in Avoidance to the Bar, *& ſic de cæteris*, and conſequently a ſubſequent Traverſe will be inſignificant ; becauſe (*a*) when a material Traverſe is taken the Reſt ſtands confeſſed.

* Page 73

(*a*) That whatever is traverſable and not traverſed is admitted ‡. Salk. 91.

---

‡ This is avoided by proteſting againſt every Thing the Party does not mean to admit : Tho' the Proteſtation does not put the adverſe Party to prove what is ſo proteſted againſt, where Iſſue is taken on another Point ; but the Proteſtation operates as an Excluſion of a Concluſion ; or, in other Words, the Record cannot, as to the Points proteſted againſt, be uſed as Evidence againſt the Party proteſting, as to thoſe Points ; becauſe by proteſting he has denied them : Had he not proteſted, thoſe Points might, perhaps, as between the ſame Parties in another Suit relative to the ſame Matter, be conſidered as admitted : And the Party proteſting might in ſuch ſubſequent Cauſe find it neceſſary to offer an iſſue on ſome Point that came under the *Proteſtando* in a former Cauſe.

Hob. 104. This Rule is thus laid down by my Lord *Hobart*, That regularly whenſoever a Traverſe is taken apt and material to the Plaintiff's Title, the Plaintiff is bound to it, and cannot for the ſame Thing leave it, and force the Defendant to accept another Traverſe tendered by him.

20 H. 4. 2. 12 E. 4. 6. 2 Rich. 3. 9. Hob. 104. But if a Man brings an Action of Treſpaſs for breaking his Cloſe on a certain Day, if the Defendant plead a Releaſe of Actions he ſhall traverſe all Treſpaſſes after ; if a Feoffment, he ſhall traverſe all Treſpaſſes before ; if a Licence for once, all before and after ; and in theſe Caſes the Plaintiff hath it in his Choice to leave the Traverſe, and traverſe the Point of Juſtification, *ſſ.* the Releaſe, Feoffment or Licence ; or he may alledge a Treſpaſs before or after, and ſo join upon the Traverſe offered, which is Traverſe after a Traverſe, but yet is not according to the Rule, a Traverſe upon a Traverſe to the ſelf-ſame Point.

Hob. 104. So if a Man brings an Action of Waſte for felling of Trees, and lays that the Leſſee felled and ſold them, and the Defendant confeſſes that he felled them, but ſaith that he beſtowed them in repairing the Houſe, *abſque hoc*, that he ſold them ; the Plaintiff may reply that he let them not, or any like Caſe of Waſte, *abſque hoc*, that he employed them in Reparations ; and though this be a Traverſe upon a Traverſe, and directly to the ſame Thing, yet it is out of the above-mentioned Rule, becauſe the Traverſe in this Caſe was not material ; for the Plaintiff might have declared of the Selling only, and the other Point was mere Surpluſage.

Poph. 107. Cro. Eliz. 418. Moor 350. S. C. *Paramor* and *Verrald*. 2 Lutw. 1437. S. C. cited. and like Point adjudged, Cro. Eliz. 99. S. P. adjudged. If Aſſault and falſe Impriſonment be laid in *London*, and the Defendant pleads a ſpecial Juſtification in (*b*) another County, with a Traverſe or *abſque hoc*, *&c.* the Plaintiff may maintain his Action, and traverſe the ſpecial Matter alledged by the Defendant, though this be a Traverſe upon a Traverſe ; for as the Matter alledged by the Defendant may be falſe, it would be unreaſonable by ſuch Falſity to ouſt the Plaintiff of the Liberty the Law gives him, of laying his Action in the proper County where the Cauſe ariſes.

(*b*) There never ſhall be a Traverſe upon a Traverſe, but where the Traverſe in the Bar takes from the Plaintiff the Liberty of his Action for the *Place* or *Time*, or ſuch like, there the Plaintiff may maintain his Action for the *Place* or *Time*, and may traverſe the Inducement to the Traverſe, and needs not to join with the Defendant in the Traverſe, but at his Pleaſure may do the one or the other ; but when the Inducement is made and concluded with a Traverſe of a *Title* ſhewn by the Plaintiff, there the Plaintiff is inforced to maintain his Title, and not to traverſe the Inducement to the Traverſe. Cro. Car. 105. 2 Lutw. 1630. S. P.

In

In Treſpaſs the Defendant juſtifies his Entry by the Command of *J. S.* Plaintiff replies, and ſhews that *J. S.* was ſeiſed in Fee, and let unto him at Will, and traverſeth the Command of *J. S.* the Defendant maintains his Plea, that *J. S.* commanded him to enter, and that he entered by his Command, and traverſeth the Leaſe at Will; and it being hereupon demurred, it was adjudged for the Plaintiff, that the Command was traverſable, and that therefore the Defendant's Rejoinder to make a Traverſe upon a Traverſe is not good. Cro. Car. 586. *Thorn* v. *Shering.*

Where one traverſes a Thing which he had before confeſſed and avoided, this is merely Form, and aided upon a general Demurrer; * for the other Party might traverſe that Traverſe, and alſo the Inducement to it. Carth. 166. 2 Lutw. 1632. * Page 74

Where to an Indictment for not repairing a Bridge the Defendants plead, that *A. B.* ought to repair the Bridge mentioned in the Indictment, and take a Traverſe to the Charge againſt themſelves; the Attorney General in this ſpecial Caſe may take a Traverſe upon a Traverſe, and inſiſt, that the Defendants are bound to the Repairs, and traverſe the Charge alledged againſt *A. B.* and an Iſſue ought to be taken on ſuch ſecond Traverſe; and the Attorney General may afterwards ſurmiſe, that the Defendants are bound to repair it, and then the whole Matter ſhall be tried by an indifferent Jury. 2 Lev. 112. Sid. 140. Hawk. P. C. 221.

So though regularly a common Perſon cannot take a Traverſe upon a Traverſe, yet the King by his Prerogative may, upon a Title diſcloſed in the Traverſe of the Party, deſert his own Title, and take a Traverſe to ſuch Matter diſcloſed, though this be a Traverſe upon a Traverſe. Vaugh. 62, 64. Mod. 280. Standf. 64. for this *vide* Title *Prerogative.*

In Debt on an Obligation conditioned to appear on a Bill of *Middleſex*, returnable *die Sabbati prox' poſt quinden' Paſch.* the Defendant pleads, that he was arreſted on a Bill returnable *die Veneris*, and pleads the Statute of 23 *H.* 6. (*c.* 9.) and that the Bond was given for Eaſe and Favour. The Plaintiff replies, that he was taken on a Bill returnable *die Sabbati*, and not *die Veneris.* The Defendant rejoins, that he was taken by virtue of a Bill returnable *die Veneris*, *abſque hoc*, that he was taken by virtue of a Bill returnable *die Sabbati*; on which the Plaintiff demurred: And it was argued, that the Rejoinder was ill, and a Traverſe upon a Traverſe; for when the Plaintiff replied, that he was taken by a Bill returnable *die Sabbati & non die Veneris*, the *& non die Veneris* was a Traverſe, whereon the Defendant might have joined, and taken Iſſue. On the other Side it was argued, that the *& non* was not any Traverſe, at leaſt not a formal Traverſe, or ſuch as the Books mention, that a Traverſe cannot be taken on a Traverſe; and to have joined Iſſue on the *& non die Veneris* would have made an immaterial Iſſue; for it matters not whether he were taken by virtue of a Bill returnable *die Veneris*, or not; for if he were not arreſted on a Bill returnable *die Sabbati*, the Bond is void by the Statute; but if he were taken on a Bill returnable *die Sabbati*, 'tis good, for that only is traverſable and triable; and ſo held the Court. Lev. 192. Saund. 20, 21. 2 Keb. 94, 105. S. C. *Bennet* v. *Pilkins.*

In Debt upon a Specialty for 200*l.* which was to this Effect, ſſ. *The Defendant did declare from his Heart before God, that he had taken the Plaintiff to be his Wife, as ſhe had taken him for her Huſband; and the more to confirm the ſaid Plaintiff, that he had no Deſign but to perform his Promiſe aforeſaid, he (the ſaid Defendant) obliged himſelf by the ſame Deed to pay unto the Plaintiff* 200*l. if he ſhould happen to be ſo baſe as to be worſe than his Word; and that if he did not pay it when demanded, ſhe (the Plaintiff) ſhould have good Right to ſue and recover it by Law,* &c. The Breach aſſigned was, that ſhe had tendered herſelf to marry the Defendant, but that he refuſed, and, afterwards married another Woman, Carth. 99, 100. *Croſſey. Hunt.*

Woman, *per quod actio accrevit*. The Defendant pleaded, that he, after the making of the aforeſaid Writing, *obtulit ſe* to marry the Plaintiff, and ſhe refuſed; *abſque hoc*, that he refuſed to take her for his Wife before ſhe had refuſed to take him for her Huſband. The Plaintiff replied, that ſhe tendered herſelf to marry the Defendant, and he refuſed; *abſque hoc*, that the Defendant offered himſelf to marry the Plaintiff; & *hoc*, &c. And upon a Demurrer to this Replication, it was inſiſted for the Defendant, that the Traverſe in it was ill; becauſe ſhe had traverſed that which was the Inducement of the Traverſe in the Bar, ſo that it is a Traverſe upon a Traverſe, which the Law will not allow; beſides, the Words of this Deed are *in præſenti*, and not executory, but declaratory of an Act executed. On * the other Side it was argued, that the Words in this Deed are ſufficient to create a wrong Contract, and that of the higheſt Nature, for God is called as a Witneſs to it; and theſe Words cannot import any other Senſe, but only a Contract to marry the Plaintiff: That the Traverſe in the Bar is ill, becauſe it is too large; for the Defendant had traverſed more than was alledged in the Declaration; ſſ. *abſque hoc*, that he had refuſed to take the Plaintiff for his Wife before ſhe had refuſed to take him for her Huſband, ſo that he intended to make this Circumſtance of Time Parcel of the Iſſue; whereas there is no ſuch Circumſtance alledged in the Declaration, nor any Affirmation, that the Defendant had refuſed before the Plaintiff had refuſed; and therefore, becauſe the Traverſe in the Bar was idle and frivolous, the Plaintiff might well traverſe the Subſtance of the Matter of the Bar; and of this Opinion was the Court, as well to the Pleading as to the Matter in Law.

* Page 75

5. To what Point the Traverſe ſhall be taken; and therein what Matters are traverſable, and of the Manner of taking thereof.

2 Sand. 5, 28. 6 Co. 24. a. Rol. Rep. 235. Carter 217. Lane 18.

Herein the general Rule is, That the Traverſe muſt be taken to ſome material Point alledged by the adverſe Party, which, if found for him who takes it, abſolutely deſtroys the adverſe Party's Right, by ſhewing, that he hath none in Manner and Form as he hath alledged; and being to the *(a)* principal Point alledged puts an End to the Matter.

(*a*) A Traverſe ſhould be always of ſuch Part, as if found for the Defendant deſtroys the Plaintiff's Action. Comb. 321.

Poph. 161. Latch 12. Noy 75. Bendl. 116. Palm. 397. S. C. *Conſtable* v. *Clobery*

If in Covenant on a Charter-party the Plaintiff declares, that upon the Ship's going with the next fair Wind, &c. he the Defendant ſhould pay ſo much; the Defendant by way of Traverſe ſays, that the Ship did not go with the firſt fair Wind; and this was held an ill Traverſe, not being to the principal Point or Giſt of the Action, which is the going of the Ship, and not the Nature of the Wind.

Lutw. 935, 1560.

A Traverſe muſt be taken to ſome Matter alledged; and therefore, where in falſe Impriſonment the Defendant juſtified by Proceſs out of an Inferior Court, and the Plaintiff replied, that the Cauſe of Action accrued out of the Juriſdiction; *abſque hoc*, that it accrued within the Juriſdiction, the Traverſe is ill, being of a Matter not alledged before; but it was held, that this being only an immaterial Traverſe, no Advantage could be taken of it on a general Demurrer, and that then the Reſidue of the Replication ſhould ſtand good.

Sand. 21. Vaugh. 3.

If any Thing in the Count be traverſed, it muſt be ſuch Part as, if true, is conſiſtent with the Defendant's Title; and if falſe, or found againſt

against the Plaintiff, doth absolutely destroy his Title; nay, if the Traverse leaves no Title in the Plaintiff, then it is good, whatever comes of the Defendant's. Show. Parl. Ca. 220-1.

In a *Scire Facias* against *A.* and his Wife, reciting, that the Wife *dum sola fuit* recovered in the King's Bench, in an Action upon the Case, 26 *l.* 13 *s.* 4 *d.* for Damages and Costs, and had Execution of these Damages, and is thereof possessed; and whereas afterwards the said Judgment was removed by Writ of Error into the Exchequer Chamber, and there reversed, and Restitution awarded; and afterwards she took the said *A.* to Husband: The Plaintiff thereupon brought this Writ to have Restitution. The Defendant pleaded, that after the Reversal had, and before the Purchase of this Writ, he paid to the Plaintiff the said Debt and Costs of 26 *l.* 13 *s.* 4 *d.* *absque hoc*, * that they be *possessionati* of the said Money *prout:* And upon Demurrer the Plea and Traverse were both held ill; and 1*st*, Three Judges held the Plea ill, because it is grounded and affirmed against a Record; for a Payment being against Matter of Record cannot be a Discharge, unless by Matter of Record. 2*dly*, Admitting it a good Plea, yet it is ill as pleaded; for he doth not rely upon it, but traverseth that which is not material, *viz.* *absque hoc*, that he is *possessionatus*, &c. which was idly alledged, and not material or traversable; and by this Traverse he waives his Pleading of the Payment, which being (*a*) specially shewn for Cause of Demurrer, the Demurrer is good: But *Berkley* held, that Payment had been a good Plea, if he had relied thereupon; because that he avers, that thereby the Party is satisfied; and that in divers Cases Matter in Fact may be pleaded in Discharge; as in Debt upon an Escape, he may plead, that the Plaintiff commanded him to let him out of Execution, and such like, &c. but as to the Traverse he conceived it ill; and therefore agreed with the other Justices, that Judgment should be given for the Plaintiff. Cro. Car. 328. *Vezey* v. *Harris & ux'.* * Page 76 (*a*) That an immaterial Traverse is aided by 27 Eliz. c. 5. unless it be specially demurred to. Dyer 366. Yelv. 151. Co. Ent. Cro. Jac. 505. 2 Lutw. 221.

In Trespass and Ejectment † the Defendant pleads, that the Plaintiff disseised *J. S.* of the Land, and then made a Lease of it to him, and that afterwards the Land descended to the Plaintiff. The Plaintiff replies, that he was seised of the Lands, and traversed the Disseisin on *J. S.* And on Demurrer, because he had not traversed the Descent, and not the Disseisin, it was held by *Rolle* C. J. that the traversing the Disseisin makes an End of all, and was therefore well taken, being the most material Matter, although the Descent might likewise have been traversed. Stile 344. *Vide* v. *Holland.* † All Matters of Defence in Ejectment are now given in Evidence on the General Issue. If the Lands are not within the Cognizance of the Court, Application should be made by Motion to stay Proceedings, otherwise Defendant must enter into the common Rule.

Trespass upon the Case brought by Bill in the King's Bench, that the Defendant's Father held of him such Land by Knight's Service, and died in his Homage, his Heir within Age, and that he tendered unto him a convenient Marriage, and shews what, &c. and demanded of him the Value of the Marriage, &c. The Defendant *protestando* to the Tenure, *pro placito* traverseth the Tender, &c. and hereupon the Plaintiff demurred: And it was resolved that the Plea was ill, for the Tender is not traversable. ‡ Cro. Car. 502. *Arundel* v. *Sanders.* ‡ Why was not the Tender traversable if taken in the Words of the Declaration; as, if the Marriage tendered was not convenient or proper, how could the Plaintiff be intitled to recover?

If the Plaintiff in his Replication sets forth a Grant of Copyhold Lands such a Day, and by such a Seneschal; and the Defendant by way of Yelv. 122-3. *Lane* v. *Alexander.*

of Rejoinder maintains his Bar, and traverſes the Grant to the Defendant the ſaid Day, and by the ſaid Seneſchal, the Traverſe is ill; for the principal Point is the Grant, which may be at another Court and Day, and by another Seneſchal, and yet good. ‖

‖ He might have traverſed the Grant, in *Manner* and *Form*, &c.

Yelv. 122. If a Feoffment by Deed ſuch a Day be pleaded, there can be no Traverſe to the Day, becauſe the Eſtate paſſes by Livery, and not by the Deed.

6 Co. 24, 25. Cro. Eliz. 650. Moor 551. *Helyar*'s Caſe. 2 Vent. 212. S. C. cited, and held to be only Form, and aided by the 27 Eliz. c. 5. A Difference hath been taken between pleading a Feoffment and a Grant of a particular Eſtate; that in the firſt Caſe, if the other will intitle himſelf by an elder Feoffment, he ought to traverſe, but not in the laſt Caſe; becauſe a Man may come to a Fee-ſimple by divers Means, *viz.* by Diſſeiſin and Tort, or by lawful Means; and therefore, when one intitles himſelf to a particular Eſtate by an elder Grant, he ſhall not traverſe the laſt Grant, but ſhall compel the other to ſhew by what Title he claims it after the elder Grant. †

† The Party having the elder Grant may confeſs the other, and avoid its Effect, by ſhewing his own; and if made by a different Grantor, he ſhould ſhew that before ſuch other Grantor had any Thing in, &c. his Grantor was ſeiſed, &c. and made ſuch elder Grant.

Marc. 21. A Man pleaded a Deſcent of a Copyhold in Fee; the Defendant, to take away the Deſcent, pleaded, that the Anceſtor did ſurrender to the Uſe of another; *abſque hoc*, that the Copyholder died ſeiſed: And the Opinion of the Court was, that it was no good Traverſe; becauſe he traverſed that which needed not to be traverſed; for being Copy-
* Page 77 * hold, and having pleaded a Surrender of it, the Party cannot have it again, if not by Surrender, as in *Hellyar*'s Caſe *ſupra*; for as none can have a Leaſe for Years but by lawful Conveyance, ſo none can have a Copyhold Eſtate if not by Surrender.

Doct. pl. 365. 6 Co. 24. S. P. and that where there are ſeveral material Things alledged, it is in the Election of the Party to traverſe which he pleaſes. In Treſpaſs the Defendant pleads, that *A.* was ſeiſed, and infeoffed *B.* who infeoffed *C.* who infeoffed *D.* whoſe Eſtate the Defendant hath; in this Caſe the Plaintiff may traverſe which of the Feoffments he pleaſes.

Sid. 227. *Palm* v. *Fleſhees.* If in Treſpaſs or Caſe the Plaintiff declares that *J. S.* was ſeiſed in Fee, and made a Leaſe to him, and the Defendant pleads that *J. N.* was ſeiſed in Fee, and leaſed to him, &c. this Seiſin of *J. N.* ſhall be intended by Diſſeiſin, for he ought to have traverſed the Seiſin of *J. S.* and ſaid, that long before ſuch a one was ſeiſed, &c.

Cro. Jac. 681. 2 Rol. Rep. 262. S. C. *Baker* v. *Blackman.* In Treſpaſs the Defendant pleads, that long before the Treſpaſs one *James Stephens* was ſeiſed in Fee, and 12 *Eliz.* infeoffed *Thomas Norwood* to the Uſe of *James Baker* and *Mary* his Wife, and the Heirs of their Bodies; and that they had Iſſue *Henry Baker*, and died ſeiſed, which deſcended unto him, and from him to his three Daughters, and juſtifies by their Leaſe, and gives Colour to the Plaintiff; the Plaintiff replies, that long Time before the Treſpaſs Sir *Thomas Tyrrel* was ſeiſed in Fee, and gave it to *Edward Baker* and *Joan* his Wife, and the Heirs Male of their Bodies, and that they had Iſſue the ſaid *James Baker* and the Plaintiff; and that *James* had Iſſue *Henry* and died, which *Henry* died without Iſſue Male; wherefore he as Heir Male entered, and that the Defendant committed the Treſpaſs, &c. and traverſeth the Seiſin in Fee alledged in *James Stephens*; whereupon the Defendant demurred, and ſhews that he traverſeth the Seiſin in Fee of *James Stephens*, whereas he ought

ought to have traverſed the Gift in Tail, which is the principal Matter of the Bar; but the Court held that it was in his Election to traverſe the one or the other.

Where by the (*a*) Inducement or Conveyance to the Action the Defendant is ouſted of his (*b*) Law, there the Defendant may as well traverſe the Conveyance as the Giſt of the Action. Dyer 121. b. Leon. 252. S. P.

(*a*) But where a Diſſeiſin is alledged by Way of Conveyance to the Title or Poſſeſſion of the Plaintiff, it need not be traverſed. Dyer 635. b. pl. 34. (*b*) Where the Conveyance to the Action is that which doth intitle the Plaintiff to the Action, it may well be traverſed if the Defendant cannot wage his Law; otherwiſe where he may wage his Law. Cro Eliz. 169, 201. S. P.

In *Aſſumpſit*, ſuppoſing that ſuch a Day 4 *Jac.* upon an Account betwixt them, the Defendant was found in Arrear in ſuch a Sum, and aſſumed to pay, *&c.* the Defendant pleads that ſuch a Day 4 *Jac.* they accounted, and then he was found in Arrear ſuch a Sum as the Plaintiff ſuppoſed, and that the ſame Day he made an Obligation for the Payment thereof, and traverſeth that any other Day after the Obligation made they accounted together *prout*, *&c.* and it was thereupon demurred; for that the Account (which is the Cauſe of the *Aſſumpſit*) is not traverſable, nor the Time, for it is but an Inducement and Conveyance to the Action: But the Court held that the Account which was the Ground of the Promiſe was well traverſable; wherefore it was adjudged for the Defendant. Cro. Jac. 234. Yelv. 171. Bulſt. 16. S. C. *Dalby* v. *Cook*.

It is ſaid, that the Conſideration of a Promiſe is never traverſable, nor allowed to be traverſed, but 'tis the Promiſe itſelf which is traverſable; but herein a (*c*) Difference is taken between a Conſideration * of a Promiſe which is executed, and a Conſideration which is executory; that the one is not traverſable, but the other is. * Page 78 Cro. Eliz. 201. Rol. Rep. 43, 401. Carth. 82.

(*c*) The Difference between a Promiſe upon a Conſideration executed and executory is, that in that executed you cannot traverſe the Conſideration by itſelf, becauſe it is paſſed and incorporated, and coupled with the Promiſe. Hob. 106.

In Trover and Converſion the Converſion is traverſable; for it is the Subſtance of the Action, and the Tort ſuppoſed in him, and ſo may well be traverſed; for if one finds Goods, but doth not convert them, no Action lieth. Cro. Eliz. 97. *per* Coke; but for this *vide* Title *Trover and Converſion*.

In Debt on an Obligation of 100 *l.* dated 12 *Julii* 10 *Car.* 1. with Condition for the Payment of 58 *l.* at the End of ſix Months; the Defendant pleads the Statute 21 *Jac.* 1. (*c.* 17.) of Uſury: The Plaintiff replies that he lent the 50 *l.* for a Year, and that the Defendant ſhould pay 8 *l.* for the Forbearance for a Year; and that, by the Scrivener's Miſtake, it was made payable at the End of Half a Year. The Defendant rejoins, that the Lending was only for half a Year, and that he was to pay for it 8 *l.* for that Time; and traverſeth, that upon the ſaid 12 *July* it was agreed the Loan ſhould be for one intire Year, or that he ſhould forbear it for a whole Year. And it was held, that this Traverſe in the Rejoinder, making the Day Parcel of the Iſſue, was ill; and that the Agreement only was traverſable. Cro. Jac. 501. *Neviſon* v. *Whitley*.

In Treſpaſs for Goods carried away, or Battery, or falſe Impriſonment, if the Defendant pleads that he is Not guilty in the Manner as the Plaintiff ſuppoſes, and it be found that he is guilty at another Day, or in another Town or County than the Plaintiff ſuppoſes, yet he ſhall recover; for in tranſitory Actions the Defendant ſhall not traverſe the County or Town where the Fact is laid, without ſome ſpecial Cauſe of Juſtification, which is ſo local that it cannot be alledged in another Place; Co. Lit. 282. Style 382. Leon. 39. 2 Leon. 79. Rol. Rep. 265, 395.

Place; as where a Conſtable of a Town in another County arreſts a Man for a Breach of the Peace, in which Caſe, if an Action be brought againſt him, he ſhall traverſe the County, and all other Places, ſaving the Town whereof he is Conſtable; (*a*) ſo where the Defendant juſtifies for Damage-feaſant, &c.

(*a*) Cro. Eliz. 667. S. P. adjudged.

Cro. Eliz. 184. *Cowleigh* v. *Edwards.* In falſe Impriſonment for impriſoning him at *Briſtol*, the Defendant juſtifies, for that he arreſted him at *Glouceſter* by virtue of a Commiſſion of Rebellion; *abſque hoc*, that he was guilty at *Briſtol*; and it was moved that the Traverſe was not good, the Cauſe of Juſtification not being local, and therefore he might have juſtified in the Place where the Action was brought; otherwiſe if the Commiſſion had been to arreſt him at *Glouceſter*; and of this Opinion was *Wray*.

Cro. Eliz. 705. *Peacock* v. *Peacock.* In Treſpaſs for an Aſſault and Battery laid in *London*, the Defendant pleaded, that the Plaintiff entered into his Houſe in *Waltham* in the County of *Eſſex*, and that he *molliter manus impoſuit* to put him out of his Houſe; *abſque hoc*, that he is guilty *extra Waltham*, and this was held a good Traverſe, the Cauſe of Juſtification, *viz.* the Defence of his Houſe, being local; *ſecus* if the Juſtification had been perſonal and tranſitory, and ſuch as might have been alledged in any Place.

Cro. Jac. 44, 45. *Wadhurſt* v. *Damme.* In Treſpaſs laid *apud Edinbridge in Comitat. Cant.* for killing his Dog, the Defendant pleaded, that *J. S.* was ſeiſed in Fee of a Warren in *D.* in the ſame County, whereof he is and then was Warrener, and that his Dog was divers Times killing Conies there, and therefore, finding him there *tempore quo*, &c. running at Conies, he there killed him; *abſque hoc*, &c. that he is guilty *apud Edinbridge prout*, &c. And on Demurrer it was objected, that he had traverſed the Place only, &c. and had not traverſed all other Places: But the Court held, that the Traverſe was good, his Cauſe of Juſtification being local, and that he needed not alledge any more than that Place.

* Page 79 Cro. Jac. 372. *Bateman* v. *Woodcock.* Cro. Eliz. 868. S. P. adjudged. * Treſpaſs of Aſſault, Battery, and Wounding in *London*; the Defendant juſtifies in the County of *Norfolk*, by virtue of a Warrant from the Sheriff of *Norfolk*, upon a Writ of *Latitat*, *Quæ eſt eadem tranſgreſſio*, &c. *abſque hoc*, that he is guilty in *London*, *vel alibi extra Comitatum Norf'*. On Demurrer one Objection was, that he had juſtified and alſo traverſed, which he ought not to have done: But the Court held it well enough; for the Juſtification being in another County, the County wherein the Action is brought ought to be traverſed; and the Plaintiff may maintain the Action and Iſſue, if he will, or he may traverſe the Defendant's Plea, at his Election.

Hob. 104. Carter 207. Sid. 293-4. Sand. 14. Lev. 241, 307. If a Man bring an Action of Treſpaſs for breaking his Cloſe on a certain Day, if the Defendant plead a Releaſe of Actions, he ſhall traverſe all Treſpaſſes after; if a Feoffment, he ſhall traverſe all Treſpaſſes before; if a Licence all before and after.

2 Mod. 68. That where the Juſtification goes to a Time and Place not alledged by the Plaintiff, there muſt be a Traverſe of both.

3 Bulſ. 209. Rol. Rep. 406. S. C. *Amſon* v. *Walcot.* In Treſpaſs laid to be done 1 *May*, the Defendant pleads a Releaſe made to him 1 *Junii*, and traverſes, *abſque hoc*, that he was guilty at any other Time after the firſt of *June*; and this was held an ill Traverſe; for the Day not being material in Treſpaſs, he ought to have traverſed, *abſque hoc*, that he was guilty before or after 1 *Junii*.

Cro. Eliz. 87. *Higham* v. *Reynold.* If in Treſpaſs for entering a Houſe the Defendant ſays, that it was the Freehold of *J. S.* and juſtifies 27 *Eliz.* a Year before the Treſpaſs ſuppoſed, and traverſes the Time before 27 *Eliz.* but ſays nothing as to the

the Time after; yet the Traverſe is good; for when he pleads his Freehold, or the Freehold of another, it ſhall be intended ſo to continue, unleſs the contrary be ſhewn, and therefore no need of traverſing the Time after.

Herein alſo this Difference hath been agreed, that where a general Action is brought, in which the Time is not material, there, upon a Traverſe to the Fact charged upon the Defendant, he muſt add *abſque hoc*, that he was guilty either before or after; but where the Thing traverſed is not to the Point of the Action, (though the Caſe may be ſo, that, if it happened before or after, the Action might have lain) the Party need not add *abſque hoc*, that he did it before or after, and this, whether the Traverſe comes in of the Plaintiff's Part or the Defendant's. Sid. 234. Keb. 680, 812.

In Caſe upon ſeveral Promiſes, the Statute of Compoſition of two Thirds was pleaded in Bar; but the Plaintiff ſhewed the Contract to have been ſince the Time of the Statute, which the Defendant did not traverſe in his Plea, as he ought to have done; and therefore Judgment was given for the Plaintiff; for if you vary from the Time in the Declaration, and make ſuch Variance material, you ought to traverſe the Time in the Declaration. 7 Mod. 16. *Beverly* v. *Pem.*

Treſpaſs and Impriſonment laid the firſt of *May* 17 *Car.* 2. The Defendant juſtifies, as Sheriff of *Coventry*, to arreſt him for a Breach of the Peace made upon him in the Execution of his Office, for which he arreſted him, and carried him before the Mayor; and traverſed all the Time before he was Sheriff, or afterwards; and the Traverſe was adjudged good, though it was objected to be too (*a*) large. Lev. 216. *Lawv. King.*

(*a*) If the Traverſe be taken more narrow than it need, being to the Prejudice of the Party, no Jeofail. 2 Lev. 81. —— But where the Traverſe contains more than is alledged in the Breach, it is not good. 3 Lev. 167.

If in Ejectment the Defendant pleads a Surrender of a Copyhold by the Hands of *J. S.* then Steward of the Manor, and Iſſue is joined; *abſque hoc*, that he was Steward; this is naught, for the Traverſe ought to be general, that he did not ſurrender; for if he were not Steward the Surrender is void; ſo of a Surrender pleaded into the Hands of the Tenant of the Manor. Cro. Eliz. 260. *Wood* v. *Butts.* * Page 80

In Battery, the Defendant pleads a Judgment obtained by *A.* his Father, and an Execution thereupon, whereon the Goods of *J. S.* were taken in Execution; and that the Plaintiff aſſaulted the Bailiffs, and would have reſcued the Goods; whereupon in Aid of the Bailiffs, and by their Command, the Defendant *moliter manus impoſuit* upon the Plaintiff to prevent his Reſcue of the Goods. The Plaintiff replied, *De injuria ſua propria*; *abſque hoc*, that the Defendant by Command of the Bailiffs, and in Aid of them, to prevent a Reſcue of the Goods, &c. whereupon the Defendant demurred generally: And upon Argument it was reſolved, 1*ſt*, That the Replication in traverſing the Command of the Bailiffs was not good, for he might of himſelf do that to prevent the Reſcue, which is a Tort and Breach of the Peace. 2*dly*, The Defendant's Plea is ill, for the Action was brought as for a Battery at *D.* and the Defendant juſtifies at *S.* in the ſame County, whereas the Bailiffs have Authority through the whole County, and therefore the Cauſe of Juſtification in the ſame County not local; ſo that he ſhould have conformed and juſtified in the ſame Place, being the ſame County where the Plaintiff declared; and if the Place had been material, he ought to have traverſed all other Places within the ſame County; & *ſic quocunque via data* the Plea was held ill. 3 Lev. 113. *Bridgwater* v. *Bythway.*

In Replevin the Defendant makes Conuſance as Bailiff to *J. S.* Plaintiff pleads, that he took them *de injuria ſua propria*; *abſque hoc*, that he Salk. 107. pl. 1.

he

Trevilian v. *Pyne.* (a) For this *vide* Cro. Eliz. 14. Rol.Rep. 46. 2Leon. 215. Yelv. 148. Comb. 471.

he was Bailiff to *J. S.* To which it was demurred: And after Argument the Traverſe was held to be well taken; and a (a) Difference obſerved between an Action of Treſpaſs *Quare Clauſum fregit*, and an Action of Treſpaſs for taking Cattle or Replevin: In the firſt Caſe, if the Defendant juſtifies an Entry to the Cloſe by Command, or as Bailiff to one in whom he alledges the Freehold to be, the Plaintiff ſhall not in his Replication traverſe the Command; becauſe it would admit the Truth of the Reſt of the Plea, *viz.* that the Freehold was in *J. S.* and not in the Plaintiff; which would be ſufficient to bar his Action, whether the Defendant was impowered by *J. S.* to enter or not; for it is not material that the Defendant has done a Wrong to a Stranger, if it be none to the Plaintiff; but in the other two Caſes, if the Defendant juſtifies taking the Cattle as Bailiff to *J. S.* in whom he lays a Title to take them, as for a Diſtreſs, or other Cauſe, there it may be material to traverſe the Command or Authority; for though *J. S.* had Right to take the Cattle, yet a Stranger who had no Authority from him, will be liable; ſo that both Parts of the Defendant's Plea in this Caſe muſt be true, and therefore an Anſwer to any Part is ſufficient; ſo in Treſpaſs for taking Goods; *aliter* in Treſpaſs *Quare Clauſum fregit.*

3 Lev. 20. *Dobſon* v. *Douglas.*

In Replevin the Defendant made Conuſance as Bailiff of *J. S.* for a Rent-charge; the Plaintiff in Bar ſays, that he took the Diſtreſs without the Privity or Command of *J. S.* and that ſuch a Day after the Diſtreſs *J. S.* came firſt to have Notice, *& deadvocavit captiones prædictas:* The Defendant demurred generally. *Et per Cur'*, The Bar is naught, for he ſhould have traverſed his being Bailiff; and he was ruled to replead accordingly, and to mend his Bar, paying Coſts, and go to Trial upon Iſſue, Bailiff or not.

2 Sand. 160. *Rex* v. *Stoughton.*

If on a Preſentment for not repairing a Highway, it is alledged, that the Defendant is chargeable *ratione tenuræ quarundam terrarum parcell' dictæ peciæ terræ, &c. dicta communi alta via Regia incluſ' & incrochiat'*; the Traverſing the *Ratione tenuræ* is ſufficient, without anſwering to the Incroachment, being the principal Point to be traverſed.

* Page 81 Lutw. 935, 1560.

* A Traverſe muſt be taken to ſome Matter alledged; and therefore where in falſe Impriſonment the Defendant juſtified by Proceſs out of an inferior Court, and the Plaintiff replied, that the Cauſe of Action accrued out of the Juriſdiction; *abſque hoc*, that it accrued within the Juriſdiction; the Traverſe is ill, being of a Matter not (b) alledged before; but it was held, that this being only an immaterial Traverſe, no Advantage could be taken of it on a general Demurrer, and that then the Reſidue of the Replication ſhould ſtand good.

(b) Mere Matter of Suppoſal is not traverſable, no more is Matter alledged out of due Time, nor Matter immaterially alledged. 2 Salk. 628. pl. 2. Ld. Raym. 349.——But whatever is neceſſarily underſtood, intended and implied, is traverſable, as much as if it were expreſſed. 2 Salk. 629. pl. 6.

Sid. 96.

In Caſe againſt a Sheriff for taking inſufficient Bail to the Intent to deceive him of his Debt; the (c) Intention to deceive is not traverſable.

(c) That Matter of Intendment is not traverſable. Stile 383. Leon. 50. S. P. Nor Cauſe of Suſpicion. 3 Bulſt. 284.

Show. 271.

In Ejectment, Antient Demeſne was pleaded in Bar; Plaintiff replied, that the Lands are pleadable at Common Law, and traverſes, that the Tenements are Parcel *de Antiquo Dominico*; and it was adjudged ill on Demurrer; becauſe he ſhould have traverſed, that the Manor was Ancient Demeſne, or elſe, that theſe Tenements were held of the Manor.

In

In an Action of (*a*) Covenant a Perſon cannot take a Traverſe in Mitigation of Damages, but muſt help himſelf upon (*b*) Evidence; and the Traverſe muſt be to the (*c*) Point of the Action; as in Covenant for Payment of Rent, the Plaintiff ſays, that there were ſeven Years Rent behind; the Defendant cannot traverſe two of theſe Years being behind, but muſt plead Covenants performed. †

(*a*) That where the Declaration is ſpecial the Defendant ſhall have Liberty to traverſe the ſpecial Matter. Carth. 82. (*b*) That in many Caſes the Matter may be ſpecially traverſed, which probably might have been given in Evidence upon the General Iſſue. Carth. 82. (*c*) In Treſpaſs, that which comes under the *Ita quod*, for Aggravation of Damages, need not be traverſed. Lev. 283.

† How can he plead Covenants performed, whether Rent is or is not in Arrear?——If there is not any Rent in Arrear, the Defendant ſhould plead Rent not in Arrear.——If Rent is in Arrear, he ſhould move the Court to ſtay Proceedings, on Payment of all Rent in Arrear, and Coſts: If there is any other Breach of Covenant aſſigned, Plaintiff may go on for that.

In Debt on a Judgment obtained 1 *May* 14 *Car.* 2. before the Mayor and Bailiffs of *Norwich*, at a Court then held according to the Cuſtom of the ſaid City, the Defendant pleads, that the Court there, according to the Cuſtom, *&c.* is held before the Mayor; *abſque hoc*, that he recovered at the Court held the ſaid 1 *May* before the Mayor and Bailiffs, according to the ſaid Cuſtom. And upon (*d*) Demurrer, the Traverſe was held ill in traverſing a Matter of Record which is not to be tried *per pais*, and in (*e*) joining the Matter of the Cuſtom, which is triable *per pais*, with the Matter of Record; but he ought to have pleaded *Nul tiel Record*, which would have made an End of all, or that there was not any ſuch Cuſtom, and have tried it *per pais*; it was likewiſe held, that making the Day Parcel of the Iſſue made the Traverſe ill.

Lev. 193. *Dring* v. *Reſpaſs.*

(*d*) That it would have been good after Verdict. Hob. 244. Hutt. 20. (*e*) A Traverſe muſt not be multifarious, but to a ſingle Point. 3 Lev. 40, 41.——Traverſe muſt not be complicated. Skin. 63, 64.

Debt upon an Obligation to the Sheriff, conditioned to appear *Octabis Martini ad reſpondend'*, *&c.* Defendant pleaded the Statute 23 *H.* 6. *c.* 9. and that he was taken and impriſoned *Virtute brevis retorn' quinden' 'Martini*, and that the Obligation was taken for Eaſe and Favour. The Plaintiff replied, *Auter brief retorn' octabis Martini*, and that he was taken and impriſoned upon that; *abſque hoc*, that he was in Priſon *Virtute brevis retorn' quindena Martini.* The Defendant demurred generally. *Saunders* argued, That the Traverſe was ill and immaterial; for it matters not whether the Writ was returnable *Quindena Martini*, or not, * but he ſhould have concluded *Et hoc paratus eſt verificare*, and left the Defendant to traverſe the Writ returnable *Octabis Martini*; and upon this Traverſe no good Iſſue can be taken; for it is not material whether any Writ was returnable *Quindena Martini*, or not; the only material Thing to maintain the Goodneſs of the Obligation is this, that the Writ was returnable *Octabis Martini. Sed per Curiam*, If the Traverſe be immaterial, the Defendant waving that ſhould have traverſed the Writs's being returnable *Octabis Martini*; but they held the Traverſe was well enough in this Caſe, it being taken to the moſt material Thing pleaded in Bar to avoid the Obligation; and they gave Judgment for the Plaintiff.

2 Lev. 174. *Gold* v. *Cutler.*

* Page 82

In Debt on a Bond made by a Priſoner to an Under-Sheriff, conditioned to pay 60 *l.* the Defendant pleads the Statute 23 *H.* 6. *c.* 9. of Sheriffs Bonds, and that this Bond was made for Eaſe and Favour, and ſo void by the Statute. The Plaintiff replies, that it was for the better Security of Money due to himſelf, and traverſeth the Eaſe and Favour: And herein it was adjudged for the Defendant; for though the Traverſe be good, yet the Inducement being ill, in not ſaying that it was *pro bono & vero debito*, the Plaintiff cannot recover.

Comb 245. *Foden* v. *Haines.*

If

Yelv. 225. Bulſt. 116. Sand. 268. S. C. cited, and like Point adjudged.

If in an Action on the Caſe for ſtopping of three Windows, the Defendant juſtifies the Stopping of two of them, and traverſes the Stopping of three Windows; the Traverſe is ill, for the Inducement goes only to Part, *viz.* the Stopping of two Windows; and yet the Traverſe goes to all three, which ought not to be; for if the Defendant had ſtopped only two, yet in Caſe the Plaintiff ſhall recover Damages (*a*) *pro tanto*; and therefore the Defendant ought to have pleaded, as to the Stopping of one Window, not guilty, and as to the other two to have juſtified, and then every Part of the Injury alledged by the Plaintiff had been put in Iſſue.

(*a*) That in an Action for Damages, and in which the Plaintiff is to recover in Proportion to his Loſs, every Part is to be put in Iſſue. 2 Sand. 206.

Vent. 70. *Aubrey* v. *James.* Sid. 444. 2 Keb. 623. S. C.

In Aſſault the Defendant juſtified, for that he, being Maſter of a Ship, commanded the Plaintiff to do ſome Service in the Ship, which he refuſing to do, he *moderate caſtigavit* the Plaintiff, *prout ei bene licuit.* The Plaintiff maintains his Declaration; *abſque hoc, quod moderate caſtigavit:* After Verdict for the Plaintiff, it was moved in Arreſt, that the Iſſue was not well joined; for *non moderate caſtigavit* doth not neceſſarily imply that he did beat him at all, and ſo no direct Traverſe to the Defendant's Juſtification, which *immoderate caſtigavit* would have been; but *de injuria ſua propria abſque aliqua tali cauſa* would have been the moſt formal Replication; but it was held to be well enough, being after Verdict. ‡

‡ But the general Replication would have been better, as it would have obliged the Defendant to prove the Whole of his Plea.

Vent. 77. *Gifford* v. *Perkins.* Sid. 450. 2 Keb. 633. S. C. adjudged.

In Debt upon a Bond entered into, to *Eliz. Perkins*, who was the Plaintiff's Wife, and he, as her Adminiſtrator, brought the Action; the Defendant pleads, that he delivered the Bond to one *Eliz. Perkins, quæ obiit ſola & innupta*; *abſque hoc*, that he delivered it to *Eliz. Perkins*, the Plaintiff's Wife. To which it was demurred ſpecially; for if it be taken, that there are two of the Name, the Defendant ſhould have pleaded *Non eſt factum* †, for it amounts to no more; or at leaſt he ought to have induced his Plea, that there were two *Eliz. Perkins*'s; but this Traverſe is deſigned to bring the Marriage in Queſtion, which is not to be tried; wherefore the Court gave Judgment for the Plaintiff.

† How could *Non eſt factum* be an Anſwer to the Bond, when produced in Court, though in Poſſeſſion of a Perſon not intitled to recover upon it?—Might not Defendant have pleaded generally, admitting the Bond to be his, but that it was not given to the *E. P.* mentioned in the Declaration, but to another *E. P.* Indeed now, by virtue of the Statute 4 Anu. c. 16. ſ. 4. he might plead *Non eſt factum*, and a ſpecial Plea.

Carth. 125. *Beake* v. *Kent.* 4 Mod. 63. S. C.

In *Aſſumpſit* againſt an Executrix, ſhe pleads ſeveral Judgments, and that ſhe hath not Aſſets *ultra.* The Plaintiff replies, that *judicia prædicta, &c.* were kept on Foot by Fraud. The Defendant maintains her Bar, and traverſes, that all or any of the Judgments were kept on Foot by Fraud. And on Demurrer it was objected, that the De-

* Page 83

* fendant ought to have rejoined ſeverally to every Judgment, and not to include all three Judgments in one general Traverſe; but it was held that this general Form of Pleading was good, it being no Diſadvantage to the Plaintiff; for if Iſſue had been joined that all the Judgments had been kept on Foot by Fraud, and if it had been found that one of them alone had been kept, *&c.* by Fraud, this Iſſue had been found for the Plaintiff; becauſe the Plea was falſe in Part, and for that Reaſon the Whole is falſe. §

§ The Traverſe ſhould have been that all or any, *or either*, *&c.* The next Paragraph is not in Point againſt this Poſition.

Leſſee

Leſſee for Years brings Covenant againſt the Leſſor, declaring upon a Demiſe and Covenant for quiet Enjoyment, and aſſigns for Breach, that the Leſſor did enter upon him, and ouſt him of the Premiſſes; the Defendant pleads that he entered to diſtrain for Rent arrear; *abſque hoc*, that he ouſted him *de Præmiſſis*; to which the Plaintiff demurred, thinking the Traverſe ill; becauſe, if he had ouſted him of any Part of the Premiſſes, he had a good Cauſe of Action; therefore he ſhould have traverſed, *abſque hoc*, that he ouſted him of the Premiſſes or any Part thereof: But *per Cur.* the Plea is well enough in this Caſe; for if the Plaintiff will join Iſſue upon the Matter of the Traverſe, and prove the Ouſter of any Part, the Iſſue will be for him; and the Court took a Diverſity between pleading the General Iſſue, as in Debt you muſt plead *Non debet nec aliquam inde parcellam*, and a ſpecial Iſſue, as this is. 2 Salk. 629. pl. 5. *White* v. *Bodinam.*

(I) Pleas in Bar, their Sufficiency and Certainty: And herein,

1. That the Plea muſt be proper to, and adapted to the Action.

HEREIN it is laid down as a general Rule, that every Man muſt plead ſuch Pleas as are pertinent and proper for him, according to the Quality of his Caſe, Eſtate and Intereſt. Co. Lit. 285, 303. Hob. 162.

As in an Action of Debt upon a Bond or other Specialty, the Defendant cannot plead *Nil debet*; it is otherwiſe in Debt founded upon a Matter *in Pais* only, as upon a Preſcription, or upon a Deed, that is not requiſite to maintain the Action. Hard. 332. of Pleading *Non eſt factum*, *vide infra*.

Therefore if an Action of Debt be brought on a Bond or ſingle Bill, and the Defendant pleads Payment without an Acquittance under Seal, this, though it be found for him, will not intitle him to Judgment; for the Obligation is in Force till it is diſſolved *eo ligamine quo ligatur*. § Cro. Jac. 377. *Wingfield* v. *Bell.*

§ Payment at or after the Day, may now be pleaded by virtue of the Stat. 4 Ann. c. 16. ſ. 12. So by ſame Statute Payment may be pleaded in Actions on Judgments.

So in Debt for the Arrears of an (*a*) Annuity granted for Life *Nil debet* is no good Plea; for the Action is merely founded upon the Deed, ſince without it no Action can be maintained; and though by the Death of the Grantee the Nature of the Action is changed, the Annuity being determined, yet this proves not but that the Action is founded upon the Deed. Keilw. 147.

(*a*) But in Debt upon the Grant of a Rent-charge *Nil debet* is a good Plea, becauſe the Plaintiff hath other Remedy to levy it, *viz.* by Diſtreſs. Otherwiſe upon the Grant of a bare Annuity, for there being no Remedy by Diſtreſs, the Grant muſt be avoided by Matter of as high a Nature, *viz.* by Acquittance. Hard. 33.

* Where the Action is founded upon a Penal Statute, it hath been adjudged that Not guilty is a good Plea. † *Page 84 Cro. Eliz. 257. Goulſ. 39. Noy 56. 2 Inſt. 651. Moor 914. pl. 1293.

† For if Defendant is not guilty of a Breach of the Law, he has not incurred the Penalty, conſequently can't in that Reſpect ſtand indebted to the Plaintiff; *ergo*, the Plaintiff cannot be intitled to recover.

So

2 Inſt. 651. and Hob. 218. S. P. adjudged.

So in Debt upon the 2 & 3 *E.* 6. *c.* 13. for not ſetting forth Tithes it hath been held, that Not guilty or *Nil debet* are good Pleas.

Hard. 332. *Wilſon*'s Caſe.

In Debt for the Arrears of a Rent-Charge by Will deviſed to the Plaintiff's Wife for Life, againſt the Adminiſtrator of the Occupier of the Land, it hath been adjudged that (*a*) *Nil detinet* is a good Plea; for a Will is no Deed, nor wants any Delivery; and in this Caſe it was ſaid, that the Action was not ſo much grounded upon the Will itſelf as upon the Statute, by which Men are enabled by Will to diſpoſe of their Lands and Rents iſſuing out thereof.

(*a*) Where the Teſtator could not plead *Nil debet*, his Executor ſhall not plead *Nil detinet*. 2 Mod. 266.

Hard. 332.

In Debt for Rent, if it be by Deed, the proper Plea is *Non eſt factum*; but if it be without Deed, the Defendant may plead *Non dimiſit*, Nothing in Arrear, or that he never entered; alſo by the better Opinion of the (*b*) Books, if the Rent be due by Indenture the Defendant may plead *Nil debet*; for an Indenture does not acknowledge a Debt like an Obligation, ſince the Debt accrued by ſubſequent Enjoyment.

(*b*) For which *vide* Hetl. 54. Dyer 14. 4 Leon. 18.

Vent. 41. Mod. 3. Sid. 423. Palm. 117. Salk. 209. pl. 1. Ld. Raym. 170.

(*c*) 3 Mod. 324, *per Cur.* Skin.

It is ſaid, that Not guilty is a good Plea to any Miſfeaſance whatſoever (*c*), though formerly in Actions for Nonfeaſance Not guilty was not pleaded, but they pleaded Specially, and traverſed any ſpecial Point alledged in the Declaration, and Not guilty to ſuch Actions was not pleaded till after the Time of the Caſe of (*d*) *Yalding* v. *Fay*.

(*d*) Moor 355. where the Caſe was; the Plaintiff declared on a Cuſtom that the Parſon ſhould find a Bull and a Boar, to which the Defendant, *Proteſtando* that there was no ſuch Cuſtom, pleaded Not guilty; and on Demurrer it was held, that Not guilty was no Plea to an Action for a Nonfeaſance, being two Negatives, which cannot make an Iſſue; but the Court held that to an Action for a Miſfeaſance it was otherwiſe. Cro. Eliz. 569. S. C. & *vide* Palm. 393. 2 Rol. Rep. 368.

Lev. 142. *Erlington* v. *Doſhant*.

In *Aſſumpſit* the Defendant pleaded Not guilty, Iſſue thereon, and Verdict that he was Guilty, and that he aſſumed in Manner and Form as declared; and it was moved in Arreſt, &c. that Not guilty was no Iſſue in this Caſe, and the finding farther that he aſſumed is void, not being in Iſſue; but *Wyndham* and *Twiſden* being only in Court held it cured at leaſt by the Verdict, and *Wyndham* held that Not guilty (*e*) was a good Plea, and Iſſue in *Aſſumpſit*, it being a Treſpaſs on the Caſe.

(*e*) But in the Caſe of *Marſhal* v. *Gibbs* in *B. R.* M. 9 Geo. 2. it was ruled to be ill on Demurrer, though good after Verdict, according to this Caſe. 2 Stra. 1022.

2 Brownl. 273. *Hare* v. *Savile* adjudged.

In an Action of Covenant for Non-payment of Rent, the Defendant cannot plead Levied by Diſtreſs, for that is a Confeſſion it was not paid at the Day, for it could not be diſtrained for till after the Day; but it was agreed that the Covenant alters not the Nature of the Rent (*f*), but that Nothing behind, or Payment at the Day, is a good Plea.

(*f*) But this in 1 Brownl. 91. *per Cur.* was held a bad Plea, for that by it the Defendant confeſſed the Covenant broken, and it tended but in Mitigation of Damages. ‡

‡ If the Leſſor had diſtrained for and received his Rent, the Defendant ſhould have pleaded, the Rent was not in Arrear.

Nil

* *Nil debet* was pleaded to an Action brought on a Covenant for a Forfeiture, and on Demurrer the Plea was held ill. * Page 85

T. 5 Geo. 2. in *B. R.*
Meard v. *Phillips.* 2 Stra. 906.

In Trover there is no Plea, but a Releaſe or Not guilty, for every Plea in Juſtification is but Tantamount.

Keb. 305. Noy 46. Hob. 187. & *vide* Title *Trover and Converſion.*

In *Aſſumpſit* and *Quantum meruit* for 20 *l.* the Defendant pleaded *Onerari non debet*, becauſe he paid the Money at the Time, &c. *Et hoc paratus eſt vertificare*; and it was held by *Holt* that *Onerari non debet* was no Plea here, becauſe the Defendant allows the Promiſe to be a good Promiſe, but avoids it by a Matter of Charge *ex poſt facto*, and therefore in this Caſe he ſhould have pleaded *Actionem non*; but where the Matter of the Plea ſhews there never was a good Cauſe of Action, *Onerari non debet* may be proper; as in Debt on a Bond, the Defendant may plead *Onerari non debet quia riens per diſcent.*

2 Salk. 516. pl. 7. Ld. Raym. 217. *Brown* v. *Corniſh.*

In Account the Defendant may plead that he was never Receiver, Agent, Factor, or Bailiff to the Plaintiff; or if charged as Bailiff he may plead that he was only hired as his Servant to drive his Plough, or he may plead a Releaſe or a Submiſſion to Arbitration.

Rol. Abr. 121, 122. Cro. Car. 116. Hetl. 114.

So he may plead in Bar, that after the Receipt of the Sum of which the Account is demanded, by the Mediation of their Friends it was agreed between them, that the Defendant ſhould make an Obligation of 100 *l.* for the 100 *l.* received, and the Profit thence to ariſe; which Obligation he did make and deliver accordingly to the Plaintiff; for the Acceptance of the Obligation deſtroys the Duty, and the Sum in Demand is thereby as ſtrongly releaſed as by a Releaſe of all Actions.

Rol. Abr. 123. & *vide* Yelv. 202.

But it is no good Plea in Bar to an Action of Account, that the Defendant hath made Payment of the Money which he received, or that he hath made Satisfaction, or that the Defendant hath given him a Receipt or an Acquittance for the Sum received; for theſe Pleas, being Matters which ſhew that he was once accountable, are only to be made Uſe of before the Auditors.

Dyer 22, 145. 6 Co. 7. *Ferrer's* Caſe. 4 Leon. 91. Stile 353, 410.

If in Account upon Receipt by the Hands of *J. S.* the Defendant pleads Never his Receiver, &c. and the Jury finds that he was his Receiver of ſuch a Sum, &c. and the Defendant pleads before the Auditors that he was poſſeſſed of ſeveral Obligations, in which the Son of the Plaintiff was bound to the Defendant, and that *J. S.* paid him this Money in Satisfaction of thoſe Bonds, and that thereupon he delivered to him the ſaid Bonds to the Uſe of the Plaintiff, which he after accepted; this is no good Plea, for it is no more than *Not his Receiver*, which is found and adjudged againſt him.

Cro. Eliz. 830. *Treſham* v. *Ford* adjudged.

In an Aſſiſe the General Iſſue is *Nul tort, nul diſſeiſin*; and therefore in an Aſſiſe of an Office it is no Plea to ſay, that there is no ſuch Office, for that amounts to no more than ſaying that he did not diſſeiſe him.

Noy 223. & *vide* Title *Aſſiſe.*

In an Attaint the Petit Jury can plead no Plea, but ſuch as may excuſe them of the falſe Oath.

Keilw. 130.

In an Information in Nature of a *Quo Warranto* againſt a Perſon, to know by what Authority he exerciſed the Office of Port-reve of a Borough, *Non uſurpavit* is no Plea, which appears from the Nature of the Charge, which is for him to ſhew by what Warrant or Authority, &c. to which that Plea is no Anſwer.

Lucas's Rep. 211, &c. *The Queen* v. *Blagden.*

In Debt by Baron and Feme the Defendant pleaded *(a) Ne unques accouple in loyal Matrimony*, and on Demurrer it was held an ill Plea; be-

Show. 50. *Allen & ux'* v. *Grey.*

(a) That this is no Plea but in Dower or Appeal, *vide* Tit. *Baſtardy.*

cauſe it puts it upon Trial by Certificate, which admits a Marriage, but not *ſecundum Leges Eccleſiæ*, and therefore he ſhould have pleaded No Marriage in Fact, which muſt have been tried *per Pais*.

* Page 86 * In Waſte the General Iſſue is *Nul waſt*, alſo Reparation of Waſte before the Writ brought is a good Plea in Waſte, and ſo is a ſpecial Non-tenure.

2 Inſt. 302, 306. Noy 93. 3 Leon. 203. & *vide* Title *Waſte*.

Cro. Eliz. 593. *Gorges* v. *Stanfield*. In an Action of Waſte for cutting down 300 Oaks, the Defendant, as to 200, pleaded that the Houſes let to him were ruinous, &c. and he cut them down, and keeps them to employ about Reparation *tempore opportuno*; and on Demurrer this Plea was held ill.

Hob. 162. Vaugh. 58. cited. Every Defendant may plead in a *Quare impedit* the General Iſſue, which is *Ne diſturba pas*; becauſe the Plea doth not defend the Wrong wherewith he ſtands charged, and leaves the Plaintiff's Title not only uncontroverted, but in Effect confeſſed; and the Plaintiff may upon that Plea preſently pray a Writ to the Biſhop, or that his Choice maintain the Diſturbance for Damages.

2 Inſt. 360. *vide* Title *Quare impedit*. At Common Law Plenarty before the Writ of *Quare impedit* brought was a good Plea; *ſecus* of Plenarty pending the Writ; but by the *Stat. Weſt.* 2. (13 *Ed.* 1. *ſt.* 1.) *cap.* 5. Plenarty is no Plea in a *Quare impedit* or *Dærrein Preſentment*, unleſs it be by the Space of ſix Months before the Writ brought; alſo Plenarty by ſix Months is no Bar againſt the King, according to the Rule *Nullum tempus*, &c.

Noy 30. *Liſter* v. *Cramel*. In a *Quare impedit*, where the Incumbent pleads the Preſentment of a Stranger, there he ought to ſhew that the Stranger had a Title, and that he was ſeiſed of the Advowſon, &c. or that he was ſeiſed of a Manor, &c. to which, &c. But where he pleads, that he was in for ſix Months by the Preſentment of the Plaintiff himſelf, or by Collation, by Lapſe, by the Ordinary, there he need not make any Title.

2. That the Plea muſt be good in Subſtance; and therein of Matter of Inducement, and that which is the Giſt of the Defence.

(*a*) *Note*, That what is Subſtance and what not, muſt be determined in every Action according to its Nature. As the Plaintiff's Action muſt have all Eſſentials neceſſary to maintain it, ſo the Defendant's Bar muſt be (*a*) ſubſtantially Good, that is, the Eſſence or Giſt of the Plea muſt be ſuch as, if found for the Defendant, the Court, according to the Rules of Law, muſt diſmiſs, or give Judgment for him; but if the Giſt of the Bar be naught, it cannot be cured even by (*b*) a Verdict found for him; but if it be bad only in Form a Verdict will cure it; and if the Giſt be traverſed, all collateral Circumſtances will be intended after a Verdict.

(*b*) A Verdict cures not only ſuch Defects as may be called artificial Defects, and come within the Purview of the ſeveral Statutes of *Jeofail*, but Natural Defects, or the Omiſſions of the Parties in their Allegations, which muſt be preſumed to have been given in Evidence to the Jury, otherwiſe they could not have found a Verdict for the Party. *Vide* Title *Amendment and Jeofail*, that theſe Statutes do not help Subſtance, 2 Salk. 521. pl. 25.

Cro. Eliz. 268. *Pendlebury* v. *Elmott*. The Defendant's Plea muſt fully (*c*) anſwer the Count or Declaration; as where in Aſſault, Battery, and Wounding, the Defendant pleaded that he was Conſtable of *D.* and for ſuch a Miſdemeanor of the Plaintiff he laid his Hands on him, and carried him to the Stocks, *quæ eſt eadem tranſgreſſio*; and on Demurrer it was adjudged for the Plaintiff, becauſe the Defendant had not either juſtified or pleaded

(*c*) That the Plea ought to be according to the Demand.

Not

Not guilty as to the Wounding; but if one pleads that the Hurt which the Plaintiff had was of his own Aſſault, this is a good Anſwer to all. Hob. 327. 3 Lev. 375.

In Replevin the Defendant as Bailiff to *P.* who was ſeiſed of the third Part of the Place, *&c.* juſtifies for Damage-feaſant; the Plaintiff * ſaith that a Stranger was ſeiſed of the other two Parts, and by his Licence he put in his Cattle; the Defendant ſaith *De injuria ſua propria abſque tali cauſa, &c.* the Plaintiff demurs; and it was adjudged no Plea, but he ought to anſwer to the ſpecial Matter in the Bar. * Page 87 Cro. Eliz. 812. *Whittnel* v. *Cook.*

So where in Covenant the Plaintiff declared, that he the Plaintiff had covenanted with the Defendant to go with a Ship to *D.* in *Ireland*, and there to take in 280 Men from the Defendant, and to carry them to *Jamaica*; and the Defendant covenanted to have the 280 Men there ready, and to pay for the Carriage of them 5*l.* a Man, and ſays that the Defendant had not the 280 Men ready, but that he had 180, and thoſe he took and carried, and the Defendant had not paid for them; the Defendant pleads that he had the 280 Men ready, and tendered them to the Plaintiff, and that he would not receive them, but ſays nothing to the Carrying of 180 Men, nor to the Non-payment for them; and as this was not a Plea to the Whole, but to the Carrying only, Judgment was given for the Plaintiff on a Demurrer. Lev. 16. *Thompſon* v. *Noel.*

If as to Part the Defendant joins Iſſue, but ſays nothing to the Reſt, and this Iſſue is found for the Plaintiff, he ſhall have Judgment; but (*a*) if the Matter is pleaded to the Whole, though in Fact but an Anſwer to Part, this is a bad Plea, and not helped by the Statute. 11 Co. 6. b. 2 Leon. 174. Godb. 55. Rol. Rep. 161. Cro Jac. 353.

Hob. 187. Goulſ. 189. Bulſ. 25. Carter 51. 3 Lev. 39. (*a*) Hard. 331.——If many Words contain one Thing in Signification, if he anſwers to them in Subſtance it is good. Cro. Eliz. 256.

If in an Action of Treſpaſs, brought by a Commoner againſt a Stranger for putting his Cattle in the Common, *per quod communiam in tam amplo modo habere non potuit*, the Defendant pleads a Licence from the Lord to put his Cattle there, but does not aver there is ſufficient Common left for the Commoners, this is no good Plea; for though it may be objected the Plaintiff may reply thereto; yet being the very Giſt of the Action, the Defendant ſhould have pleaded thereto. † 2 Mod. 6. *Smith* v. *Feverell.*

† *Qu.* As this ſhould be Treſpaſs on the Caſe, if the General Iſſue is not the proper Plea, and if the Defendant, in ſuch Caſe, might not give every Thing in Evidence under that Plea which could intitle him to a Verdict? ——For the Charge in the Declaration being, that Defendant *unlawfully and unjuſtly* did the Fact, it ſhould ſeem that Not guilty, is the moſt proper Anſwer, and muſt intitle Defendant to give all his Merits in Evidence.

In Debt upon an Obligation conditional, the Defendant cannot plead in Bar Matters in Diſcharge of the Obligation, but he muſt plead it in Diſcharge of the Sum contained in the Condition of the Obligation; for it is not a Debt ſimply by the Obligation, but the Performance or Breach of the Condition makes it a Debt; for the Obligation is guided by the Condition, ſo that if the Condition be not diſcharged, the Obligation remains in Force §. Yelv. 192. Cro. Jac. 254. *Neale* v. *Sheffield.*

§ Now by 4 Ann. c. 16. ſ. 12. Payment after the Day may be pleaded.

In Debt upon a Bond, it is no Plea, that the Plaintiff accepted a new Bond, in Satisfaction of the old, for that is no Satisfaction actual and preſent, as it ought to be. Hob. 68. *Lovelace* v. *Cockait.*

In Debt upon an Obligation of 100*l.* recited to be for Rent, Entry and Suſpenſion is no Plea: becauſe it only anſwers a Recital in the Condition, which is not material, and not the Condition itſelf. Hob. 130. *St. John* v. *Diggs.*

Noy 64. *Countess of Warwick* v. *The Bishop of Litchfield*

The Condition of an Obligation was, that if *A.* pay 20*l.* at *Michaelmas* next, and 20*l.* at *Easter* after, so 20*l.* at every of the said Feasts so long as *A.* shall live, or until *B.* shall be preferred to a Benefice of 40*l. per Ann.* In an Action of Debt upon that Obligation the Defendant pleads that *B.* was preferred, *&c.* before *Michaelmas* next; and held no good Plea on Demurrer; for take it which Way you will, he ought to pay the 20*l.* at the said two Feasts that are expresly set down, for they are absolute.

Cro. Jac. 232. *Elve* v. *Sabe*, adjudged.

In Debt upon an Obligation the Condition was, if such Lands be proved to be Parcel of the Manor of *D.* then the Plaintiff may enjoy them without Interruption of the Defendant, that then, *&c.* the Defendant pleads that they were not proved to be Parcel of the Manor, and it was thereupon demurred; and it was insisted that he ought to have pleaded that they were not Parcel of the Manor, so as Proof * thereof might have been made in that Action; and of that Opinion was the whole Court.

*Page 88

Hob. 28.

In an Action on the Case against a common Bargeman, for Goods delivered to him to carry to such a Place, *&c* if he pleads, that he was discharged of keeping, without saying of carrying them, 'tis not good.

2 Mod. 33. *Durk* v. *Vincent.*

In Debt upon a Bond conditioned to perform Covenants, one of which was for Payment of Money upon making Assurances, the Defendant pleaded, he paid the Money such a Day, but doth not mention when the Assurance was made, that it might appear to the Court the Money was immediately paid pursuant to the Condition; and for that Reason the Court were all of Opinion the Plea was not good.

2 Vent. 156. *Brown* v. *Rands.*

In Debt upon an Obligation, conditioned to permit the Obligor's Wife (whom he intended to marry) to dispose of his personal Estate, the Defendant the Obligor pleaded *Quod conditio ejusdem scripti nunquam infracta fuit per ipsum ad aliquod tempus hucusque; & hoc paratus est verificare:* And on Demurrer the Court held the Plea naught, and that for saving the Bond, it was necessary to shew he had performed the Condition.

2 Mod. 176. *Harman's* Case.

But where in Covenant the Breach assigned was, that the Defendant did not repair, and he pleaded generally *Quod reparavit, & de hoc ponit se super patriam*; and this was held good after a Verdict.

March 77.

If, in a *Quantum meruit* for Medicines, the Defendant pleads, that he hath paid to the Plaintiff *tot & tantas denariorum summas*, as the said Medicines were worth, without shewing what Sum in certain he hath paid, this is no good Plea. †

† He should have pleaded *Non assumpsit*.

March 100.

If in *Assumpsit* the Plaintiff declares, that the Defendant did assume and promise to pay the Plaintiff so much Money, and also to carry away certain Wood before such a Day; the Defendant as to the Money cannot plead that he paid it; and as to the Carriage of the Wood *Non assumpsit*; for the Promise being intire cannot be apportioned. §

§ *Non assumpsit* would have been the proper Plea, for the Promise being performed, it's as if it had never existed, nor has the Plaintiff any Cause of Action.

2 Mod. 43. Mod. 205. S. C. *Milward* v. *Ingram.*

If the Plaintiff declares upon an *Indebitatus Assumpsit*, and upon a *Quantum meruit*, and the Defendant pleads, that after the said several Promises made, and before the Action brought, the Plaintiff and Defendant came to an Account concerning divers Sums of Money, and that the Defendant was found in Arrear to the Plaintiff in 30*l.* and thereupon in Consideration that the Defendant promised to pay the said 30*l.* the Plaintiff promised likewise to release and acquit the Defendant of

of all Demands; this is a good Plea, for by the Account the first Contract is merged. †

† What was before uncertain being by the Account reduced to a Certainty, which is more advantageous to the Plaintiff.

If the Plaintiff declares upon an *Indebitatus assumpsit* for 100*l.* and upon an *Insimul computassent* the same Day for another 100*l.* and the Defendant pleads, that the said several Sums of 100*l.* are for one and the same Cause of Action, and for one Sum of 100*l.* only, and not for several Sums; and that after the Time of the said several Promises made, the Defendant, by Order of the Plaintiff, paid to one *B.* 30*l.* in Part of Payment and Satisfaction of the said Money in the Declaration mentioned, and in full Payment and Satisfaction of the Residue of the said Money, did become bound to the Plaintiff in a Bond of 120*l.* conditioned for the Payment of 65*l.* to the Plaintiff at a certain Day in the Condition specified, which said 30*l.* and Bond the Plaintiff accepted, *&c.* this is a good Plea; for though 'tis no Plea to say the several *Narr'* are for one Sum only, and so to go no further, yet when the Defendant pleads over, that the very Sum demanded is satisfied, this is a good Plea; and if the several 100*l.* were distinct Sums, the Plaintiff might have replied so, and taken Issue thereupon; but when he admits there was but 100*l.* due, and that satisfied, the Plea is good. Raym. 449. 2 Jon. 158. *Case* v. *Barber.*

* In Trespass for taking several Goods, the Defendant justified for several Amercements assessed in a Court Baron; but because he did not shew an Affeerment by the Affeerors, Judgment was given for the Plaintiff. * Page 89 3 Lev. 19. *Coniers* v. *Frank.*

In Trespass for pulling down a Gate, treading his Grass, *&c.* the Defendant as to pulling down the Gate justified, that Time out of Mind he had a Passage *per & trans* the Yard, and that a Gate was erected upon the Passage, so that he could not pass with his Beasts, wherefore he broke and pulled down the Gate, *&c.* And on Demurrer to this Plea, it was objected, that the Defendant could not justify the Pulling down and Breaking of the Gate, not having shewn that it was locked or nailed, so that he could not pass. *Sed per Curiam*, Having pleaded that the Gate was put there, so that he could not use the Passage, it shall be intended that it was locked or nailed, or the Way thereby straitened that he could not pass, and the Plea therefore good. ‡. 3 Lev. 92. *Sprigg* v. *Neal.*

‡ Defendant might shew that in removing the Gate he necessarily and unavoidably a little broke the same, doing as little Damage as he could.

In Debt upon an Obligation the Defendant pleads, that he delivered it as an Escrow; *& hoc paratus est verificare*; this held a vicious Plea, for he ought to shew to whom he delivered it; and also he ought to conclude his Plea, (*a*) *Et issint nient son fait.* Vent. 9.

(*a*) *Vide* 1 Vent. 210.

If in an Action for the following Words, *Thou art a Bankrupt*, the Defendant pleads, that such a Day and Year the Plaintiff became a Bankrupt, and so justifies, but does not alledge that he continued a Bankrupt; this is no good Justification, for it shall not be presumed that he continued so. Cro. Jac. 371. *Upsheer* v. *Betts.*

If in an Action for these Words, *She is a Thief to you and to me, and hath stolen* 20*l.* *from me, and* 40*l.* *from you*, the Defendant pleads, the Plaintiff is a Thief, and stole two Hens from the Defendant; this is no good Plea; for it does not answer the particular Charge in the Declaration, and the last Words are as material to be answered as the first. Cro. Jac. 676. 2 Rol. Rep. 414. *Hilsden* v. *Mercer.*

If

Style 118. *Starchy's* Caſe, adjudged upon a Demurrer to the Plea.

If the Plaintiff declares, that whereas ſhe was a Woman of good Fame and Reputation, &c. the Defendant ſaid of her, *She is a common Whore*, &c. *per quod*, &c. and the Defendant pleads, that at the Time when the Words were ſpoken the Plaintiff was not of an honeſt Reputation, as in the Declaration is alledged; this is no good Plea.

5 Mod. 226. ſaid *arguendo*.

If the Defendant pleads a proper Plea, though it is not full, it is aided by the Statute; and therefore in all Caſes where Iſſue is taken upon an inſufficient Plea in Bar, and which would have been ill upon Demurrer, it is held, that after a Verdict the Defendant ſhall not take Advantage thereof.

Cro. Eliz. 778. Rol. Abr. 225. Moor 696. 5 Mod. 226. cited.

Therefore in Treſpaſs, where the Defendant pleaded a Concord in Bar, but not with Satisfaction, Iſſue being taken upon the Concord, the Plea was held ill, for Want of Satisfaction being pleaded; yet it was not merely void, becauſe Concord was a good Plea to ſuch an Action, though not ſo fully pleaded as it might. †

† So ruled on Error being brought.

Hob. 326. *Reynolds* v. *Buckle*.

So in Debt for Rent upon a Leaſe for Years, Entry is a proper Plea, but not good, without ſaying he did expel and hold him out; yet if Iſſue be taken upon *Non intravit*, and found for the Defendant, he ſhall have Judgment.

Cro. Jac. 678. *Johns* v. *Ridler*.

In Ejectment the Defendant pleaded, that one *Ridler* was ſeiſed in Fee, and made a Leaſe to him for five Years, by virtue whereof he was poſſeſſed, until the Leſſor of the Plaintiff entered and diſſeiſed him, and made a Leaſe to the Plaintiff, that thereupon he re-entered and ejected him, *prout ei bene licuit*. The Plaintiff replies, that the Leſſor was ſeiſed in Fee, and leaſed to him, and the Defendant ouſted him; *abſque hoc*, that he did diſſeiſe the Defendant: Upon which Iſſue was joined, and found for the Plaintiff; and though this Iſſue was vain, * it being impoſſible that a Leſſee for Years ſhould be diſſeiſed; yet the Defendant ſhall not take Advantage of ſuch an ill Plea; but having confeſſed a Leaſe made to the Plaintiff, and it being found that he did not diſſeiſe the Defendant Judgment ſhall be given for the Plaintiff; but if there had been a Verdict for the Defendant, he could not have Judgment; for then the Jury would have found againſt the Law, that a Termor was diſſeiſed.

* Page 90

3. Of general Pleading to avoid Prolixity; and therein of affirmative and negative Pleas.

Co. Lit 303. 8 Co. 133. Plow. 123, 126, 129. (*a*) 26 H. 8. 5. Keilw. 95. 40 E. 3. 30

It ſeems that formerly great Certainty and Exactneſs was required in ſetting forth all the Particulars in a Declaration, as likewiſe in pleading the Performance of Conditions and Covenants; as (*a*) in a Bond for Performance of Covenants, it was held neceſſary to demand Oyer of the Condition, and likewiſe of the Covenants, and to plead particularly the Performance of each of them; this created great Inconveniencies in overloading the Proceedings with a Recital of uſeleſs Facts; and therefore this Rule hath in the modern Practice received a Relaxation; and it is now ſettled, that where the Matters to be pleaded tend to Infiniteneſs and Multiplicity, whereby the Rolls may be incumbered in the Length thereof, to allow of general Pleading.

Raym. 400. *Aglionby* v. *Towerſon* adjudged.

As if in an *Aſſumpſit* the Plaintiff declares, that whereas there was a certain Diſcourſe between the Plaintiff and Defendant, concerning a Marriage to be had between the Nephew of the Plaintiff and the Niece of the Defendant, and thereupon the Defendant, in Conſideration the Plaintiff would do his Endeavour and Labour to perſwade his Nephew

phew to marry the Niece of the Defendant, did aſſume and promiſe to pay the Plaintiff, &c. and avers, that ſuch a Day, and divers other Days and Times *Omnibus modis quibus poteret conatus fuit & elaboravit ſuadere* his ſaid Nephew to marry the Defendant's ſaid Niece, &c. this is a good Declaration, without ſhewing in particular how he did his Endeavour; for if he ſhall ſet forth his ſeveral Speeches to his Nephew in the Praiſe of the young Lady, or the Advantages of a married Life, &c. the Record would be too long.

So in an *Aſſumpſit* the Plaintiff declares, that in Conſideration the Plaintiff would find and provide for a ſick Man all ſuch Neceſſaries as he ſhould want, the Defendant aſſumed and promiſed to pay, &c. and avers, that he had found him Neceſſaries, amounting to ſuch a Sum, &c. this is a good Declaration, without ſhewing in particular what thoſe Neceſſaries were, for that would make the Record too prolix. 3 Bulſt. 31. Rol. Rep. 173. *Crips* v. *Bainton.*

In *Aſſumpſit* for Labour and Medicines in curing the Defendant of a Diſtemper, &c. who pleaded *Infra ætatem*; the Plaintiff replied it was for Neceſſaries generally: And upon Demurrer to this Replication, it was objected, that the Plaintiff had not aſſigned in certain how or in what Manner the Medicines were neceſſary; but it was adjudged, that the Replication in this general Form was good. Carth. 110. *Huggins* v. *Wiſeman*, & *vide* Title *Infancy*, Letter (I).

So where Trover was brought for a Library of Books, † and held to be good without expreſſing what they were; becauſe to ſet down the particular Books would make the Record too prolix; and in this Caſe *(a) Plow.* was cited, where a Man pleaded, that he was Knight of the Shire *per majorem numerum*, and held to be good. Vent. 114. *Emery's* Caſe. (a) *Bulkeley's* Caſe cited, alſo Raym. 9.

† *Sed que de hoc?* He might have declared of a certain Number of Books: But ſurely nothing can be more uncertain than the Term *Library*; as what may be a very proper Library for a Gentleman in one Art or Profeſſion may be a very improper one for another, &c.

So in an Action on the Caſe for ſetting an Houſe on Fire, *per quod*, amongſt divers other Goods, *ornatus pro equis aratris amiſit.* After Verdict for the Plaintiff, it was objected, that this was uncertain; but the Objection was diſallowed by the Court. And in this Caſe Juſtice *Windham* ſaid, that if he mentioned only *diverſa bona* it had been well enough; as a Man cannot be ſuppoſed to know the Certainty of his Goods when his Houſe is burnt; and that, to avoid Prolixity, the Law will ſometimes allow ſuch a Declaration. * Page 91 M. 16 Car. 2. in *B. R. Prior* v. *Dawkes.* Keb. 825. S. C.

As to general and particular Pleading there are many Diſtinctions which may be reduced to this Rule, that a Certainty or Generality in Pleading is required, according to the Nature of the Subject Matter pleaded; and this has begot the Diſtinction between *(b)* Negative and Affirmative Pleas; as if a Man is bound to perform all the Covenants in an Indenture, if they are all in the Affirmative, he may plead Performance thereof generally, and is not obliged to exhibit to the Court a Performance of each of them; which would overload the Proceedings with a Recital of all the Covenants, whereas one only might be in Controverſy between the Parties. Co. Lit. 303. Leon. 136. Keilw. 95. Palm. 70. Lev. 303. Sid. 215. 2 Vent. 156. (b) Mode, and other Circumſtances of Quality, Time and Place, are requiſite in Affirmative Pleas, none of which are neceſſary in Negatives. Show. Parl. Caſes 97. and ſeveral Authorities there cited.

But if ſome of the Covenants are in the Negative, (c) the Defendant muſt plead ſpecially; for a Negative cannot be performed, otherwiſe on Co. Lit. 303. Moor 856. CroEliz. 691. Sid. 87. (c) But if the Negative Covenants are all void and againſt Law, and the Affirmative good and lawful, he may plead Performance generally, and the Court ſhall take Notice that the Negative Covenants are void and againſt Law. Moor 850. Godb. 212. Hob. 12.

a ſpecial

a ſpecial Demurrer the Defendant's Plea would be bad ; *aliter* on a general Demurrer.

Show. Parl. Ca. 9. *arguendo.* Even in Affirmatives our Law allows of general Pleading, where Particulars would be many ; as in a Bond for Performance of Covenants, upon an Apprentice's Indenture, for finding him Meat, Drink, Waſhing, Lodging, and other Neceſſaries, held, that *invenit* Meat, Drink, Waſhing, Lodging, & *alias res neceſſarias*, is a good Plea, though intirely uncertain what or how much ; and the Reaſon is not only becauſe it is in the Words of the Covenant, for that Reaſon doth not always hold ; for many Times you muſt ſhew how, and are forced to vary from the Words of the Covenant in the Breach ; as in the Caſe of quiet Enjoyment, Breach muſt alledge how, and by whom, and under what Title the Man was diſturbed ; but there is another Reaſon, becauſe the Particulars would be many.

Co. Lit. 303. Palm. 70. Cro. Eliz. 560. Leon. 311. Where ſome of the Covenants are in the Disjunctive, there the Defendant cannot plead Performance generally, becauſe both the Alternatives are not to be performed ; and by pleading Performance generally, he does not ſhew in certain what is performed by him ; and therefore this is bad on a ſpecial Demurrer, which ſhews the Want of that Certainty ; but where the Plaintiff does not demur for Want of ſuch Certainty, it ſhall be intended that the Defendant performed one of them, and therefore good.

Savil 120, 121. If the Condition of an Obligation be to perform the Award of *J. S.* and he awards the Obligor to pay 100*l.* or to procure a Stranger to be bound in 200*l.* &c. the Defendant may plead Performance generally ; becauſe one Part is void, and it will be intended that he pleads Performance of that Part which he was bound to perform, and not the other Part.

Cro. Eliz. 870. *Waller* v. *Croot.* If in Debt upon an Obligation, conditioned that if the Obligee ſhall enjoy ſuch Lands till the full Age of *J. S.* and if *J S.* within one Month after his full Age makes an Aſſurance thereof to the Obligee, then, &c. the Defendant pleads, that *J S.* is not yet of full Age ; this Plea is not good, without ſhewing the Obligee hath enjoyed the Lands in the mean Time ; for the Condition is in the Copulative.

* Page 92 Dyer 229. Hob. 69, 107. (*a*) If the Condition be to convey an Eſtate, in pleading it muſt be ſhewn by what Manner of Conveyance it was done. Leon. 72. 2 Leon. 39. 2 Mod. 240. Godb. 36.——So if the Condition be to ſhew a ſufficient Diſcharge of an Annuity, in pleading Performance it muſt appear what Manner of Diſcharge it was, that the Court may adjudge whether ſufficient or not. 9 Co. 25. Hob. 107.——In Debt upon an Obligation, conditioned to deliver all Evidences concerning ſuch Lands, the Defendant muſt plead, that he hath delivered ſuch and ſuch Charters, which are all the Charters concerning the Land. Keilw. 95. But *per* Cro. Eliz. 869. he may plead, that he hath delivered all, &c. and the contrary in ſome Particulars ought to be ſhewn on the other Side ; *per Curiam.*

* Where the Covenants are to do a Matter of Law, as to (*a*) convey, diſcharge an Obligation, ratify, or to confirm, &c. there it muſt be pleaded ſpecially ; becauſe, being a Matter of Law to be performed, it ought to be exhibited to the Court, to ſee if it be well performed, who are Judges of the Law, and not a Jury, who are Judges of the Fact only.

Co. Lit. 303. b. (*a*) As to levy a Fine. Cro Jac. 560. 2 Rol. Rep. 159. Where the Covenants are Matters of (*b*) Record, the Performance muſt be ſhewn ſpecially ; becauſe it muſt appear to be done by the Record, and is not to be tried by a Jury on the General Iſſue.

2 Co. 4. *Manſer's* Caſe, and the like Point in Winch 9. Cro. Jac. 363, 634. Leon. 71. March 121. Keilw. 80. If in Debt upon an Obligation, conditioned that the Plaintiff ſhall enjoy certain Lands diſcharged, or otherwiſe ſaved harmleſs (*c*) from all Incum-

(*c*) If the Condition be to ſave harmleſs from all Bonds entered into for the Obligor, *exoneravit & indem' conſervavit* is no

Plea

Incumbrances, the Defendant pleads, that the Plaintiff had enjoyed the Lands discharged and kept indemnified from all Incumbrances; this Plea is naught; for being in the Affirmative it ought to have been shewn how; but if he had pleaded in the Negative, *Non fuit damnificatus*, it had been otherwise.

Plea without shewing how. Cro. Eliz. 916. adjudged, but that he need not shew from what Bonds he saved him harmless; and *per* Cro. Eliz. 433. *per Gaudy*, there is a Diversity when the Condition is to discharge from a particular Thing, and when from a Multiplicity of Things, for in the last Case it is sufficient to plead generally.

Where the Bar is in the Negative, it is impossible for the Plaintiff to go to an Issue, for a Negative cannot be proved; and therefore the Plaintiff must assign a Breach, by replying in the Affirmative, on which Issue may be properly taken; as if a Condition of a Bond is, that the Defendant should not deliver Possession to any Person but the Lessor, or to such Persons as lawfully evicted him; the Defendant pleads he did not deliver the Possession to any but such as lawfully evicted him; here it comes on the Plaintiff's Side to assign a Breach, and shew that he delivered the Possession to some Person that had not lawfully evicted him; because, the Condition being in the Negative, the Defendant's Plea must necessarily be in the Negative also, and the Plaintiff, to assign a Breach, must assign a Fact directly opposite to such Negative Condition. Lev. 83. *Pullen* v. *Nicholas.*

So if an Obligation be to perform an Award, and the Defendant pleads no Award made, it is not sufficient for the Plaintiff to shew an Award made in his Replication, unless he shews also a Breach; because the Defendant's Plea is in the Negative, and the Plaintiff, by replying in the Affirmative, does not shew the Obligation to be broken; for the shewing such an Award leaves it uncertain whether it was performed or not; and his having shewn that there was an Award subsisting, does not make it appear that he was intitled to the Money, unless he also shews that the Award was broken. *Vide* Title *Arbitrament.*

The Condition of a Bond was, that the Obligor should render an Account of the Goods of *William Narril* deceased, which came to his Hands, and make an equal Dividend between him and the Obligee; the Defendant pleads, no Goods came to his Hands; the Plaintiff * must reply what Goods came to his Hands, and farther assign the Breach that he did not account for them; because the Plaintiff, by replying the Goods came to the Defendant's Hands, leaves it on his own shewing indifferent to the Court whether he be intitled to the Penalty of the Obligation or not, unless he goes farther, and shews that the Defendant did neither account nor divide them. Sand. 102. *Hayman* v. *Gerrard.* * Page 93

(*a*) If in Debt upon an Obligation conditioned to pay 30*l.* to *A. B.* and *C. tam cito* as they shall come to the Age of twenty-one Years; the Defendant pleads that he paid those Sums *tam cito* as they came of Age; this no good Plea, for the Time, Place, and Manner of Performance ought to be shewn in certain, so that a certain Issue might be taken upon it; adjudged upon a special Demurrer. Cro. Jac. 359. 2 Bulst. 267. S. C. *Halsey* v. *Carpenter.* (*a*) If the Condition be to surrender a Copyhold, the Defendant must not plead generally, that he hath surrendered it, but must shew when the Court was held. Winch 11. adjudged ——If the Condition be, that the Obligee shall enjoy an Office according to Letters Patent, the Defendant must not plead *in hæc verba*, but shew the Effect of the Letters Patent, and the Enjoyment accordingly. Hob. 295.

If in Debt upon an Obligation conditioned to perform Covenants, one of which was for the Payment of Money upon the making an Assurance, the Defendant pleads that he paid the Money such a Day, but saith not when the Assurance was made; this is naught, for it ought 2 Mod. 33. *Duck* v. *Vincent.*

ought to appear that the Money was immediately paid purſuant to the Covenant.

Cro. Eliz. 749. *Mints* v. *Bethel.* In Debt upon an Obligation, conditioned that the Defendant at all Times, upon Requeſt, ſhould deliver to the Plaintiff all the Fat and Tallow of all the Beaſts which ſhould be killed or dreſſed by the Defendant, his Servants or Aſſigns, before ſuch a Day; the Defendant may plead, that upon every Requeſt to him made he did deliver to the Plaintiff all the Fat and Tallow of all Beaſts, *&c.* without ſhewing how many Beaſts were killed or dreſſed, or what Quantity of Fat he delivered; for if the Pleadings were not ſo contrived as to purſue the Covenants, the Defendant would be obliged to fill the Pleadings with Multitudes of uſeleſs Deliveries, which might not be controverted by the Plaintiff; whereas the Plaintiff by aſſigning a particular Breach in the Non-delivery at any one Time may bring the whole Matter in Queſtion.

Cro Eliz. 749. cited between *Sands* and *Maleverer.* But here we muſt take Notice of another Diſtinction, *viz.* That when the Condition conſiſts of Matters to be done that lie within his own Knowledge, though they conſiſt of great Variety, yet the Defendant cannot plead generally, but muſt ſhew the particular Performanee of all Matters in his Plea; as if the Condition be that the Defendant, Bailiff of the Plaintiff's Manor, ſhould render an Account of all the Rents of the Manor he has received before ſuch Day; if the Defendant plead he has accounted for all the Sums before ſuch a Day, it is ill; but he muſt ſhew the particular Sums, becauſe it lies within his own Knowledge only.§

§ *Sed qu.* If he may not ſay he received divers Sums, to the Amount of ſuch a Sum in Groſs, and that he rendered an Account thereof?

Sid. 215. *Woodcock's* Caſe. So if the Condition be, that the Defendant ſhould deliver Briefs to all Churches within ſuch a Time, and ſhould collect the Money given upon them, and ſhould deliver it over to the Plaintiff; there the Defendant cannot plead generally, that he has delivered the Briefs, collected the Money, and delivered it over to the Plaintiff; but he muſt particularly ſhew what Briefs were delivered, what Sums were collected, and that he delivered them over to the Plaintiff, becauſe ſuch particular Facts lie within his own Knowledge only.†

† *Qy.* See Note preceding A much ſhorter Iſſue might be taken. Suppoſe he pleaded he delivered Briefs to all Churches, collected all the Money, amounting in the whole to ſo much, and no more, and that he delivered the ſame to the Plaintiff. If not true in either of the Particulars it might eaſily be falſified by the Plaintiff: He might ſay he did not deliver Briefs to all Churches, for that he omitted ſuch a Church; or that he did not collect the Money, but omitted to collect ſuch a Sum; or that he collected more than alledged, to wit, ſo much, and did not deliver the whole to the Plaintiff; or that he did not deliver the Money collected to the Plaintiff, or any Part; or not all, only ſo much.

Lutw. 419. If the Condition be, that the Defendant pay the Plaintiff all Manner of Coſts and Charges that *J. S.* ſhall charge the Plaintiff with, for carrying on a Suit; the Defendant pleads he did pay all Manner of Coſts and Charges; this is ill, becauſe it relates to one ſingle Point, which may and ought to be ſhewn in certain, in order that the Plaintiff may take Iſſue upon it.‡

‡ He ſhould have ſaid, that *J. S.* charged the Plaintiff ſo much, and no more, for the Coſts and Charges, and that he paid the Plaintiff the ſame, to wit, on ſuch a Day, at the Place where the *Venue* was laid.

* Page 94 Sid. 334. *Church* v. *Brunſwick.* *A Bond to pay from Time to Time a Moiety of all ſuch Monies as from Time to Time he ſhould receive; Payment of a Moiety generally, without ſhewing the Particulars in certain, was held a good Plea, becauſe it is of what he ſhould receive from Time to Time; otherwiſe if theſe

theſe Words had been omitted, becauſe in that Caſe there would be a Stuffing of the Rolls with a Multitude of Particulars. ‖

‖ But *qu.* If he ſhould not ſhew how much he received?

In an Action on the Caſe againſt the Defendant, who promiſed, that in Conſideration the Plaintiff would diſcharge a third Perſon then under Arreſt, that he would pay the Money; and alledged *in facto* that he *exoneravit*, &c. and this was held ſufficient without ſhewing how; for that it may be done by Compoſition, &c. and without Deed. Cro Eliz. 913. *King* v. *Hobbs.*

So in Debt upon a Bond conditioned to perform the Award of *J. S.* if it is awarded that a Suit in Chancery by the Defendant againſt the Plaintiff ſhall ceaſe, and the Plaintiff ſtand acquitted *De qualibet materia in eadem contenta*, the Defendant may plead *quod ſtetit inde quietatus*, without ſhewing how, or that he *in facto* diſcharged him; for it was not intended that an actual Diſcharge ſhould be given, but that by the Arbitrament he ſhould be acquitted. Cro. Jac. 339. Rol. Rep. 8. 2 Bulſ. 93. *Freeman* v. *Sheen.*

In Debt upon a Bond, the Condition whereof was to free and keep harmleſs the Plaintiff of and from all Coſts and Damages that may ariſe by reaſon of a Law-Suit, &c. the Defendant pleaded *Non damnificatus* generally; and on Demurrer to this Plea it was held good *, becauſe the Condition was to ſave the Plaintiff harmleſs from ſomething that was uncertain at the Time of making thereof, *viz.* from the Coſts and Charges of the Suit, that no Coſts might be recovered againſt him; but if it had been to ſave harmleſs from a particular Thing †, there ſuch a negative Plea generally would not have done, becauſe the Defendant ought to ſhew how he had indemnified the other. 5 Mod. 243. *Harris* v. *Pett.*

* The Particulars of the Damnification ſhould have been ſhewn by the Plaintiff in his Replication.

†*Vide infra.*

In Caſe upon an Agreement, in which the Defendant promiſed to aſſign all the Profits which accrued by a Voyage made by a Ship, &c. and the Breach aſſigned was, that the Defendant *non performavit agreamentum prædict'*; upon a Verdict and Judgment in *C. B.* for the Plaintiff Error was brought in *B. R.* where it was inſiſted that the Breach was too general and incertain: But *per Cur'* had this been even on Demurrer, it would have been good, but being after a Verdict it is beyond Queſtion, for the Plaintiff would not have Damages given if he had not proved a good Breach; and here the Agreement is ſingle, *ſſ.* to aſſign; ſo the Non-performance is in the Non-aſſignment, and it being Negative, and in the Words of the Agreement, the Judgment was affirmed. Skin. 344. pl. 13. *Knight* v. *Keech.*

In Debt on a Bond conditioned to acquit, diſcharge, and ſave harmleſs a Pariſh from a Baſtard Child, the Defendant pleaded *Non damnificatus* generally; and on Demurrer it was held, that being in the Negative he need not ſhew how, and it not appearing on the whole Record that the Pariſh was damnified, Judgment was given for the Defendant. 3 Mod. 252. *Mather* v. *Mills.*

4. Of Surpluſage and Repugnancy in Pleading.

If either Party, Plaintiff or Defendant, alledge more than is neceſſary to introduce new Matter repugnant and contradictory to what went before, in any Point not material, this will not vitiate the Pleadings, according to the Maxim *Utile per inutile non vitiatur*; and ſuch redundant or repugnant Part ſhall be rejected, eſpecially after a Verdict; ſo though there be a Repugnancy in any material Point, though this is not aided after Verdict, yet if it appears that the Verdict was given on a different Part of the Declaration, or if the Plaintiff releaſe ſuch repugnant Part, Judgment ſhall be given for him. Co. Lit. 303. Plow. 232, 502. Co. 42. 19 H. 6. 30, 32. Sand. 282.

In

Cro. Jac. 549. * Page 95

In Debt on an Obligation the Defendant pleads Payment of 50 *l.* 14 *Jun.* 11 *Jam.* according to the Condition; the Plaintiff replies *quod* * *non ſolvit* 50 *l. prædict'* 14 *Auguſt Ann.* 11. *ſuprad' quas ad eundem diem ſolviſſe debuiſſet*; *& hoc, &c.* the Verdict found *quod non ſolvit prædict'* 14 *Junii prout* the Defendant had ailedged; the Objection here was that no Iſſue was joined, becauſe they do not meet in the Time the Money was paid; but the Word *Auguſt* being plainly Surpluſage, for when he ſaid *quod non ſolvit prædict'* 14 *die*, it is a ſufficient Traverſe without the Word *Auguſt*, and *Auguſt* is plainly repugnant to the Word *prædict'*, for *prædict'* refers to *June*, and ſuch Surpluſage, being a Repugnancy to what was before material, was idle and void.

Cro. Jac. 618. *Hanbury* v. *Ireland.*

In Treſpaſs the Bill was filed *Hil.* 18 *Jac.* ſetting forth that the Defendant 2 *January* 17 *Jac.* beat the Plaintiff's Servant, *per quod* the Plaintiff *ſervitium per magnum tempus, ſſ. a prædict'* 20 *Martii ſuprad' uſque primum diem Martii extunc prox' ſequen perdidit*; on a *Nihil dicit* a Writ of Inquiry was awarded, and 10 *l.* Damages; but the Defendant had Judgment, becauſe the Gift of the Action is for the Uſe of the Plaintiff's Service, and the Battery is but Inducement, and the Loſs of the Service is not *ex neceſſitate rei* relative to the Battery; for the Servant might fall ill ſome Time after the Battery, and the Plaintiff having laid a different Month from the Battery, there is nothing in the Record to determine the Court to the 20th of *January*, and to rectify the Month *March* as repugnant; and if the Loſs of the Service ſtands on the Month of *March* 17 *Jac.* until *March* following, it takes three Months of the Time elapſed after the Time of the Action brought, for which the Jury was not authorized to give Damages.

2 Leon. *Monings* v. *Warley.*

But in Debt upon a Bond, conditioned that if the Plaintiff did not depart out of the Defendant's Service without his Leave, *&c.* then if he paid the Plaintiff 100 *l.* within 28 Days upon Demand, the Bond ſhall be void; the Defendant pleaded that the Plaintiff 4 *Maii* 30 *Eliz.* departed out of his Service, and without his Leave; the Plaintiff replied that 6 *Septem.* in the ſame Year ſhe departed with Leave, and that afterwards 4 *Octob.* ſhe demanded the 100 *l.* which the Defendant refuſed to pay; *abſque hoc*, that ſhe departed without Leave; it happened that the Demand was laid to be 4 *Octob.* and the Writ was teſted 18 *Octob.* ſo that there was not 28 Days between the Demand and the Action brought, yet the Plaintiff had Judgment; tho' upon her own ſhewing ſhe brought the Action 14 Days too ſoon; for the Iſſue was upon the Departure, and the Demand in the Replication was altogether immaterial, and therefore ſhall be rejected as Surpluſage.

Yelv. 94. Carth. 288, 289. *& vide* Lev. 194, 195. Like Point, *& vide* Title *Ejectment.*

If in Ejectment the Plaintiff declares on a Leaſe made to him the third of *May*, and that the Defendant *poſtea, ſſ.* 1 *Maii* ejected him, this is good after Verdict; for by the *Poſtea* it appears that the Defendant committed a Tort on the Plaintiff's Title, and when he lays a repugnant Day, it is as if he had laid none; and if no Day be laid, it ſhall be intended after Verdict that the Tort was committed before the Action; for it would be very foreign after Verdict to intend, that the Action was brought by the Spirit of Prophecy for a Wrong to be committed afterwards; and beſides, the Jury could not take Cognizance of any Fact done ſince the Action brought, for that was not in Iſſue.

Cro. Jac. 377. *Coddington* v. *Wilkin.* Carth. 95.

In Treſpaſs for entering his Cloſe 10 *Julii* 44 *Eliz. contra Pacem Dominæ Reginæ Eliz. & Domini Regis nunc*, after Verdict this was moved in Arreſt of Judgment, and held that theſe Words *Domini Regis nunc* were but Surpluſage.

S. P. *& vide* Show. 28. where it is held that this would not be good on Demurrer.

If

If an Action be brought, and the Plaintiff concludes his Declaration with a *contra formam ſtatuti*, and there happens to be no Act of Parliament in the Caſe, the Words *contra formam ſtatuti* ſhall be rejected as Surpluſage. Vent. 103. *Ward* v. *Rich.*

* So in Treſpaſs for entring his Cloſe and treading down his Graſs and Corn, and hunting there, the Defendant being an inferior Tradeſman, *contra pacem Domini Regis, & contra formam ſtatuti inde proviſ'* ; in this Caſe, though ſeveral Treſpaſſes are alledged, the laſt of which only is within the Statute, and the Concluſion of the Count is *contra formam ſtatuti*, which in a grammatical Conſtruction goes to the whole Count ; yet as in Law it goes only to the Hunting, it therefore may be applied to the latter Part, and rejected as to the Reſt for Surpluſage. * Page 96 Salk. 212. pl. 2. Ld. Raym. 149. 12 Mod. 122. Comyns 26. pl. 18. Holt 661. pl. 1.

Carth. 382. 5 Mod. 307. Comb. 420. S. C. *Bennet* v. *Talbot.*

In *Aſſumpſit* for Money had and received by the Defendant for the Plaintiff, *ad uſum* of the Defendant ; and Verdict upon *Non aſſumpſit* for the Plaintiff: On Motion in Arreſt of Judgment the Court held, that theſe Words, *ad uſum* of the Defendant, ſhould be rejected, being inſenſible and repugnant ; and then the Promiſe is for Money had and received by the Defendant for the Plaintiff, which is well. Salk. 24. pl. 7. Ld. Raym. 669. Comyns 115. pl. 79. 12 Mod. 510. *Palmer* v. *Stavely.*

Mod. 42. Sid. 306. 2 Keb. 615. S. P.

In Covenant againſt an Apprentice the Plaintiff aſſigned for Breach, that the Apprentice, before the Time of his Apprenticeſhip expired, and *durante tempore quo ſervivit*, departed from his Maſter's Service ; the Defendant demurred and had Judgment ; becauſe the Declaration was repugnant, for it ſhould have been *durante tempore quo ſervire debuit.* Salk. 213. pl. 4. *Nevil* v. *Soper.*

So in Treſpaſs for taking and carrying away his Timber and Brick, *ſuper terram ſuam jacent' erga confectionem domus de novo ædificat'* ; and the Court held this inſenſible ; for they could not be Materials towards building a Houſe already built. Salk. 213. *Lawley* v. *Arnold.*

Treſpaſs *Quare clauſum fregit & ſolum fodit* ; the Defendant juſtifies, that he and his Anceſtors, and all thoſe whoſe Eſtate he had in a Cottage, have uſed to have Common of Turbary to dig and ſell *ad libitum*, as belonging to the Houſe, *&c.* and adjudged an ill Plea, being repugnant in itſelf ; for a Common appertaining to a Houſe ought to be ſpent in the Houſe, and not ſold abroad ; alſo ſuch a Common, as is aboveſaid, is an Intereſt and a Frank-tenement. Noy 145. *Valentine* v. *Penny.*

If an Annuity, Common of Paſture, Common of Eſtovers, or the like, be granted for Life or Years, *&c.* the Reverſion may be granted without Attornment ; and therefore to plead it is Surpluſage, and more than needs ; becauſe in none of them is there any Tenure, Attendance, Remainder or Payment out of Land. Co. Lit. 312. a.

In an Avowry for a Rent-Charge, the Defendant made Title to *Jan. Stiles*, with whom he married *Anno* 1603, and becauſe at *Mich.* 1597, 20*l.* was arrear, and not paid to him and his Wife, avowed *Hill.* 7 *Jac.* Adjudged a good Avowry ; for the ſaying it was arrear to him and his Wife was but Surpluſage, when the contrary appears, he not being married then. Cro. Jac. 282. *Bowles* v. *Poor.* Bulſt. 135. S. C. & *vide* Hob. 208. Moor 887.

If an Acceptance of Rent of an Aſſignee be pleaded, *quod receperunt & acceptaverunt de prædict' J S. redditum ſicut fertur ſuperius reſervat', viz. ſex denarios de redditu prædict'* ; this is repugnant, becauſe it is in a Point perfectly material ; and it is repugnantly pleaded, becauſe it is ſaying he received the whole Rent, and yet received but Part of it, which is in Subſtance a different Thing ; and the *Sex denar'* is no Surpluſage, becauſe Like Point. Sand. 298, 305.

becauſe it is the certain Sum that is alledged to be accepted; and therefore the Acceptance is not in the Form only.

Latch 175. Noy 44. Yelv. 5. If a Man makes ſeveral Demands in one Declaration, and in the *toto ſe attingunt* miſcaſts the whole Sum, and makes it more than what is contained in the ſeveral Articles demanded; this ſhall not vitiate the Declaration, becauſe the Caſting up one Total is mere Surpluſage, and that Total not agreeing with the Parts, ſuch diſagreeing Surpluſage cannot hurt; for it is plainly the Miſtake of the Clerk, in computing the Demand aright, and not of the Party, in ſhewing any particular Demand otherwiſe than he ought.

* Page 97 Yelv. 5. Noy 44. Latch 175. & *vide* 1 Sand. 282. that the Plaintiff may remit ſuch Overplus declared for. * But if a Man brings a Plaint in an inferior Court, and the Declaration ſets forth particular Demands, which over-run the Sum mentioned in ſuch Plaint, though never ſo little, and the Jury give a Verdict according to the Sums mentioned in the Declaration; this is erroneous; for the Plaint in Court is in Nature of a Writ, and is the Original and Foundation of the whole Proceedings; and if the Declaration, Verdict, or Judgment, are for more than is contained in the Writ or Plaint, and if it be beyond it ever ſo little, by the ſame Reaſon they may go to larger Sums *in infinitum*; and then the Plaint or Writ would be no Direction for the future Proceedings of the Court.

5. That the Pleading ought to be direct and not argumentative.

Co. Lit. 303. a. (*a*) Every Plea muſt be direct, and not by way of Argument or Rehearſal.

(*a*) A Plea in Bar, that deſtroys the Plaintiff's Action only argumentatively, is not good. Yelv. 223.

Dyer 42, 43. 2 Co. 3. & *vide* 1 Lev. 194. If a Man be bound by Obligation to warrant Lands, and in an Action on this Bond the Defendant pleads, that the Plaintiff *pacifice gaviſus eſt*, &c. this is naught, being only argumentative; for he ſhould have pleaded, that he did warrant the Lands, & *non damnificatus*.

Dyer 118. To ſay *Quod indentura teſtatur quod dimiſit* is an ill Plea; for he ought to ſhew that he demiſed *de facto*.

2 And. 179. In a *Formedon in reverter*, the Demandant counts of a Gift to Baron and Feme in Tail, and that they are dead without Iſſue, the Defendant cannot plead, that the Gift was to them in *(b)* Fee, without traverſing the Gift in Tail, being only argumentative.

(*b*) So in a *Quare impedit* cannot plead that *A.* is Incumbent, and not *B.* without a Traverſe that *B.* is Incumbent, being only argumentative, *ſi. A.* is Incumbent, *ergo B* is not. 2 And. 179.——In Treſpaſs againſt divers Defendants, they plead, that one of the Defendants was dead before the Writ purchaſed; the Plaintiff replies, that he was alive; this is naught, without adding *& ſic nient morte*; ſo if Villenage be pleaded, Replication, that he is Frank-free, without adding *nient Villein*, is naught. 19 H. 6. 4.

7 E. 4. 16. 2 And. 179, 180. So if a *Sci. Fa.* be brought againſt a Parſon for the Arrears of an Annuity recovered againſt him, the Defendant pleads, that before the Writ brought he had reſigned into the Hands of the Ordinary, who accepted thereof; this is no good Plea, for he ought to have pleaded, that he was not Parſon the Day of the Writ brought.

4 Mod. 405. *Derrier* v. *Arnaud.* In *Aſſumpſit* the Defendant pleaded, that the Plaintiff was *Alienigena in Regno* Franciæ *ſub ligeantia adverſarii Dom' Regis*, &c. *oriundus*: And on Demurrer to this Plea, the Exception to it was, that this was not a direct Affirmative, that the Plaintiff was *Alienigena*, in that it ſhould have been *Natus*, and not *Oriundus*; but ſome Precedents being cited out of *Raſtal*, where the Word *Natus* was ſupplied with *Oriundus*, the Plea was held good.

A Plea

A Plea, that he is now a Subject, intended a natural one, and that he was always ſo. Lev. 121.

In *Aſſumpſit* againſt an Executor, on the Promiſe of his Teſtator, he pleaded *Non aſſumpſit*; and after Verdict for the Plaintiff, it was objected, that it did not appear by the Plea (*a*) who did not aſſume: But *per Cur'*, It ſhall be intended of the Teſtator, for here is no Charge of any Aſſuming by the Executor. Lev. 184. *Browning* v. *Litton.*

(*a*) *Super ſe aſſumpſit*, without ſaying to whom,

where the Law raiſes the Promiſe, will be well enough, but not in the Caſe of a ſpecial Promiſe. Sid. 292. 2 Keb. 57. Cro. Eliz. 703.

* So in Debt againſt an Executor on the Bond of his Teſtator, the Defendant pleaded *Non eſt factum ſuum*; and it was adjudged, that *ſuum* ſhould be intended the Teſtator. * Page 98 Latch 125. *Baker*'s Caſe.

If a Horſe be taken as a Stray, and the Owner ſays, he demanded the Horſe *proferendo ſatisfactionem*; this is ſufficient, and a direct Affirmation, as in the Caſe of *Warrantizando vendidit.* 2 Salk. 680. *Henly* v. *Walſh.*

If a Man pleads, that he entered *come* or as Heir to ſuch a one; this is poſitive enough: So if a Man juſtifies as Bailiff or Servant; this is not barely argumentative, but as poſitive and direct as if he had alledged that he was Heir, Bailiff or Servant. 5 H. 7. 1, 2. Dyer 132.

If the Condition of a Bond be to ſtand to the Award of *J. S.* and ſo, that the Award be made on or before the 16th of *March*, and no Award be pleaded, and the Plaintiff replies, that after the making the Bond, and before the Action brought, *ſſ. prædict'* 16 *die Martii*, they made an Award; the (*b*) *Scilicet* is a direct Affirmation that the Award was made within the Time limited by the Condition, and may therefore be traverſed. Sand. 169.

(*b*) The Word *Licet* is not a bare Implicative, ſo is *Et quia*

but is an expreſs Averment. 3 Leon. 67. Plow. 127.——*Eo quod* is an Affirmative; *Quod cum*, &c. and may be traverſed. Lev. 194. 1 Sand. 117.

6. Negative Pregnant.

It is laid down as a Rule, that every Plea ought to be direct, and not by way of Argument; and that therefore Iſſue cannot be joined on a Negative Pregnant, or an Affirmative Pregnant of a Negative, *i. e.* ſuch a Negative as ſuppoſes or implies an Affirmative, or ſuch an Affirmative as implies a Negative; as *Ne dona pas per le fait* implies a Gift by Parol, and therefore the Iſſue ought to have been *Ne dona pas modo & forma*, and this Kind of Pleading is held to be ill on a (*c*) Demurrer; becauſe the Plea, &c. is not a certain Affirmative or Negative of any ſingle Point in Queſtion, but being only an Error in Phraſe, it is aided after Verdict. Co. Lit. 126. a. 303. a. Doct. pl. 256. 2 Leon. 197. Leon. 136. Stile 309. Bro. Tit. *Negative Pregnant.* Fitz. *Iſſue* 88.

(*c*) There muſt be a

ſpecial Demurrer to a Negative Pregnant, that is, a Negative Plea which doth alſo contain in it an Affirmative; and to an argumentative Plea, that is, a Plea which concludes nothing directly, but only by way of Argument or Reaſoning; for the Court will intend every Plea good, till the contrary appears. Lil. Reg. 437.

In Treſpaſs for cutting his Trees, the Defendant pleads, that it was by the Command of the Leſſor to give them to a Stranger; the Plaintiff replies, that he did not cut the Trees by his Command; this was held a Negative Pregnant, and that he ſhould have pleaded *Ne commenda pas.* 21 H. 6. 46, 47. Doct. pl. 256.

After Iſſue joined the Defendant pleaded a Releaſe of the Plaintiff *Puis darein continuance*; the Plaintiff replies, that it is not his Deed *Puis darein continuance*; this is a Negative Pregnant, becauſe it implies 21 H. 6. 9. Doct. pl. 256.

the Deed to be his, though not executed at the Time alledged by the Defendant.

22. H. 6. 38, 39. Doct. pl. 256. In Case against an Host, for that the Plaintiff's Goods were embezzled by his Default, he pleaded, that they were not lost by his Default; this is Negative Pregnant, and he should have pleaded the special Matter.

28 H. 6. 7. Doct. pl. 256. *Quære.* In Case for burning the Plaintiff's House by the negligent Keeping of his Fire, the Defendant pleaded, that the House was not burnt by the negligent Keeping of his Fire; this is Negative Pregnant.

5 H. 7. 9. Doct. pl. 257. If a Defendant plead, that the Cattle died in a Pound overt by the Default of the Plaintiff, and the Plaintiff replies, that they did not die * Page 99 * by his Default generally; this is a good Plea; but if he says, that they did not die in a Pound overt, this is a Negative Pregnant.

3 H. 6. 37, 38. Doct. pl. 257. In Trespass the Issue joined was, that *J. N.* the Defendant did not disseise the Plaintiff to the Use of *W. P. &c.* and held a Negative Pregnant; but had he pleaded *Non disseisivit modo & forma*, it had been good to all Intents and Purposes.

36 H. 6. 22. Doct. pl. 257. In a Writ of Entry *sine assensu capituli*, *Ne alien pas* is a Negative Pregnant; so of an Entry for the Alienation of Tenant for Life.

22 H. 6. 38. Doct. pl. 237. In Trespass the Defendant justifies, by reason that the particular Tenant aliened the Reversion in Fee to him; the Plaintiff traverses, that he did not alien in Fee; this is no good Issue, but a Negative Pregnant; for if he aliened but for another's Life, his Entry is lawful.

2 Lil. Reg. 212. He in Reversion brings a Writ of Entry *in casu proviso*, upon an Alienation made by the Tenant for Life, supposing that he has aliened in Fee, which is a Forfeiture of his Estate; the Tenant comes and pleads, that he hath not aliened in Fee; this is a Negative, wherein is included an Affirmative; for though it be true, that he hath not aliened in Fee, yet it may be he hath aliened in Tail, which is also a Forfeiture of his Estate.

Carter 221: *Warcup* v. *Symonds* adjudged. If an Executor pleads several Judgments, and that he hath not Assets *ultra*; and the Plaintiff replies, they are kept on Foot by Fraud; and the Defendant rejoins, they are not kept on Foot by Fraud; *&c.* but doth not say Nor any or either of them; the Rejoinder is naught, for (*a*) there is a Negative Pregnant.

(*a*) Where a Plea, that a House, *&c.* was not burnt for want of good Custody of his Fire, is a Negative Pregnant. Bro. Title *Negative Pregnant* 3. Fitz. *Issue* 88.——Saying that you accepted not the Obligation in Satisfaction, implies that he gave you the Obligation, which is a Negative Pregnant. Stile 309.

Cro. Jac. 87. *Min.* v. *Cole.* If an Action of Trespass be brought for entering into a Man's House, the Defendant pleads, that the Daughter licensed him to enter, by which he entered; the Plaintiff replies, *Quod non intravit per licentiam suam*; though this Replication be a Negative Pregnant, for it seems rather to confess the Licence than to deny it; yet the Verdict having found that Licence, the Dubiousness of Phrase is now removed, and the Truth appears by the Verdict.

Cro. Car. 312. *Gill* v. *Glass.* So in Debt for Rent on a Lease, the Defendant pleads *Quod nihil habuit in tenementis tempore dimissionis*; and the Plaintiff replies, *Quod habuit in tenementis*, without shewing what Estate; though this had been bad on a Demurrer, because, by not shewing what Estate he had, it is Pregnant of this Negative, that he had not such an Estate by which he had Power to demise, yet after Verdict it is good, where the Truth appears that he had such an Estate that he could demise.

Lev. 83. *Pullen* v. *Nicholas.* In Debt on an Obligation to perform Covenants in an Indenture of Lease made by the Plaintiff to the Defendant, whereby the Defendant covenanted, that he would not deliver the Possession to any but the Lessor, or to such Persons as should lawfully evict him; the Defendant pleads,

pleads, that he did not deliver the Poſſeſſion to any but ſuch as lawfully evicted him: And on Demurrer to this Plea it was objected, that the ſame was ill, and a Negative Pregnant; and that he ought to have ſaid, that ſuch a one lawfully evicted him, to whom he delivered the Poſſeſſion; or that he did not deliver the Poſſeſſion to any: But the Court held the Plea purſuing the Words of the Covenant good, being in the Negative; and that the Plaintiff ought to have replied, and aſſigned a Breach; and therefore Judgment was given againſt him.

* 7. That Things muſt be pleaded according to their Operation in Law. *Page 100

The Grant or Conveyance of one Jointenant to his Companion muſt be pleaded as a Releaſe; for one Jointenant cannot enfeoff his Companion, becauſe they are already both ſeiſed *per mie et per tout*; and this Manner of Conveyance paſſing by Livery cannot operate ſo as to give him what he already has; but though a Releaſe be the proper Conveyance from one Jointenant to another, yet if the Jury find, that the one Jointenant did grant or convey to another, this amounts to a Releaſe; for they having found the ſubſtantial Part, the Court is to apply the Words according to the Operation they have in Law; but every ſuch Conveyance muſt be pleaded as a Releaſe. Co. Lit. 193. b. 2 Co. b. Sid. 452. 2 Sand. 96. Vent. 78. Raym. 187.

So if Tenant for Life grant his Eſtate to him in Reverſion; this is a Surrender, and muſt be pleaded accordingly, being the Operation it hath in Law. 4 Mod. 151. Comb. 190.

If *J. S.* pleads the Grant of a Rent from his Father in this Manner, *viz.* that in Conſideration of Love and Affection, and 5 *l.* he *conceſſit & aſſignavit*, &c. and there is neither Attornment nor Inrolment of the Deed; this cannot paſs as a Grant at Common Law, nor as a Bargain and Sale for want of Inrolment; and though it *(a)* amounts to a Covenant to ſtand ſeiſed, being in Conſideration of Love and Affection, yet it ought to have been *(b)* ſo pleaded, being the Operation it hath in Law. 2 Vent. 149, 260, 266. *Lade* v. *Baker* and *March*. 4 Mod. 149. 3 Lev. 241. S. C.

(*a*) A Man may bargain and ſell to his Son, but then the Conſideration of Money ought to be expreſſed, and it ought to have all the other Circumſtances of a Bargain and Sale; yet if it hath not, and the Conſideration of Love and Affection is expreſſed, it will amount to a Covenant to ſtand ſeiſed. 7 Co. 40. *Bedel's* Caſe. 2 Co. 24. Cro. Eliz. 394. and *vide* Vent. 137. Lev. 56. Mod. 173. *Croſs* v. *Scudamore*. (*b*) The Word *Dedi* or *Conceſſi* may amount to a Grant, to a Feoffment, to a Gift, Leaſe, Releaſe, Confirmation or Surrender; and it is in the Election of the Party to uſe it to which of theſe Purpoſes is moſt agreeable to his Intereſt, and therefore he may plead it as either. Co. Lit. 301. b. 4 Mod. 150. cited.

All neceſſary Circumſtances implied by Law in a Plea need not be expreſſed; as in pleading a Feoffment, Livery and Attornment are implied; *ſecus* in a Grant. Co Lit. 303. Yelv. 135. Plow. 149, 150.

In pleading a Countermand to a Submiſſion to Arbitration, it need not be alledged, that the Party gave Notice to the Arbitrators, for without that it is no Countermand; and therefore if no Notice be given, Iſſue may be joined upon the Point, *Quod non revocavit*. 8 Co. 82.

If a Diſſeiſee plead, that he could not enter for Fear, he muſt ſhew ſome juſt Cauſe of Fear, that the Court may judge of the Reaſonableneſs of an Apprehenſion of Danger to his Perſon; but in a ſpecial Verdict, if the Jurors find, that the Diſſeiſee did not enter for Fear of Corporal Hurt, it is ſufficient, and it ſhall be intended that they had Evidence for what they find. Co. Lit. 353. b.

Comb. 403. Ld. Raym. 154. 2 Salk. 676. pl. 3. Carth. 411. *Trygarn* v. *Fletcher.*

The Defendant made Conuſance as Bailiff to *Jane Griffith*, that *Robert Griffith* was ſeiſed in Fee, and deviſed to *Thomas Griffith* in Tail, and that a Common Recovery was ſuffered againſt him, to the Intent that *Jane* ſhould have a Rent of 40 *l. per Ann.* after the Death of *Thomas*; and that there was a Deed after the Recovery declaring the Uſes, *&c.* which was held to be ill pleaded; for he ſhould not have ſet forth the Deed, but have pleaded according to the Conſtruction of Law, that the Recovery was to ſuch Uſes at the Time.

4 Co. 22. *Page 101

The Admittance of a Copyholder, as well upon a Deſcent as Surrender, may be pleaded as a Grant, to avoid the Inconvenience which * would follow, if the Copyholder ſhould be forced in pleading to ſhew the firſt Grant; for that was either before the Time of Memory, and ſo not pleadable, or within the Time of Memory, and (*a*) then the Cuſtom fails.

(*a*) That he was ſeiſed *ſecundum conſuetudinem manerii* does not neceſſarily import a Copyhold. 3 Bulſt. 230. Rol. Rep. 211. 2 Vent. 144.

4 Co. 22. b.

So he may alledge the Admittance of his Anceſtor as a Grant, and ſhew the Deſcent to him, and that he entered, without ſhewing any Admittance of himſelf.

4 Co. 22. (*b*) Without ſhewing of whoſe Grant, Cro. Jac. 103. adjudged

But he cannot plead, that his Father was (*b*) ſeiſed in Fee at the Will of the Lord by Copy of Court Roll of ſuch a Manor, according to the Cuſtom of the Manor, and that he died ſeiſed, and it deſcended to him; for in Truth his Intereſt in Judgment of Law is but a particular Intereſt at Will.

naught upon a general Demurrer, Cro. Car. 190. *per totam Curiam*; though the Son had there ſhewn, that after the Deſcent he was admitted: But by three Judges, it is but a Fault in Form, and the Iſſue being taken upon a collateral Matter, and found for the Plaintiff, it is helped by the Statute of Jeofails.——But if *A.* pleads the Grant of the Reverſion of a Copyhold after the Death of *B.* Tenant for Life, he need not ſhew the Beginning of the Eſtate of *B.* nor by whom granted; for it is not the Title of *A.* but Matter of Inducement only. Cro. Jac. 52. 2 Vent. 182.

Hard. 366. 2 Lev. 194. *vide* Title *Leaſes.*

If one licence another to enjoy ſuch a Houſe or Land till ſuch a Time, this amounts to a preſent and certain Leaſe or Intereſt for that Time, and may be pleaded as ſuch, though it may be alſo pleaded as a Licence; and if it be pleaded as a Leaſe for Years, and traverſed, the Leſſee may give the Licence in Evidence to prove it.

And. 307. Cro. Eliz. 352. Rol. Abr. 939. *Douſe* v. *Jeffries.*

If an Obligee in a Bond covenants not to ſue the Obligor, this amounts to a Releaſe, and may be pleaded as ſuch: but if the Covenant is that he will not ſue him before ſuch a Day; this reſts only in Covenant, and the Party, if ſued, can only have an Action of Covenant.

Noy 5. Show. 321. S.C. cited.

A. having a Rent-charge iſſuing out of three Acres, *B.* purchaſed two Acres thereof, and *A.* covenanted and granted to and with *B.* not to diſtrain in theſe two Acres for the Rent. *Glanvil*, contrary to *Anderſon*, held it a Releaſe; and the Court held, that if it be a Releaſe, the Tenant of the other Acre may plead it, for thereby the Rent was extinct.

Lit. Rep. 190. *Everard* v. *Herne.*

If two are bound in an Obligation, and the Obligee releaſes to one of them, provided the other ſhall not take Benefit of this Releaſe, the Proviſo is void, and the other ſhall take Advantage of the Releaſe, if he can get it to ſhew.

Cro. Car. 551. March 95. *Dennis* v. *Pain.*

If two are jointly and ſeverally bound in an Obligation, and the Obligee by a Deed covenants and agrees not to ſue one of them, this ſeems to be no Releaſe, but that he may ſue the other.

Carth. 63, 64. 2 Salk. 573. pl. 1.

If the Obligee covenants and grants to and with the Obligor, that during ninety-nine Years he will not put the Bond in Suit; this is only a Cove-

a Covenant, upon which an Action will lie, but it cannot be pleaded in Bar of the Bond; but where the Covenant is, that the Obligee will not at any Time hereafter put the Bond in Suit; such Covenant is pleadable in Bar as a Releaſe; and in the Argument of this Caſe it was allowed by all, that if a Letter of Licence contains the following Words, *viz.* that if the Creditor ſues within ſuch a Time his Debt ſhall be forfeited, ſuch Licence is pleadable in Bar. Show. 46. *Ailoffe* v. *Scrimſhire.*

* 8. Of Colour in Pleading. *Page 102

Colour is a feigned Matter, which the Defendant or Tenant uſeth in his Bar when an Action of Treſpaſs or an Aſſiſe is brought againſt him, in which he gives the Demandant or Plaintiff a Shew that he hath a good Cauſe of Action, whereas in Truth he hath not, but only a Colour and Face of a Cauſe; and it is uſed to the End that the Determination of the Action ſhould be by the Judges, and not by the Jury, and therefore Colour ought to be Matter of Law, or doubtful to the *Lay Gents.* 2 Lil. Reg. 273. *Vide* 10 Co. 91. in Dr. *Leyfield*'s Caſe.

In an Aſſiſe, when the Defendant pleaded only a colourable Bar, that is ſuch a Bar as ſhewed ſome Title in the Demandant, they proceeded to take the Aſſiſe at large, which was in this Manner; the Aſſiſe ſhewing no Title in the Plaintiff, the Defendant would ſhew his own Infeoffment or Inveſtiture, but becauſe ſuch Feoffment was only Evidence that there was no Diſſeiſin, it would amount to the general Iſſue without Colour; and therefore the Defendant urged, that the Plaintiff obtained by virtue of an Inveſtiture, on which the Ceremony of Livery had never paſſed, and the Validity of ſuch Inveſtiture, being a Queſtion of Law, was not to be anſwered by the Jury, and therefore the Plea of his own Inveſtiture, which alone would have been only Evidence of no Diſſeiſin, joined to the Plaintiff's Title, which turned on a Queſtion of Law, drew the Cauſe from the Jury to the Court; and this obliged the Plaintiff to ſhew by what Inveſtiture he claimed, and then the Aſſiſe was taken at large on the Title of the Plaintiff; which was done, that the Plaintiff's Title might appear on Record, and the Plaintiff be confined to give Evidence touching that Title, that the Jury might not wander from that Evidence; and that, if they did, they might the more eaſily convict them in an Attaint. 2 Inſt. 411. Booth 214. 10 Co. 90. Doct. pl. 72, &c. 10 Co. 91.

In an Aſſiſe, if the Tenant pleads, that he demiſed the Lands to the Demandant for Years, this is no good Plea; becauſe the Complaint is of a Diſſeiſin of a Freehold, and the Tenant gives the Demandant no Colour to have an Aſſiſe. Keilw. 103.

If in an Aſſiſe the Tenant pleads in Bar, that his Father was ſeiſed and died, and that he as Son and Heir entered, and gives Colour to the Demandant; and he replies, that he himſelf was ſeiſed, till by the Father of the Tenant diſſeiſed, and that he made continual Claim, and after the Death of the Father re-entered, and was ſeiſed till, &c. this is a good Replication, and yet his Title is founded on his own Poſſeſſion only. Keilw. 103.

In Treſpaſs, if the Defendant juſtifies the Taking of the Cattle Damage feaſant, he need not give any other Colour to the Plaintiff; for by this Juſtification he acknowledges the Property to be in him. Co. Ent. 652. Doct. pl. 73.

In Ejectment the Plaintiff's Title in his Declaration muſt be anſwered; and it is not ſufficient barely to give Colour, as in Treſpaſs, or an Aſſiſe. † Dyer 365. Co. Ent. 79. Raſt. Ent. 254.

† In Ejectments the modern Practice is, to plead the General Iſſue, the Defendant entering into a Rule to confeſs Leaſe, Entry and Ouſter, by which Means the Title only is in Queſtion between the Parties.

10. Co. 88. Colour ought to have the following Qualities, *1ſt*, It ought to be a Matter doubtful to the Jury; as where the Defendant ſays, that the Plaintiff claims by Colour of a Deed of Feoffment, where nothing paſſed by the Deed; this is a good Colour, being a Doubt to the *Lay Gents* whether the Land paſſed by this Feoffment without Livery. *2dly*, It ought to have Continuance, though it wants Effect; as where the Defendant gives Colour by Colour of a Deed of Demiſe to the Plaintiff for the Life of *J. S.* who before the Treſpaſs was dead; this is not any Colour, for this doth not continue; but he ought to ſay, * that he claims by virtue of a Deed of Demiſe made to him for his Life where nothing paſſed by that. *3dly*, It ought to be ſuch Colour that if it were effectual would maintain the Nature of the Action, as in Aſſiſe to give Colour of Freehold, *&c.*

*Page 103

Raſt. Ent. 277. Co. Ent. 673. 10 Co. 90. In Treſpaſs if the Defendant pleads a Fine *ſur Conuzance de Droit*, levied by the Anceſtor of the Demandant, he ſhall not give Colour although this be but executory; otherwiſe if he pleads, that his Anceſtor granted the Reverſion after an Eſtate for Life or Years.

10 Co. 90. Doct. pl. 77. The Reaſon why Colour ſhall be given in a Writ of Entry, *ſur diſſeiſin*, Writ of Entry in Nature of an Aſſiſe, in Aſſiſe, Treſpaſs, *&c.* is to make a certain Iſſue; but when the ſpecial Matter of the Plea totally bars the Plaintiff, no Colour is neceſſary; and therefore in pleading a Warranty, an Eſtoppel or Fine with Proclamations, no Colour is neceſſary.

22 H. 6. 50. When a Man pleads to the Writ, or to the Action of the Writ, no Colour ſhall be given.

Doct. pl. 77. Where the Defendant intitles himſelf by Act of Parliament, no Colour is to be given.

10 Co. 90. Doct. pl. 77. Where Letters Patent are pleaded, the Defendant ought to plead Colour by former Letters Patent in this Form, *Scilicet colore quarundarum Literarum Patentium fact' prædict'* the Plaintiff, *&c. ubi nil tranſivit*, and not that the Plaintiff claims *Colore conceſſionis ſive dimiſſionis, &c.*

Doct. pl. 78. He who juſtifies for Wreck, Waifs, Strays, need not give Colour.

10 Co. 91. So he who juſtifies for Tithes ſhall not give Colour; for although any Perſon ſevers them from the nine Parts, yet they belong to the Parſon.

22 H. 6. 50. 18 E. 4. 3. 10 Co. 89. b. That if in Treſpaſs the Defendant juſtifies as Servant to *J. S.* he need not give Colour. In Treſpaſs the Defendant pleads, that the Freehold is in *J. S.* or that *J. S.* is ſeiſed in Fee as of his Demeſne, and that he by the Command of *J. S. &c.* he need not give Colour; for though the Fee or the Freehold be in *J. S.* yet the Plaintiff might have an Intereſt for Years as a Leaſe in the Premiſſes; but where the Defendant makes a ſpecial Juſtification in him, in whoſe Right as Servant, *&c.* there he ought to give Colour; as if he pleads that *J. S.* was ſeiſed, and infeoffed him, in whoſe Right, *&c.* there he ought to give Colour; for in this Caſe it cannot be preſumed that the Plaintiff has any Intereſt in the Land.

Lutw. 1343. *& vide* Cro. Eliz. 76.

Raſt. Ent. 62. 21 H. 6. 39. In Forcible Entry the Defendant may plead, that he was ſeiſed until diſſeiſed by the Plaintiff, and this is good without giving Colour.

Dyer 246. In Aſſiſe the Defendant juſtifies by virtue of a Leaſe for Years, he need not give Colour, in as much as he does not plead in Bar of the Aſſiſe, nor does he take the Freehold on himſelf.

2 Rol. Rep. 140. In Treſpaſs the Defendant pleads, that the Plaintiff claims *Colore Feoffamenti*, by which nothing paſſed, this is not good Colour, for he ought to have pleaded *Colore Chartæ Feoffamenti.*

Where

Where the Defendant derived a Title to himſelf by divers meſne Conveyances, and gave Colour to the Plaintiff by one who was laſt named in the Conveyance, this was held naught; and that he ſhould have given Colour by him who was firſt named in the Conveyance. 2 Rol. Rep. 140.

In Treſpaſs for entering the Plaintiff's Houſe, and taking and carrying away of his Goods, the Defendant pleaded, that before the Treſpaſs ſuppoſed one *A.* was poſſeſſed of the ſaid Goods, and the ſaid Goods being in the Houſe of the Plaintiff, the ſaid *A.* ſold them to the Defendant, by Force whereof he was poſſeſſed, and being ſo poſſeſſed came to the Plaintiff's Houſe, *&c.* and by Aſſent and Licence of the Plaintiff's Wife he entered into the Houſe, and carried away the * Goods; and this Plea was held naught, there being no Colour given the Plaintiff, and the Licence given by the Wife not material, nor ſufficient for juſtifying an Entry; but in this Caſe it was held that the Want of Colour is but Matter of Form, which muſt be taken Advantage of on Demurrer. 3 Leon. 266. *Taylor* v. *Fiſher.* * Page 104

In Treſpaſs for taking and carrying away a hundred Loads of Wood the Defendant juſtifies, for that *J. S.* was poſſeſſed of them *ut de bonis propriis*, and the Plaintiff claiming them by Colour of a Deed of Gift afterwards made, took them; and the Defendant retook them; and it was thereupon demurred, becauſe the Colour given to the Plaintiff is a good Title for the Plaintiff, and confeſſeth the Intereſt in him; for Colour ought to be ſuch a Thing, which is good Colour of Title, and yet is not any Title; as a Deed of a Leaſe for Life, becauſe it hath not the Ceremony of Livery, ſo the Grant of the Reverſion is not good without Attornment; but a Deed of Goods and Chattels, without other Act or Ceremony, is good; ſo of Colour by a Leaſe for Years, or by Letters Patent. Cro. Jac. 122. *Radford* v. *Harbyn.*

9. Of pleading Non-tenure and Diſclaiming.

The Plea of *Non-tenure*, or that the Defendant holdeth not the Lands mentioned in the Plaintiff's Count or Declaration, is chiefly uſed in (*a*) real Actions, and is ſaid to be General or Special; General where the Party denies ever to have been Tenant to the Lands in Queſtion; Special where he alledges that he was not Tenant at the Time of the Writ purchaſed. Doct. pl. 129. Bridg. 72, 73. Dyer 227.

(*a*) So in Debt on a Leaſe *Non-tenure* is a good Plea. 4 H. 6. 5. Doct. pl. 129.

At (*b*) Common Law if the Tenant had pleaded *Non-tenure* as to Part, it would have abated all the Writ; but by the Statute of 25 *E.* 3. *cap.* 16. it is enacted, That by the Exception of *Non tenure* of Parcel no Writ ſhall be abated, but only of that Parcel whereof *Non-tenure* was alledged. (*b*) 36 H. 6. 6. Mod. 181.

When the Tenant pleads *Non-tenure* to the whole Lands demanded, he need not ſet forth who is Tenant; but when he pleads *Non-tenure* as to Part, he muſt ſet forth who is Tenant of the other Part, and muſt (*c*) aver that he himſelf was not Tenant *die impetrationis brevis.* Doct. pl. 128.

(*c*) Pleading *Non-tenure* as the Time of the Writ purchaſed is ſufficient, without adding *Nec unquam poſtea*, Doct. pl. 128.—with what Certainty, Mod. 181.

If Iſſue be joined on a Plea of *Non-tenure*, and it is found by Verdict, that before the Writ purchaſed the Tenant infeoffed divers Perſons with an Intent to defraud him who had Cauſe of Action, and notwithſtanding ſtill took the Profits, this Finding is ſufficient to intitle Cro. Eliz. 233. *Leonard* v. *Bacon.*

the

(d) For which *vide* Title *Fraud.* the Demandant, the Feoffment being void by the *(d)* Statute 13 *Eliz.* c. 5

Mod. 181. *Fowle* v. *Doble.* If a Formedon be brought of 140 Acres lying in three Vills, and the Tenant pleads *Non-tenure* of 100 Acres, he need not ſet forth in which of the Vills the 100 Acres lie.

6. Co. 10. a. Doct. pl. 129 If on a Plea of *Non-tenure* for the Whole the Writ abates, the Demandant ſhall not have a new Writ by Journies Accounts; otherwiſe if it abates only on a Plea of *Non-tenure* for Part.

33 H. 6. 2. Doct. pl. 128. In a *Præcipe*, after Jointenancy pleaded, the Defendant, to another Writ, cannot plead *Non-tenure*, for by his former Plea he hath affirmed himſelf to be Tenant; but had the firſt Writ been brought againſt a

*Page 105 * Huſband, and the ſecond againſt Huſband and Wife, ſhe might have pleaded *Non-tenure*, being a Stranger to the firſt Action.

Doct. pl. 129. 10 H. 6. 22. In a Writ of Entry in the Nature of an Aſſiſe againſt Huſband and Wife, the Huſband ſays, that the Wife was not Tenant of the Land the Day of the Writ purchaſed, *nec unquam poſtea*, and held a good Plea.

Mod. 250. As to *Non-tenure*'s being a Plea in Bar or in Abatement, this Difference hath been taken, *viz.* That *Non-tenure*, which goes to the *Tenure*, as when the Tenant denies that he holds of the Demandant, but ſays that he holds of ſome other Perſon, is in Bar; but *Non tenure*, that goes to the *Tenancy* of the Land, as where he pleads that he is not Tenant of the Land, goes in Abatement only.

2 Rol. Rep. 54. Rol. Rep. 302. Cro. Eliz. 872. 6 Mod. 226. A General *Non-tenure* is not a good Plea to a *Scire Fa.* upon a Judgment in a perſonal Action, becauſe it falſifies the Plaintiff's Return; but in a *Sci. Fa.* to have Execution of a Judgment in a real Action one may plead *Non-tenure* againſt the Return of the Sheriff, becauſe of the high Regard the Law has to the Freehold.

2 Ld. Raym. 854. Salk. 40. pl. 9. 2 Salk. 679. pl. 7.

Owen 134. 3 Lev. 205. But a ſpecial *Non-tenure* may be pleaded to a *Sci. Fa.* upon a Judgment in a perſonal Action; as to a *Sci. Fa.* on a Judgment for Debt or Damages againſt Tenant for Years, he may plead that he has only a Term for Years.

3 Lev. 330. *Hunlock* v. *Peter.* (e) Co. Lit. 102, 361. In a Formedon in Reverter, if the Tenant pleads *Non-tenure* generally, the Demandant may maintain his Writ, that he is Tenant, though he can recover no Damages; adjudged by all the Court, and that *(e) Lit.* and *Co.* were not to be intended of a ſimple Plea of *Non-tenure*, but of *Non-tenure* with a Diſclaimer, as the Pleadings were uſually in *Littleton's* Time; for upon the ſimple Plea of *Non-tenure*, ſuppoſing the Tenant hath no Freehold but a Reverſion in Fee, the Demandant ſhall not be reſtored to the Fee, for nothing is diſowned by the ſimple Plea of *Non-tenure* but only the Freehold, which may be true, and yet he may have the Reverſion in Fee; but when the Tenant diſclaims, or pleads *Non-tenure* and diſclaims, the Demandant ſhall be reſtored to the Whole, becauſe he hath diſclaimed the Whole.

10. Pleading *Hors de ſon Fee.*

Doct. pl. 216. Bro. Tit. *Hors de ſon Fee.* And. 237. *Hors de ſon Fee* is an Exception to avoid an Action brought for Rent-Services, &c. iſſuing out of Lands by him who pretends to be the Lord; for if the Defendant can prove that the Land is without the Compaſs of his Fee the Action falls.

Bro. *Hors de ſon Fee* pl. 9. If the Writ comprehends Certainty of Title, as in *Mordanceſtor*, Formedon in the Deſcender or Remainder, *Hors de ſon Fee* is no Plea; otherwiſe

wiſe in *a Writ of Entry *ſur diſſeiſin*, or in an Aſſiſe of Rent; but in an Aſſiſe, if the Party makes Title, *Hors de ſon Fee* is no Plea. 5 E. 4. 6. 27 H. 8. 7. Dyer 311.

In Treſpaſs or Reſcue *Hors de ſon Fee* is no Plea, without ſhewing of whom the Land is held. 6 E. 4. 4. Doct. pl. 216.

In a Ceſſavit *Hors de ſon Fee* is no good Plea, becauſe the Tenure is traverſable. 2 Inſt. 296.

If a Stranger claims a Seigniory, and diſtrains and avows for the Services, the Tenant may plead that the Tenancy is *extra Feodum*, &c. of him, that is, out of the Seigniory, or not holden of him; but he cannot plead *extra Feodum*, &c. unleſs he takes the Tenancy upon himſelf.† Co. Lit. 1. b. 1 Mod. 104. cited, and there ſaid by the Ch. J. that this Rule is to be intended in Caſes of an Aſſiſe, and ſo were all the Books cited in Co. Lit. for Proof of this Opinion.

† *Vide infra* 106.

In an Avowry the Tenant cannot plead *Ne unques ſeiſe* of ſuch Services generally, becauſe he leaves no Remedy for the Lord either by * Avowry, or by Writ of Cuſtoms or Services; and therefore, if he is a Tenant in Fee-ſimple, he ought either to diſclaim or plead *Hors de ſon Fee*. 9 Co. 34. b. *Page 106

If in (*a*) Treſpaſs for taking of Goods the Defendant juſtifies by Command of the Lord of the Manor, of whom the Plaintiff held by Fealty and Rent, and that for Non-payment of the Rent he took them *Nomine diſtrictionis*; the Plaintiff may reply, that the *Locus in quo extra abſque hoc quod eſt infra Feodum*, &c. adjudged upon a ſpecial Demurrer, it being ſhewn for Cauſe that the Plaintiff had not taken the Tenancy on himſelf. 2 Mod. 103, 104. *Sherrard* v. *Smith*.

(*a*) So in an Avowry a Stranger may plead generally *Hors de ſon Fee*, and ſo may Tenant for Years. 2 Mod. 104. *per Cur.*

11. Eſtoppels in Pleadings.

There are three ſeveral Kinds of Eſtoppels, by Matter of Record, by Matter in Writing, and by Matter in *Pais*. *1ſt*, By Matter of Record, *viz.* by Letters Patent, Fine, Recovery, Pleading, taking of Continuance, Confeſſion, Imparlance, Warrant of Attorney, Admittance. *2dly*, By Matter in Writing, as by Deed indented, by making an Acquittance by Indenture or Deed Poll, by Deſeazance by Indenture or Deed Poll. *3dly*, By Matter in *Pais*, as by Livery, by Entry, by Acceptance of Rent, by Partition, by Acceptance of an Eſtate. Co. Lit. 352. a.

Every Eſtoppel, becauſe it concludes a Man to alledge the Truth, muſt be certain to every Intent, and not to be taken by Argument or Inference. Co. Lit. 352. Every Eſtoppel ought to be a preciſe Affirmation of that which makes the Eſtoppel. Co. Lit. 305.——Eſtoppels are odious in Law; and although all Parties to an Indenture are bound by the Words thereof, becauſe they agree to it, yet that muſt be intended of material Words, and not of all minute and deſcriptive Words and Circumſtances.————A Matter alledged that is not traverſable ſhall not eſtop. Co. Lit. 352. a.——An Eſtoppel is not taken Notice of unleſs relied on in Pleading. Mod. 291.——An Eſtoppel cannot be pleaded with a Traverſe. 2 Mod. 37.

By Matter of (*b*) Record all Parties are eſtopped, ſo that a Man ſhall not be received to take an Averment (*c*) directly contrary to a Record. 9 H. 6. 60.

(*b*) If a Deed be inrolled When of Record, the Party is eſtopped to ſay that it is not his Deed, or that it was not acknowledged by him. Leon. 184. 3 Leon. 84. Comb. 248. *& vide* Title *Bargain & Sale*. (*c*) If one of my Name levies a Fine of my Land, I may confeſs and avoid the Fine by ſhewing the Special Matter which ſtands with the Fine. Cro. Eliz. 531. *& vide* Title *Fines*.——Where one ſhall be eſtopped to ſay, that a Writ iſſued after the *Teſte*,

Co. Lit. 352. b. When the Truth is apparent in the ſame Record, the adverſe Party ſhall not be eſtopped to take Advantage thereof, for he cannot be eſtopped to alledge the Truth when it appears of Record.

Stile 395. *Bayle* v. *Scarborough*. If *A. B.* is outlawed by the Name of *A. B.* Eſq; and comes in *gratis*, and reverſes it for want of Proclamations, he ſhall not be eſtopped to ſay afterwards that he was a Knight and no Eſquire.

(*d*) 7 Mod. 38. Salk. 3. pl. 7. S. C. If one puts in Bail by a wrong Name, *(d)* he ſhall be concluded thereby, as was agreed *per Cur.* in the Caſe of (*e*) *Smith* v. *Villars*; and in a Civil Action he need not join in the Recognizance; and in the Caſe of the Earl of *Banbury*, who was indicted by the Name of *George Knowles*, Eſq; though by the Courſe of the Court he ought to have joined in the Recognizance; yet, becauſe if he had entered into one by the Name of *G. K.* it would have been an Eſtoppel upon him, * he was indulged to bring others who gave Bail for him by the Name of *G. K.* Eſq; for their Act could not conclude him.

*Page 107

(*e*) But then it muſt be pleaded as an Appearance. Salk. 8. pl. 19.

2 Jon. 170. Skin. 10. pl. 10. Raym. 456. *Morgan* v. *Vaughan*. Where one brought a Writ of Error upon Judgment in Dower againſt him, and aſſigned for Error that he was within Age, ‖ and appeared by Attorney, and Iſſue being joined upon the Nonage, and found for the Plaintiff in Error, the Defendant therein would have ſtaid Judgment, becauſe in the Aſſignment of Error it was alledged that 7 *Sept.* 20 *Car.* 2. he was of the Age of fourteen & *non amplius*, and the Writ of Error was brought 4 *July* 26 *Car.* 2. and in *Michaelmas* Term following, and Error aſſigned by Attorney, when he could not be of the Age of twenty-one, according to his own Allegation; but the Subſtance of the Iſſue being whether he was within Age, and the *viz.* no material Part of the Iſſue, it was held no Eſtoppel.

‖ If Infant Plaintiff appears by Attorney and has Verdict, Judgment not to be reverſed.

21 Jac. 1. c. 13.

Co. Lit. 352. Matters alledged by way of Suppoſals in Counts ſhall not conclude or eſtop, otherwiſe it is after Judgment given; and though after Nonſuit the Suppoſal in the Count ſhall not conclude, yet the Bar, Title, Replication, or other Pleading of either Party, which is preciſely alledged, ſhall conclude after Nonſuit.†

† If Plaintiff is nonſuit is he not in the ſame Situation as if he had never inſtituted the Suit; and does not a Plaintiff frequently ſubmit to a Nonſuit for the Purpoſe of bringing another Action, in which the former Record cannot be given in Evidence?——Lord *Coke* can only mean in thoſe Caſes where a Nonſuit is peremptory, which are very few, as in Appeals in *favor' vitæ*, &c. &c. and in Attaint, &c. after Appearance. When a Nonſuit is peremptory, ſee 5 Com. Dig. 161. (X. 4.)

Co. Lit. 352. a. Regularly a Stranger ſhall not be bound by nor take Advantage of an Eſtoppel.

Co. Lit. 352. a. Privies in Blood, as Heirs, Privies in Eſtate, as the Feoffee, Leſſee, &c. Privies in Law, as Lords by Eſcheat, Tenant by the Curteſy, Tenant in Dower, the Incumbent of a Benefice, and others that come under by Act in Law or in the *Poſt*, ſhall be bound by and take Advantage of Eſtoppels.

Where

Teſte, Lutw. 334. ‡——But whether it may not be ſo found by Verdict, *vide* Lev. 173. Sid. 271. 1 Keb. 930. 2 Keb. 32. *Bailey* v. *Bunning*.——Whether the Defendant ſhall be eſtopped to ſay, that the Plaintiff's Teſtator was dead when a Writ was ſued out in his Name. Lutw. 254.——Where one ſhall be eſtopped by praying Oyer of a Record or Deed. Lutw. 1644. Salk. 7. pl. 17.

---

‡ In the Caſe of *Combe* and *Pitt*, it is ſettled that the actual Day of ſuing out the Writ may be ſhewn in pleading. *Vide* the Caſe in 3 Burr. 1423, &c.

Where the Record of the Eſtoppel runs to the Diſability or Legitimation of the Party, there all Strangers ſhall take Benefit of that Record, as Outlawry, Excommengement, Profeſſion, Attainder of *Præmunire*, Baſtardy, Mulierty, and ſhall conclude the Party, though they be Strangers to the Record. Co. Lit. 352. a. Keilw. 180.

But of a Record concerning the Name of the Perſon, Quality or Condition, no Stranger ſhall take Advantage, becauſe he ſhall not be bound by it. Co. Lit. 352. a. Keilw. 96. 180.

If *A.* leaſes by Indenture to *B.* to begin after the Expiration of a Leaſe to *D.* in Covenant brought by *B.* againſt *A.* he is eſtopped to ſay there is no ſuch *D.* and though the common Rule is, that a Recital is not an Eſtoppel, yet where the Recital is material, as here, it is otherwiſe. 2 Leon. 11. *vide* Vent. 84. Vaugh. 82.

If by Indenture between *A.* and *B.* reciting that *A.* was ſeiſed in Fee of certain Lands, *A.* in Conſideration of a Marriage to be had between her Son *B.* grants a Rent out of thoſe Lands to *B.* to begin after the Death of her Son, and covenants to pay it; in an Action againſt *A.* upon this Covenant ſhe cannot plead ſhe had Nothing in the Land at the Time of the Covenant, but that a Stranger was ſeiſed thereof, both becauſe ſhe is eſtopped by the Deed, and the Covenant extends to it as an Annuity. Allen 79. *Newton* v. *Weeks.*

If *A.* being a Leſſee for Years makes an Under-leaſe to *B.* by Indenture, and *B.* covenants with *A.* to perform all the Covenants in the original Leaſe to be performed by *A.* his Executors, &c. in an Action upon this Covenant *B.* will be eſtopped to ſay there are no Covenants in the original Leaſe. Hill. 7 G. 1. in *B. R. Atkinſon* v. *Coatſworth*, & *vide* Show. 58. Carth. 76. Holt 210. pl. 1.

If the Condition of an Obligation be to perform all Covenants contained in ſuch an Indenture, in Debt upon the Obligation, the Defendant (*a*) cannot ſay that there is no ſuch Indenture, becauſe he is eſtopped. Rol. Abr. 408, 872. *Jewel's* Caſe. Cro. Eliz. 757. L. P. Sand. 316. Mod. 15. L. P.

(*a*) But he may ſay there are no Covenants, Mod. 15.—But then he will confeſs the Obligation to be ſingle, and the Plaintiff upon Demurrer ſhall have Judgment. Lev. 3. adjudged, & *vide* Lev. 45. Raym. 27.

* If the Condition of an Obligation hath Reference to a Particular to be done, or in which a Generalty is to be done, the Obligor ſhall be eſtopped by it to ſay, that there is no ſuch particular Thing; as if the Condition of an Obligation be to releaſe all the Right that he hath for Life in *Black Acre*, he ſhall be eſtopped to ſay, that he hath not any Right for Life in *Black Acre*, becauſe this contains a Particular. *Page 108 Rol. Abr. 872-3.

But if the Condition of an Obligation contains (*b*) a Generalty, a Man ſhall not be concluded to ſay, that there is no ſuch Thing; as in Debt upon an Obligation, of which the Condition is to perform all Agreements now ſet down by *J. S.* the Defendant may ſay, that no Agreement was then ſet down by *J. S.* becauſe this comprehends a Generalty. (*a*) For this Diverſity *vide* Cro. Eliz. 362. Owen 110. Poph. 114. Moor 405. Brownl. 117. Yelv. 226. 2 Bulſ. 19. Latch 125. Cro. Jac. 375. Dal. 28. Show. 59.

If the Condition of an Obligation be to pay (*c*) all ſuch Sums of Money in which *T. S.* ſtands bound by his Deed Obligatory to *T. H.* of and for the Behoof of the Children of *W. S.* according to the Will of, &c. he Dyer 3. Savil 90.

(*b*) So if the Condition be to pay all ſuch Sums which he was bound to pay by his ſeveral Obligations, according to Moor 23. pl. 79. but in Dal. 28. it is a *Qu.* being General.

ſhall

ſhall be eſtopped to ſay, that *T. S.* never ſtood bound by any Deed Obligatory for the Uſe of the Children of *W. S.*

Moor 420. pl. 578. *Paramour* v. *During.*

In Debt upon a Bond conditioned to pay (*a*) all Legacies that *J. S.* had given by his Will, the Defendant ſhall be eſtopped to ſay, that *J. S.* made no Will; but he may ſay that *J. S.* gave no Legacy by his Will.

(*a*) Where the Condition was to give *J. S.* all the Goods bequeathed to him by his Father, the Defendant ſhall be eſtopped to ſay he had no Goods bequeathed. Godb. 177.

Cro. Eliz. 362. Poph. 114. Moor 405. Owen 110. S. C. *Stroud* v. *Willis.*

In Debt upon an Obligation conditioned for Payment of 37*l.* for Rent reſerved on a Demiſe of Copyhold Lands for 40 Years, according to ſuch Articles indented, the Defendant ſhall be eſtopped to ſay he had nothing in the Lands demiſed; though objected, if he had nothing in the Land, then he ought not to be paid the Rent.

Noy 79. Latch 125. *Germin* v. *Randall.*

In an Action upon a Bond conditioned to pay 10*d.* weekly for keeping a Baſtard, according to an Order made by the Juſtices, the Defendant is eſtopped to ſay, there is no ſuch Order.

Cro. Eliz. 756. Dyer 196. S. C. in Margin, *Willoughby* v. *Brook.*

In Debt upon a Bond conditioned that (*b*) whereas *A.* had commenced ſeveral Suits in the *K. B.* againſt *B.* if *B.* ſhould appear, and make Anſwer thereto, then, &c. the Defendant cannot ſay that *B.* appeared, and was ready to anſwer, but there was no Action there depending againſt him, for he is eſtopped ſo to ſay.

(*b*) Where it was recited that *J. S.* claimed to have a Leaſe, and the Condition was to ſave harmleſs from all Claims of *J. S.* the Defendant could not plead *J. S.* had no Leaſe. 3 Leon. 118.

Allen 52. Stile 103. S. C. *Hart* v. *Buckminſter.*

In Debt upon a Bond, conditioned that whereas the Plaintiff had carried 12,000 Billets for the Defendant to *D.* if the Defendant ſhould pay the Plaintiff after the Rate of 17*s.* *per* 1000, then, &c. the Defendant cannot plead that the Plaintiff did not carry 12,000 Billets to *D.* for he is eſtopped to deny it.

Cro. Jac. 640. Godb. 283. S. C. *Maby* v. *Shepheard.*

If in an Action upon a Bond againſt one as Executor of *Edmund Shephard*, upon *Oyer* prayed it appears that the Words are *me Edwardum*, ‖ *S. teneri*, &c. and that he ſubſcribed it by the Name of *Edm. S.* (which was his true Name) and upon *Non eſt factum teſtatoris* pleaded, it is found to be the Deed of the ſaid *Edm. S.* yet the Plaintiff ſhall not have Judgment, the Truth appearing on the Record; for *Edward* * and *Edmund* are two diſtinct Names, and the (*c*) Subſcription by the Name of *Edm.* being no Part of the Bond, is not material.

* Page 109

(*c*) That if a Man binds himſelf by a wrong Name, he ſhall be eſtopped to avoid it. *Vide* Dyer 279. Leon. 322. Moor 897. Cro. Jac. 261, 558. Lutw. 894, & Title *Miſnomer.*

‖ The Declaration might have been with an *Alias*, or that *Edmund*, by the Name of *Edwardum* bound himſelf, or he may be eſtopped. *Vide infra* 109.

Salk. 7. pl. 17. *Linch* v. *Hook.*

If *A.* gives a Bond by the Name of *B.* and is ſued by the Name of *B.* and pleads the Miſnomer, the Plaintiff may reply that he made the Bond by the Name of *B* and eſtop him by demanding Judgment if againſt his own Deed he ſhall be admitted to ſay his Name is *A.*

M. 39 Eliz. *Prat* v. *Planner.*

If *A.* enters into a Bond to *B.* conditioned that *A.* ſhall uſe and maintain *C.* his Wife; in an Action upon this Bond *A.* ſhall not be eſtopped to ſay that *C.* was married to *D.* (who is yet living) before ſhe married *A.* and ſo *A.* cannot uſe and maintain her as his Wife, for he confeſſes and avoids, becauſe ſhe might notwithſtanding be called in common Speech or named his Wife in Writing.

If

If in an Action for 5*l.* by the Leſſor upon a Covenant to pay ſo much for every Acre of Meadow ploughed, he lays the Ploughing of an Acre of Lands called *Lane's Meadows* (there being other Meadows leaſed) the Defendant may plead that the Lands in the Indenture leaſed, there called *Lane's Meadows*, are not Meadow, but Time out of Mind Arable; for though all Parties to an Indenture are bound by the Words thereof, yet it muſt be intended of material Words, and not ſuch as are deſcriptive only; and if the Cloſes had been leaſed as containing 500 Acres, yet the Defendant would not have been eſtopped to ſay there were not ſo many.

M. 11 G. 1. in *B. R. Skipwith* v. *Green.*

If one gives an Acquittance under his (*a*) Hand and Seal for Rent due at a Day, he ſhall be eſtopped thereby to demand Rent due at a Day before.

Lev. 43. Sid. 44. Raym. 21. S.C. *Palmer* v. *Stannage*, and 3 Co. 65. Dyer 271. And. 14. Bendl. 186. Moor 87. L. P.

(*a*) If not under his Hand and Seal it is no Eſtoppel, but Evidence only. Comb. 59.

But yet if one avows for Rent due at a Day, he ſhall not be eſtopped to (*b*) avow for Rent due at a Day after.

Lev. 43.

(*b*) May have Covenant after. Comb. 59, 60.

If upon a Writ of Error it be aſſigned for Error, that the Plaintiff died before the Trial, and Iſſue thereupon taken, the Plaintiff in Error, by his Pleading to the Action, is eſtopped to give in Evidence that the Plaintiff died before the Action brought; but the Defendant in Error pleading *quod adhuc in plena vita exiſtit, & hoc, &c.* lets the Plaintiff looſe from the Eſtoppel.

Comb. 446. ruled by *Holt* at *Guildhall.*

12. Pleading with a *Profert*, and demanding Oyer: And herein,

1. In what Caſes there muſt be a *Profert* or (*c*) *Monſtrans de fait.*

(*c*) Is the producing the Deed in Court.

Where the Plaintiff declares upon a Deed, or the Defendant pleads a Deed, it muſt regularly be with a *Profert in Curia*, to the End the adverſe Party may at his own Charge have a Copy of it, without which he is not bound to anſwer; and the (*d*) Reaſon why Deeds muſt be ſhewn or produced to the Court is, becauſe it is the proper Office of the Court to judge of the Sufficiency of them, to ſee that they are duly executed, and without Razure or Interlineation, and whether they are abſolute, conditional or revokable.

2 Lil. Reg. 210, 382. (*d*) 6 Co. 36. 10 Co. 93. Hob. 233. Style 459. 2 Salk. 498. pl. 5. 2 Ld. Raym. 1076. Salk 76. pl. 18. 6 Mod. 244.

* A Deed therefore that is (*e*) requiſite *ex inſtitutione legis* muſt be ſhewn in Court, though it concerns a Thing collateral, and conveys or transfers nothing; as in Caſe of Attornment by a Corporation, which muſt be by Deed, there the Deed muſt be ſhewn; *ſecus* where it is *ex proviſione hominis*; as where the Condition of a Leaſe is, that the Leſſee ſhall not aſſign but by Deed, and not by Parol, and there he may plead the Aſſignment, without ſhewing the Deed; an Aſſignment by Parol being ſufficient, had it not been provided againſt by Covenant.

*Page 110

6 Co. 38. *Bellamy's* Caſe. Bulſt. 119. Cro. Car. 143.

(*e*) But tho' a Thing will paſs without Deed, yet if the Party pleads a Deed, and makes a Title thereby, he muſt come with a *Profert.* 2 Mod. 64.

In (*f*) all Caſes, where a Thing cannot be demanded but by Deed, the Deed muſt be produced.

Stile 459. *per Glin* C. J.

(*f*) But in a Motion for a Prohibition granted on Letters Patent, the Suggeſtion need not be with a *Profert.* 2 Show. 304.

But

6 Co. 38. Cro. Jac. 102. 3 Lev. 205. Cro. Jac. 372. *Bateman* v. *Woodcock.* Rol. Rep. 221. S. C. Rol. Rep. 221. *per* Coke and Dodderidge, & *vide* Dyer 29. pl. 194. Like Point.

But of Things executed, or Eſtates determined, a Deed need not be ſhewn; as a Licence which is executed, though of its own Nature it cannot be without Deed.

So if in Treſpaſs againſt a Bailiff, he juſtifies by virtue of a Warrant, without any *Profert* thereof, this is ſufficient; for the Warrant, being executed and returned to the Sheriff, is determined; but it is ſaid to be otherwiſe in a Juſtification for a Rent-charge or ſuch Things as have Continuance.

So the Grantee of the next Avoidance to a Church, having preſented, need not ſhew the Deed of Grant to him, being a Matter executed.

3 Lev. 205. *Aileſbury* v. *Harvey.*

So where in Replevin the Defendant juſtified by a Condemnation before the Juſtices of Peace upon the Statute of Exciſe, for the Non-entry of Strong Waters, and a Warrant made thereupon to levy 20*s.* ſet for a Fine; and Exception was taken thereto, becauſe there was no *Profert hic in Curia* of the Warrant. But *per Cur'*, the Statute does not require that the Warrant be under Hand and Seal, but only in Writing, and no Writing is to be pleaded, unleſs it be a Deed; and held further, that this being executed need not be ſhewn.

Co. Lit. 225. Jenk. 305. Cro. Car. 209. 5 Co. 75.

Alſo a Perſon, who comes in by Act or Operation of Law, need not produce the Deed, or plead with a *Profert in Curia*; as Tenant in Dower; ſo of Tenant by Statute-Staple or Merchant, who may take Advantage of a Rent-charge without ſhewing the Deed.

Co. Lit. 225. b.

So if a Guardian in Chivalry in Right of the Heir had entered for a Condition broken, he might have pleaded the Eſtate to have been on Condition, without ſhewing any Deed; becauſe his Intereſt was created by Law.

Co. Lit. 226. a.

But the Lord by Eſcheat, though his Eſtate be created by Law, ſhall not plead a Condition to defeat a Freehold, without ſhewing it; becauſe the Deed belongs to him.

Co. Lit. 226. a.

So Tenant by the Curteſy ſhall not plead a Condition made by his Wife, and a Re-entry for a Condition broken, without ſhewing the Deed; for though his Eſtate be created by Law, yet the Law preſumes that he (*a*) had the Poſſeſſion of the Deeds and Evidences belonging to his Wife.

(*a*) 10 Co. 94. S. P. and may detain it for his Life.

Cro. Car. 209. *Gray* v. *Fielder.*

In Debt upon an Obligation aſſigned by the Commiſſioners of Bankrupts, without ſhewing the Obligation; upon which there was a Demurrer; but becauſe the Party came in by Act in Law, and has no Means to obtain the Obligation, it was adjudged to be good enough, without ſhewing of it in Court.

*Page 111

(*b*) 10 Co. 94. laid down as a Maxim. One need not produce a Deed in pleading, which is made to a third Perſon, and which he has no Means to come by. 2 Show. 418. 3 Lev. 83. Moor 870. Plow. 149.

* Where a Man is a (*b*) Stranger to the Deed, and doth not claim any Thing compriſed in the Grant, nor any Thing out of it, nor doth claim any Thing in Right of the Grantee, as Bailiff or Servant, there he ſhall plead the Patent or Deed, without ſhewing of it.

Hob. 302. *Holland* v. *Shelley.* (*c*) He who is privy, as Leſſee for Years, Feoffee, &c. cannot plead a Deed without ſhewing it. Bro. *Monſtrans* pl. 61. Co. Lit. 267, 317.

Grantee of the next Preſentation was outlawed, and the Church became vacant; the Lord of the Manor, who was intitled to the Goods and Chattels of Perſons outlawed, brought a *Quare impedit*; and it was reſolved, that the Plaintiff being in *in le poſt*, and not (*c*) privy to the

Grant

Grant in any wiſe, need not ſhew the Deed of Grant to the Perſon outlawed.

Where a Perſon pleads, that he claims by virtue of a Feoffment to Uſes, or that *J. S.* being ſeiſed in Fee, covenanted with *A.* and *B.* to ſtand ſeiſed to the Uſe of ſuch and ſuch Perſons, and that the Lands came and belong to him by virtue of ſuch Covenant, he need not produce the Deed; for the Deed doth not belong to him, though he claims thereby, but to the Covenantees; alſo he is in by Force of the Statute of Uſes, by Operation of Law; as Tenant in Dower, Tenant by Statute-Staple, *&c.* are. Cro. Car. 441. *Stockman* v. *Hampton.* But for this *vide* Dyer 277. Cro. Jac. 217. Jon. 377. Noy 145.

and Carth. 316. S. P. determined for the following Reaſons. *1ſt*, Becauſe the Deed doth not belong to him who is only *Ceſtui que Truſt*. *2dly*, Becauſe he hath no Remedy in Law to get Poſſeſſion of the Deed. *3dly*, He is in merely by Operation of Law, and not in the *Per*.

In Debt againſt an Executrix for 10*l.* the Plaintiff declared upon an Obligation, conditioned to pay 5*l.* to *A.* to the Uſe of *M.* his Daughter, at a Time limited in a certain Indenture; the Defendant pleads, that the Indenture was made between her Teſtator and one *J. S.* by which the Plaintiff infeoffed *J. S.* to the Uſe of the Teſtator, and his Heirs, and that the Teſtator covenanted to pay 5*l.* to the Plaintiff within two Months after the Death of *W. R.* which *W. R.* is yet alive; the Plaintiff demurred; becauſe the Defendant did not produce the Indenture: But the Court held, that the Plea was good without it, becauſe the Defendant was a Stranger to the Deed; and it does not belong to her, but belongs to the Feoffees, and ſhe has no Means to enforce them to produce it, and the Court will not impoſe an Impoſſibility, eſpecially ſhe being an Executrix. Lutw. 481. *Crotch* v. *Crotch.*

Where a Man juſtifies under a Deed only as Servant, and claims no Title himſelf, nor hath any Intereſt therein, but the Title and Intereſt is his Maſter's; yet he ought to ſhew the Deed, for it is the Subſtance of the Title, and without ſhewing of it he cannot juſtify. Cro. Jac. 292. 2 Lil. Reg. 202.

So where the Defendant juſtified as Servant to the Queen's Patentee for Years, and by his Command, but did not bring into Court the Patent; and the Plea was held naught; for that he deriving his Title from the Patentee, not by Act in Law, but by his Command, he ought to ſhew the Patent, as well as he who claims under the Patent by Aſſignment; but he who claims Intereſt under an Act in Law (becauſe he had no Means to compel the Patentee to ſhew it) may juſtify without ſhewing of it. Cro. Jac. 317. & *vide* Stile 15.

So where a Servant juſtifies for Tithes by Leaſe, yet, coming in by Title and Privity, he ought to ſhew it, as well as his Maſter; and he cannot plead the Entry into another's Soil without making a good Title thereto, which ought to be by ſhewing of the Leaſe. Cro. Jac. 360. 2 Lil. Reg. 202.

* In an Aſſiſe the Tenant pleads a Feoffment of the Anceſtor of the Plaintiff unto him, *&c.* and the Plaintiff ſaith, the Feoffment was on Condition, *&c.* and that the Condition was broken, and pleads a Re-entry, and that the Tenant entered and (*a*) took away the Cheſt, in which the Deed was, and yet detaineth the ſame; he ſhall not in this Caſe be enforced to ſhew the Deed. *Page 112 Co. Lit. 226. a.

(*a*) If the Party who would plead the Deed has it not, he ought to move the Court, and the Court will order him the Deed, or a Copy of it. Sid. 50.

In Debt upon a Bond, conditioned for the Performance of the Covenants in an Indenture, the (*b*) Defendant ought to ſhew the Indenture; Sand. 8, 9. *Jevons* v. *Harridge.*

(*b*) He cannot plead Performance without ſhewing of it. Allen 72. Vent. 37. Mod. 266.

and

and the Entry always ſuppoſes it to be brought into Court by him, though the Court will ſometimes (*a*) compel the Plaintiff to give a Copy thereof to the Defendant, if he ſwears he never had a Part thereof, or hath loſt it; but this is done *ex gratia Curiæ*, and not *ex debito juſtitiæ*; but in ſuch Action, after Oyer of the Bond and Condition, it was entered upon the Roll, that the Defendant prays Oyer of the Indenture, & *ei legitur*, This Indenture, &c. and the Defendant pleaded, &c. It was adjudged upon a general Demurrer, that this Manner of Pleading was good in Subſtance, though not formal; for it ſhall be intended the true Indenture, and that it was in Court, though by the Record it did not appear to be ſo. But *per Curiam*, If it had been on a ſpecial Demurrer, it had been naught.

(*a*) That if it be loſt, the Court will compel the Party to ſhew his Counterpart, and he to plead thereto, otherwiſe they will grant an Imparlance.

Cro. Jac. 426. Sid. 386. 2 Keb. 430.

6 Mod. 237. *per Curiam.* When one is bound by Bond to perform Covenants in an Indenture in an Action upon the Bond, the Defendant, in order to diſcharge himſelf, ought to ſhew the Deed to the Court, that they may ſee what the Covenants are; for he cannot ſhew that he has performed all, without ſhewing what he was to perform; and therefore he ought to recite the Indenture, whereof he is ſuppoſed to have a Counterpart, in his Plea; but if he never had a Counterpart, or had loſt it, upon Oath thereof the Court will compel the Plaintiff to give him a Counterpart, in order to ſet it out for his Defence.

Salk. 215. pl. 3. *Hill* v. *Aland.* But where an Action was brought upon a ſpecial Agreement contained in a Note, and a Rule was made to ſhew Cauſe why the Plaintiff ſhould not give the Defendant a Copy; but upon Cauſe ſhewn the Rule was diſcharged; becauſe the Contract, upon which the Action was founded, was a parol Contract, of which the Note was only Evidence, and therefore the Defendant ought not to have a Copy. †

† But perhaps, if there was good Reaſon to ſuſpect a Forgery, the Court might make a Rule compelling Plaintiff or his Attorney to leave it with the Maſter for Inſpection, or to produce it to Defendant and his Witneſſes, that they might inſpect it.

2 Bulſt. 228. Stile 193, 264. Where a Deed is only Inducement to the Action, it need not be pleaded with a *Profert*.

Cro. Eliz. 217. Jon. 377. Cro. Jac. 43, 70, Cro. Car. 442. Rol. Rep. 13, 328.

Palm 387. Cro. Jac. 673. *Slackman* v. *Weſt.* 3 Mod. 52. S C. cited; and for which *vide* Yelv. 201. As where a Leſſee for Years claimed a Way to his Houſe by a *Que Eſtate*, without ſhewing the Deed; and this was held ſufficient by three Juſtices againſt one, becauſe the Leſſee has not the Deed; and it is but a Conveyance to the Action, which is grounded on the Diſturbance done to him in his Poſſeſſion; but if he had claimed a Rent or Common in Groſs, which could not paſs without Deed, it had been otherwiſe; for there he could not ſhew *Que Eſtate*, without ſhewing the Deed, how he came by the Eſtate.

Brown. 220. Cro. Jac. 171. 2 Mod. 277.

*Page 113 *Vide* Cro. Jac. 32. Cro. Eliz. 217. Hob. 301. Moor 885. Cro. Car. 190. * It was formerly, and before the Statute 16 & 17 *Car.* 2. *c.* 8. held, that the not pleading a Deed with a *Profert* was Matter of Subſtance, and that ſuch Omiſſion made the Judgment (*b*) erroneous.

(*b*) Where the Want of a *Profert* was made good or diſpenſed with by the Plea of the adverſe Party. Hutt. 54.

But

But now by the 8th Chapter of the ſaid Statute it is enacted, 'That 'after Verdict Judgment ſhall not be ſtaid or reverſed for Default of al- 'ledging the bringing into Court any Bond, Bill or other Deed men- 'tioned in the Pleadings, or of any Letters Teſtamentary or of Ad- 'miniſtration.' Since this Statute, it hath been (*a*) held only Matter of Form.

(*a*) For which *vide* Sid. 249. Salk. 497. Lutw. 1353. 6 Mod. 135.

And by the 4 & 5 *Anne*, *cap.* 16. 'No Advantage or Exceptions ſhall 'be taken for want of a *Profert in Cur'*, &c. but the Court ſhall give 'Judgment according to the very Right of the Cauſe, without regard- 'ing any ſuch Omiſſion and Defect, except the ſame be ſpecially and 'particularly ſet down and ſhewn for Cauſe of Demurrer.'

In a *Sci. Fa.* by an Executor, the Clauſe of *Profert hic in Curia Literas Teſtamentarias* may be inſerted in the Middle as well as in the Concluſion of the Writ. Carth. 69; *Boſworth* v. *Ridgley*.

2. Of demanding Oyer.

(*b*) Oyer of a Deed or Record is always to be had by him who is to be charged by it, and not by him who pleads it; and he who pleads or declares upon it muſt (*c*) ſhew it. Bro. *Oyer de faits* 15.

(*b*) To demand Oyer of an Obligation is not only for the Defendant's Attorney to deſire the Plaintiff's Attorney to read the Obligation to him, as the Word ſeems to import, or to have a Sight of it, but that he may have a Copy of it, that his Client may conſider by it what to plead to the Action. 2 Lil. Reg. 226.——(*c*) But the Defendant may, if he pleaſes, plead without demanding Oyer of it; and if he doth once plead, he cannot after waive his Plea and demand Oyer. 2 Lil. Reg. 226.—Where there ought to be Oyer, the Party, if he has demanded it, is not bound to plead without it. 6 Mod. 28.

If a Man (*d*) enters into an Obligation by a wrong Name, no Advantage can be taken thereof, without demanding of Oyer of the Deed. 6 Mod. 303.

(*d*) If the Defendant would take Advantage of a wrong Original, he muſt demand Oyer of it. 4 Mod. 246.

Articles of Agreement indented were pleaded, and Replication was, that in the ſaid Articles it is further covenanted, without demanding Oyer of the Deed; and the Court held it ill Pleading, and gave Judgment *niſi*. Keb. 513.

For according to Hutt. 33. they cannot plead and ſhew the Counterpart.

In Treſpaſs the Defendant juſtifies for Common, and ſets forth Letters Patent of the King *hic in Curia prolat'*; which Plea the Plaintiff accepts, without demanding Oyer of the Letters Patent, but after he demanded Oyer of them; but denied *per Curiam*; and the Prothonotaries ſaid, that he is not obliged to ſhew them, if not required at the Acceptance of the Plea. Paſch 26. Car. 2. in *C B. Mathews* v. *Alderton*.

Oyer of the Deed cannot be demanded but during the Time it is in Court, and that is all the Term wherein it is produced, and then it may be entered *in hæc verba*; and there may be a Demurrer or Iſſue upon it; but it cannot be done of another Term, becauſe the Deed is then out of the Court. 5 Co. 76. Lutw. 1664. 2 Lil. Reg. 267.

* If the Defendant pleads a former Action depending in the ſame Court in Abatement, and the Plaintiff craves Oyer of the Record, if it is not given in convenient Time, *viz.* the next Day, the Plaintiff may ſign Judgment. *Page 114 Carth. 452. Ld. Raym. 347. *Theobald* v. *Long*, and Carth. 517. S. C. where this is ſaid to be the quickeſt Method of proceeding.

If

Salk. 72. pl. 9. Ld. Raym. 715. *Foreland* v. *Marygold* adjudged, & *vide* Stile 459. See 12 Mod. 534.

If in Debt on a Bond for Performance of an Award the Defendant pleads no Award, and the Plaintiff ſets forth an Award, with a *Profert hic in Curia*, and the Defendant craves Oyer, and then demurs for Variance between the Award ſet out in the Replication and the Oyer, and the Variance appears material, the Defendant muſt have Judgment; otherwiſe if the Variance had been as to thoſe Parts in which the Award was void; and though in Debt on an Award the Plaintiff need not ſet forth more than makes for him, yet it is otherwiſe in Debt on a Bond; for there the Plaintiff muſt reply the whole Award; and if ſuch Replication be without a *Profert*, the Defendant may reply *Nul tiel agard.*

Lil. Reg. 267. 6 Mod. 27, 233. 2 Show. 310. pl. 321. & *vide* under the Diviſion Title *Imparlance.*

After Imparlance Oyer cannot be demanded, becauſe the Imparlance is to another Term; but if it be by Bill in *B. R.* it may, tho' not in the Common Pleas.

Sid. 308.

When Oyer of a Deed is prayed, it is intended that the Deed is in Court, and the *Ei legitur*, or Reading of it, is the Act of the Court.

3 Salk. 119. pl. 2.

When a Deed is pleaded with a *Profert hic in Curia*, the very Deed itſelf is by Intendment of Law immediately in the Poſſeſſion of the Court; and therefore when Oyer is craved, it is of the Court, and not of the Party; and (*a*) after Oyer is craved the Deed becomes Parcel of the Record, and the Court muſt judge upon the Whole; and the Demand of Oyer is a Kind of Plea, and may be counterpleaded.

(*a*) When upon Oyer of the Deed it is entered, the whole Caſe appears to the Court as fully as if the Deed had been in the Plea. Hob. 217. Show. Parl. Ca. 221.

Carth. 513.

If the Defendant prays Oyer of the Bond and Condition, and it is entered *in hæc verba*, the Condition becomes Parcel of the Plaintiff's Declaration, and it is not Part of the Defendant's Plea.

Trin. 27 Car. in *B. R.* *Mayor and Commonalty of London* v. *Goree.* 2 Lev. 142. 3 Keb. 491. S. C.

Debt for the Duty of Scavage, and declares upon a Patent of *Ed.* 4. Defendant imparls, and after demands Oyer of the Letters Patent; upon which the Plaintiff demurs. *Per. Cur'*: The Demurrer is ill; for the Defendant having demanded Oyer, *&c.* he ought either to have it, or to be ouſted of it by the Rule of Court; but there cannot be a Demurrer upon the Demand; he ought to have counterpleaded the Demand of the Oyer, and the Judgment of the Court would have been, that he ſhould anſwer *ſine auditu*, *&c.* and it was reſembled to an *Aid prier*, in which the Plaintiff cannot demur, but muſt counterplead.

13. Pleading a Recovery in a former Action.

6 Co. 7. Hob. 4, 5. Vent. 170.

It is a Maxim in Law, *Quod nemo bis vexari debet ſi conſtat Curia quod ſit pro una & eadem cauſa*; ſo that regularly a Bar in a real or perſonal Action by Judgment, Confeſſion, Verdict or Demurrer, is a perpetual Bar, and may be pleaded to any new Action of the ſame or like Nature.

*Page 115 6 Co. 7. & *vide* Title *Ejectment.*

But herein there is a Diverſity between real and perſonal Actions; for though in the latter, as Debt, Account, *&c.* the Bar is perpetual; * yet in real Actions there is this Diſtinction, that a Bar in one real Action is not a Bar to an Action of a higher Nature; and therefore if a Man is barred in an Aſſiſe of *Novel Diſſeiſin* he may have a *Monſtrans de droit*, *Aſſiſe de Mordanceſtor*, *Ayel*, *Beſail*, *Entry ſur Diſſeiſin a ſon Anceſtor*; and this is ſaid to be in Favour of Inheritances.

So

So if a Man is barred in a *Formedon in Deſcender*, he may bring a *Formedon in Remainder* or *Reverter*. 5 Co. 33. a. 2 Mod. 43.

If a Man is barred in an Action of Treſpaſs for taking of Goods, this cannot be pleaded in an Appeal of Robbery, being of a higher Nature. Bro. *Eſtoppel* 217. 4 Co. 43.

Where *A.* robbed *B.* of 3000 *l.* of Money in Bags, for which he was afterwards indicted and convicted, and afterwards *B.* brought Treſpaſs againſt *A.* for taking of the ſaid Monies, who pleaded the Indictment, by the *Procurement* of the Plaintiff, and the Conviction in Bar, but did not ſhew that the Plaintiff had given Evidence for the Conviction; for which reaſon the Bar was held inſufficient; for otherwiſe he ſhall not have Reſtitution, and the Allegation of *Procurement* is not ſufficient; *& ea de cauſa* Judgment was given for the Plaintiff, and not for the Matter in Law, for that was againſt him. Noy 82. Lane 144. *Markham* v. *Cobb.*

If a Man grants a Rent to another, payable at a certain Day, and covenants to pay the Rent accordingly, if the Grantee afterwards recovers in an Action of Covenant for the Non-payment of the Rent, (*a*) this will be a Bar for any Action after for the Rent; (*b*) for in the Action of (*c*) Covenant he ſhall recover all the Rent in Damages. Rol. Abr. 353. *Strong* v. *Watts.*

(*a*) So a Recovery or Bar in an *Aſſumpſit* will be a good Bar in Debt for the ſame Thing. 4 Co. 94. Yelv. 84. Cro. Jac. 110. Cro. Eliz. 240. (*b*) But in *Aſſumpſit* the Defendant cannot plead an Account brought for the ſame Money to which he had rendered his Law; becauſe Damages are recovered in *Aſſumpſit*, but not in an Account. Moor 458. But *quære*; *& vide* Cro. Jac. 110. (*c*) So where an Action is brought upon a ſpecial *Aſſumpſit* to pay Rent. Cro. Car. 415. Cro. Eliz. 57.

If *A.* and the other Executors of *B.* bring Debt upon a Bond, and the Defendant pleads, that before the Purchaſe of this Writ the ſaid *A.* as Adminiſtrator to *B.* brought Debt upon the ſame Bond againſt the Defendant, who then pleaded, that *B.* made Executors, who adminiſtered, *&c.* and the Plaintiff then replied, that Adminiſtration was committed to him *pendente lite* between the Executors; upon which the Defendant then demurred; and it was adjudged for him; and ſo now pleads this Matter by way of Eſtoppel, and demands Judgment if, as Executor, he ſhall have an Action upon the ſame Bond againſt the ſame Defendant; this is no good Plea; for by the firſt Judgment the Plaintiff was only barred as to the Action of the Writ, *viz.* to have one as Adminiſtrator; but this Miſtake of his Action is no Bar nor Eſtoppel to bring his true Action. 5 Co. 32, 33. *Robinſon's* Caſe. Cro. Jac. 15. S. C. by the Report of which it appears, that he did not know that he was Executor; and there ſaid, that the Rule in perſonal Actions, once barred and always barred, muſt be intended where it is a Bar to the Right, not where the Action is only miſconceived.——And ſo is 6 Co. 8. where the S. C. is cited, and 2 Mod. 319.——So where Judgment is given upon the Manner, not the Matter of the Plea. 2 Lev. 210.——If a Man brings Treſpaſs for taking his Horſe, and is barred in that Action, yet if he can get the Horſe into his Poſſeſſion, the Defendant is without Remedy; for notwithſtanding the Recovery the Property is ſtill in the Plaintiff. 2 Mod. 319. *per Cur.*'

If in Trover for Plate the Defendant pleads that the Plaintiff had before brought his Action for the ſame Plate againſt *J. S.* and had Judgment to recover 20 *l.* Damages, and (*d*) had *J. S.* in Execution for the ſame, and avers it to be the ſame Converſion, *&c.* this is a good Plea; for by the Judgment the Damages which were before uncertain are reduced to a Certainty, and therefore he ſhall not demand the * Uncertainty again; and by the Judgment the Property of the Goods is altered. Cro. Jac. 73. *Brown* v. *Wotton.* Yelv. 67. Moor 762. S. C. *Page 116

(*d*) So tho' he had him not in Execution; for by the Judgment *tranſit in rem judiciatam.* Yelv. 68.——And where and how the Defendant may enforce the Plaintiff to enter up his Judgment, to the End he may plead it to another Action, *vide* Latch 216.

Cro. Jac. 73. for this *vide* Title *Obligation.*

But a Judgment in Debt againſt one Obligor, upon a joint and ſeveral Obligation, and the Body taken in Execution, is no Plea to an Action brought againſt the other Obligor.

6 Co. 44. *Higgin's* Caſe.

If a Man hath Judgment in *B.* upon an Obligation, he ſhall not afterwards bring an Action of Debt upon the ſame Obligation, as long as the ſaid Judgment remains in Force; for by this Judgment the Specialty is turned into a Matter of Record.

6 Co. 45. a. Where a Judgment in a foreign

Otherwiſe if in the County Court by *Juſticies*, for that Court not being of Record, he may, upon the ſame Obligation, have Debt in a Court of Record.

Attachment ſhall be pleaded in Bar to other Actions, *vide* Rol. Abr. 555. and Title *Cuſtom of London.*

Cro. Jac. 284. Brownl. 81. *Level* v. *Hall.*

If in Debt on a Bond the Defendant pleads, that the Plaintiff brought another Action in *London* upon the ſame Bond, to which the Defendant there pleaded *Non eſt factum*, and it was found for him; upon which it was entered, that the Defendant ſhould recover Damages againſt the Plaintiff, *Et quod eat inde ſine die*, this is no Plea, becauſe the Judgment was not *Quod querens Nil capiat per breve*, and ſo no Judgment was given as to bar the Plaintiff in another Suit.

Lev. 261. *Parker* v. *Amys.*

If in Debt againſt Executors they plead a Judgment obtained againſt one of them as Adminiſtrator, this is a good Bar; for though he might have pleaded in Abatement to the firſt Action, yet he was not obliged ſo to do, and this Recovery againſt him was upon the Right of the Debt.

Mod. 20. *Leppin* v. *Kedgwin.*

If in Action upon the Caſe the Declaration is inſufficient, and the Defendant pleads an ill Plea, but Judgment is given againſt the Plaintiff upon the Inſufficiency of his Declaration, but by Miſtake entered *Quia placit' prædict' &c. bonum & ſufficiens in lege exiſtit, &c. ideo conſideratum, &c. quod querens Nil Capias per billam*, (*a*) whereas it ought to have been entered *Quod defendens eat inde ſine die*, and the Plaintiff brings a new Action, and declares aright, and the Defendant pleads the former Judgment, reciting the Record *verbatim*, this is no good Plea; for, without Queſtion, the Plaintiff having only committed a Miſtake in his Declaration, he may ſet it right in a ſecond Action.

(*a*) Where Judgment is given for the Tenant or Defendant upon a Plea in Bar, or to the Writ, *&c.* the Judgment is all one, *viz. quod eat inde ſine die*, and ſhall have Reference to the Nature or Matter of the Plea, and ſo be taken to go in Bar, or to the Writ. Co. Lit. 363. 8 Co. 68.

Mod. 207. *per Cur.* Skin. 120. pl. 15. S. P.

But if a Declaration be faulty, and the Defendant takes no Advantage thereof, but pleads a Plea in Bar, upon which the Plaintiff takes Iſſue, and the Right of the Matter is found for the Defendant, the Plaintiff ſhall have no other Action, for he is eſtopped by the Verdict; ſo if a Declaration be faulty, and the Plaintiff demurs to the Plea in Bar, by which he confeſſes the Fact, if well pleaded, he is eſtopped thereby, and ſhall have no other Action; § but if the Plea is not good, it can be no Eſtoppel, but the Plaintiff may have another Action.

§ In ſome Caſes where the Merits are really with the

Plaintiff, and he haſtily demurs to a good Plea, conceiving it to be bad, the Court will before Judgment, give him Leave to withdraw his Demurrer, on Payment of Coſts, and take Iſſue on the Plea.

Cro. Car. 35. *Laicon* v. *Bernard.* Hutton 81. S. C. adjudged by three Judges againſt Yelverton.

If in Trover for certain Sheep the Plaintiff declares that the 25th Day of *March* in the Year, *&c.* he was poſſeſſed thereof, and loſt them, and that the ſame the laſt Day of *April* in the ſame Year came to the Hands of the Defendant, who the ſame Day converted, *&c.*

and

and the Defendant pleads, that the Plaintiff had before brought Treſpaſs againſt the Defendant, and *J. S. quare ceperunt & abduxerunt* the ſaid Sheep, and thereupon counted of a Taking the 14th of *April* in the ſame Year, to which the Defendants then pleaded a Judgment againſt *J. N.* who was poſſeſſed of the ſaid Sheep, and that by Virtue * of a *Fi. Fa.* thereupon, the ſaid Sheep were ſold to the Defendant, *&c.* whereupon Iſſue being joined it was found for the Plaintiff, and 2 *d.* Damages given, upon which the Plaintiff had Judgment for the ſaid 2 *d.* Damages and 6 *l.* Coſts, and avers the Taking and Driving, for which the ſaid Recovery in Treſpaſs was had, and the Converſion in this Action to be all one, *&c.* and to this Plea the Plaintiff replies and confeſſes the ſaid Action, and Recovery of the 2*d.* Damages, *&c.* but ſays the ſaid 2*d.* Damage was not given for the Value or Converſion of the ſaid Sheep; *abſque hoc*, that the ſaid Traking and Driving, whereupon the ſaid Judgment was had, is the ſame Treſpaſs *quoad* the Converſion of the ſaid Sheep of which the Plaintiff now declares; this is a good Replication, and the Plaintiff ſhall recover; for the Damage being ſo ſmall, cannot be preſumed to be given for the Value of the ſaid Sheep; for if ſo the Plaintiff muſt for 2*d.* only loſe his Property in the ſaid Sheep; therefore it ſhall be preſumed, and may be averred, that this Damage was given for the Chaſing and Driving, and that the Plaintiff had the Sheep again, and after loſt them, *&c.* and the rather becauſe in Time the Converſion is ſuppoſed ſo long after the Chaſing and Driving. * Page 117

If in an Action upon the Caſe the Plaintiff declares againſt the Defendant, that he falſely and maliciouſly did procure a Commiſſion of Bankrupt to iſſue out againſt the Plaintiff, *&c.* by virtue whereof the Defendant broke his Shop, and took away his Goods and Shop-Books, whereby he was diſcredited and loſt his Trade, to his Damage, *&c.* and the Defendant pleads, that the Plaintiff had brought an Action of Treſpaſs for the Breaking his Shop, taking his Goods, *&c.* and upon that Action had recovered Damages, *&c.* this is no good Plea, for this Action is not brought for the ſame Thing as the former was, in which no Damages could be recovered for the Scandal, upon which this Action is grounded. Stile 3, 4. 201. *Watſon* v. *Norbury.*

If in Trover for certain Goods the Defendant pleads, that the Plaintiff had brought Treſpaſs *vi & armis* for the ſame Goods, and upon Not guilty pleaded a Verdict and Judgment was thereupon given for the Defendant, *&c.* this is no good Plea, becauſe this Action will in many Caſes lie where Treſpaſs will not; and ſo it may be very well preſumed, that the Plaintiff at firſt only miſtook his Action, and brought Treſpaſs where his Evidence would ſerve in Trover only. Raym. 47. 3 Mod. 1, 2. 2 Mod. 318. *Put* v. *Rawſtern.*

But it hath been ſince held, that if in Trover for certain Goods the Defendant pleads, that the Plaintiff had before brought an Action of Treſpaſs *Quare vi & armis ceperunt & aſportaverunt* againſt the ſame Defendants for the ſame Goods, to which the Defendants then pleaded Not guilty; and upon a ſpecial Verdict, which the Defendants in their Plea ſet forth *verbatim*, the Court then gave Judgment, that the Plaintiff *Nil capiat per billam*, and that the Defendants *Irent inde ſine die*, and avers the Goods in both Declarations to be the ſame; and the Taking and Carrying away, *&c.* ſuppoſed in the ſaid Action of Treſpaſs, and the Coming to the Hands of the Defendant, *&c.* in this Declaration, to be the ſame, and the Cauſe of Action the ſame, *&c.* this is a good Plea; for though Trover will lie in many Caſes where Treſpaſs will not, yet upon the Matter here diſcloſed in Pleading it appears the Plaintiff was before barred, not by Miſtake of his Action, but upon the Rights and Merits of the Cauſe. 2 Vent. 169. *Letchmere* v. *Toplady.*

2Brownl.49. *Stiles* v. *Baxter.*

If *A.* ſays *B.* is perjured, and thereupon *B.* brings his Action, and *A.* juſtifies, and Iſſue is thereupon taken and found for the Defendant, and Judgment thereupon given, and after *A.* again publiſhes the ſame Words of *B.* and thereupon *B.* brings another Action, and *A.* pleads the firſt Judgment in Bar, this is a good Plea.

*Page 118 3 Lev. 248. *Gardner* v. *Helvis.*

* If an Alderman of *N.* brings an Action for theſe Words, *He is a raſcally Alderman, a factious Alderman, a Lampooner*, and avers, that a Lampooner is there underſtood of a Libeller, and the Defendant pleads a former Action brought for the ſame Words, and laid in the ſame Manner (ſaving only that in the firſt Action no Interpretation is given to the Word *Lampooner)* in which Action the Plaintiff was barred, this is a good Plea; for the Plaintiff having been once barred ſhall not intitle himſelf to a new Action by a new Interpretation of the ſame Words.

Salk. 10. pl. 3. Ld. Raym. 370. *Johnſon* v. *Long.* Carth. 456. S. C. adjudged,

In Caſe for erecting a Nuſance 2 *die Feb.* the Defendant pleaded a prior Action brought for erecting a Nuſance 20 *die Martii*, and a Recovery thereupon, and avers theſe to be the ſame Nuſance and Erection; Plaintiff demurred, and Judgment againſt him, for he may have an Action for the continuing of the ſame Nuſance, but can never have a new Action for the ſame Erection.

becauſe the Plaintiff had not laid any Continuance of the Nuſance in his Declaration.

Salk. 11. pl. 5. *Fetter* v. *Beale.* Ld Raym. 339, 692. 12Mod. 542.

But though an Action will lie for the continuing a Nuſance, yet it hath been held that in Aſſault, Battery and Maihem; if the Plaintiff in his Declaration recites a Judgment in a former Action for the ſame Battery, and ſhews that he has ſince ſuſtained conſequential Damages by a Piece of his Skull's coming out; yet this will not intitle him to a new Action; for *per Holt* Ch. J. every new Dropping is a Nuſance; but here is not a new Battery, and in Treſpaſs the Grievouſneſs or Conſequence of the Battery is not the Ground of the Action, but the Meaſure of the Damages which the Jury muſt be ſuppoſed to have conſidered at the Trial.

(K) Duplicity in Pleading: And herein,

1. The Reaſon why Duplicity is a Fault, and the Manner of taking Advantage thereof.

Co. Lit. 304. a. Doct. pl. 135.

THE Plea, ſays my Lord *Coke*, that contains Duplicity or Multiplicity of diſtinct Matter to one and the ſame Thing, whereunto ſeveral Anſwers (admitting each of them to be good) are required, is not allowable in Law; and this Rule, ſays he, extends to Pleas Perpetual or Peremptory, and not to Pleas (*a*) Dilatory, for in their Time and Place a Man may uſe divers of them. Alſo where the Tenant or Defendant may plead the General Iſſue, there, upon the General Iſſue pleaded, he may give in Evidence as many diſtinct Matters to bar the Action or Right of the Demandant or Plaintiff as he can: Alſo a Spe-

(*a*) But where the Defendant pleaded 10 Outlawries on meſne Proceſs in Diſability, to which the Plaintiff demurred for Duplicity, it was held that the Plea was naught; and the Diverſity between a Plea in Bar and Abatement as to Duplicity being urged, it was anſwered by the Court, that there was a Difference between a Plea of an Outlawry in Diſability and other Pleas in Abatement; and that this Plea was ill for Duplicity, becauſe the Plaintiff is diſabled as well by one Outlawry as by all the other nine, to which ſeveral Anſwers are required. Carth. 8, 9.

cial

cial Verdict may contain double or treble Matter, and therefore in those Cases the Tenant or Defendant may either make Choice of one Matter, and so plead it to bar the Demandant or Plaintiff, or plead the General Issue, and take Advantage of all; or he may plead to Part, one of the Pleas in Bar; and to another Part, another Plea; and his Conclusion of his Plea, shall avoid a Doubleness, and hereby neither the Court nor the Jury is so much inveigled, as if one Plea should * contain divers distinct Matters; and if the Tenant make Choice of one Plea in Bar, and that be found against him, yet he may resort to an Action of a higher Nature, and take Advantage of any other Matter. * Page 119

The Reasons why Duplicity in Pleading is held a Fault are, that the Party being effectually barred by one single Point, it is unnecessary and vexatious to put him upon litigating any other; and though he might take Issue on any one Point, yet must he be at a Loss, which the material Point is, so as to traverse the same, and thereby put an End to the Cause; whereas the Party pleading such double Matter must be presumed conusant of his own Strength, and therefore ought to put his Defence on that single Point, which will put an End to it; besides, the Jury ought not to be charged with Multiplicity of Things, when finding any one of them contrary to their Evidence lays them liable to the Severity of an Attaint. 5 H. 7. 7. Doct. pl. 135. Plow. 194. Yelv. 13. Rol. Rep. 112. Vent. 47-8.

Also from the Expence and Vexatiousness attending it, a Person is no more allowed to plead and demur to the same Fact, than he is to plead double; for the Duplicity herein draws the Matter to a different *Examen*, since the Demurrer is to be tried by the Court, and the Fact by a Jury. *Vide* under the Division *Demurrer*; *& vide* 11 Co. 52.

So where one confesses and avoids, and likewise traverses the same Point, this is in Nature of a double Plea, and therefore naught. 2 Vent. 212. 3 Mod. 318. Co. Ent 504.

But though Duplicity in Pleading be a Fault, yet must the same be taken Advantage of on a special Demurrer, that is, the Party must shew wherein the Doubleness consists; and it is not sufficient to demur *quia duplex & caret forma, &c.* but he must lay his Finger on the very Point that is so. 2 Rol. Rep. 306. Lutw. 4. 3 Mod. 251. Ld. Raym. 332. Comb.

Poph. 113. Lev. 76. Salk. 219. pl. 5. 2 Ld. Raym. 798. 2 Salk. 678. pl. 5. 7 Mod. 71. *& vide* Title *Demurrer* more Authorities to this Purpose.

If a Plea is pleaded which is double, and the adverse Party demurs not for the Doubleness, he is obliged to answer both Parts. 1 Vent. 272.

2. What shall be said Duplicity in Pleading.

In Trespass for Assault and Battery. Defendant justifies by a *Molliter manus imposuit* for due Correction of the Defendant as his Servent, and pleads over, that since that Time the Plaintiff *exoneravit & relaxavit* (without saying *per Scriptum*) to the Defendant the said Matter; to this Plea it was demurred for Doubleness specially, and the Opinion of the Court was, that it was double: for though the Release be not sufficiently pleaded, yet it is pleaded so as Issue might be taken upon it, which will be expensive and vexatious to the Plaintiff; but had it been really no Plea at all, or such a one on which no Issue could be taken, then it had been only (*a*) Surplusage, and consequently could not amount to a double Plea. Sid. 175. Keb. 661. *Bleke* v. *Grove*.

(*a*) Matter of Surplusage shall never make a Plea double. 1 H. 7. 16. Dyer 42. b. Doct. pl. 138. S. P.

In

Raym. 50. Keb. 125, 164. *Beesly* v. *Walker.* In an Action of falſe Impriſonment the Defendant juſtifies by Force of a *Latitat* out of *B. R.* by Force of which he took him; the Plaintiff replies that he did it *de injuria ſua propria, &c.* it was moved that this was naught after a Verdict, and not helped; but the Court held it well after a Verdict, but that upon a Demurrer it would be naught, as being multifarious jumbling (*a*) Matters of Record and Matters of Fact together, and putting both into the Mouths of the *Ley Gents.*

(*a*) For this *vide* Hob. 244.

Hutt. 20. Sid. 314.

*Page 120 5 H. 7. 7. Dyer 242. a. Doct. pl. 136. * In Debt on an Obligation the Defendant pleaded, it was on Condition that he ſtood to the Award of certain Perſons, ſo that it were delivered in Writing, and pleads that no Award was made nor delivered in Writing; and this Plea was held naught for Duplicity, for the Award might be made in one County, and might be delivered in another, and ſo the ſame Jury not proper Judges of both theſe Facts.

Plow. 140. 19 E. 4. 4. But if an Executor pleads *Plene Adminiſtravit*, and ſo *Riens in mains*, this is not double, being only an Inference neceſſarily following his Plea. In Debt upon an Obligation, if the Defendant ſays that the Obligation was made by Dureſs of Impriſonment, and by Menace of Impriſonment, this is a double Plea.

1 H. 7. 15. 18 H. 8. 4. Dyer 243.——In Debt for Rent *Nihil debet* and *Nihil habuit in tenementis* held to be double and repugnant. *Vide* 4 Mod. 254.‡

---

‡ But now they may, by Leave of the Court, be pleaded in ſeveral Pleas, by Force of the Statute 4 Ann. c. 16. ſ. 4. *poſt* 121.

Co. Lit. 304. Hob. 29. In a *Scire Facias* on a Fine, as Heir to two Parceners, the Tenant pleaded in Bar a Fine levied by the two Parceners with Warranty, and he relied on the Warranty; and that Plea was held double, and he forced to rely on the Warranty of one.

Co. Lit. 304. Hob. 29. So if one have divers Warranties, and they fall by Deſcent on one Perſon, Heir to both, yet he muſt be vouched as Heir to one only; for as to the Demandant the Voucher is a Kind of Plea in Bar, and ought to be ſingle; for the Demandant may counterplead the Poſſeſſion of the Vouchee and his Anceſtors, which he cannot do if they be divers; and as to the Vouchee the Voucher is a kind of Demand or Suit, and ought to be ſingle; for the Vouchee may counterplead the Lien, which he cannot do if they be divers.

2 Vent. 198, 222. Saund. 338. In Debt on a Penal Bill of 7*l.* for the Payment of 10 Shillings at one Day and 10 Shillings at another, and ſo till the Whole was paid; the Plaintiff aſſigns the Breach, that the Defendant did not pay on the ſaid ſeveral Days, *&c.* the Defendant pleads an inſufficient Plea, the Plaintiff replies, and the Defendant demurs generally; in this Caſe it was held that no Exception could be taken on the general Demurrer to the Declaration for the Doubleneſs, but Judgment ſhall go againſt the Defendant for the Inſufficiency of his Plea.

Lev. 79. In Covenant on a Leaſe, wherein the Leſſee covenanted to pay his Rent yearly by equal Portions at *Michaelmas* and *Lady-Day*; the Breach aſſigned was, that he did not pay the Rent due at the aforeſaid ſeveral Feaſts during the Term; and though it was objected, that the Breach was not well aſſigned, but ought to have been ſo particularly; yet it was reſolved to be well enough, for perhaps it was never paid at any of the Days; and this differs from the Caſe laſt above-mentioned, for there the Aſſignment of Non-payment at any one of the Days was ſufficient to intitle him to the Penalty of the Bill.

2 Sand. 48, 49 *Trethewy* v. *Ackland.* In Debt againſt an Executor who pleads ſeveral Judgments had againſt him, *&c.* the Plaintiff replies to each ſeverally, that it was had by

by Fraud to bar him of his Debt: This Replication is clearly double, because if he had avoided any one of the Judgments he ſhould have had a general Judgment againſt the Defendant, his Plea being intire; (*a*) yet in this particular Caſe this Pleading is allowed, for he may be miſtaken in one; and in this Caſe he has it in his Election to plead Fraud to them all ſeverally, or to any one of them, omitting the others; and if Payment of ſeveral Obligations had been alledged, the Plaintiff might traverſe the Payment of each ſeverally, or of any of them; and though he miſtake ſome of the Sums to which he pleaded *Non ſolvit*, yet it ſhall not hurt; for it is no more than if he had ſaid Nothing to them; and in the Caſe of ſeveral Judgments the Plaintiff may reply, that one was obtained by Fraud, that Satisfaction is acknowledged on Record on another, and ſo avoid each by a different Plea.

Lev. 281. & *vide* 1 Mod. 33. 2 Mod. 36. 2 Keb. 591. 2 Sand. 336. 4 Mod 54, 63. Carth. 195.

(*a*) This is called an anomalous Caſe againſt the Rules of Law, which condemn double Pleading; but in this Caſe it hath ſeveral Times been allowed. 2 Sand. 48. Camb. 444. Ld. Raym. 263. Salk. 298. pl. 10. Carth. 429. 12 Mod. 153, 229.

* If a Man pleads two Things where he is compellable to ſhew both, this does not make his Plea double.

*Page 121

Plow. 194. Doct pl. 136.

As where to a Plea in Abatement in Trover that another Action depends by *B.* and *C.* for the ſame Cauſe, the Plaintiff replied that they are both dead; this Replication is not double, for he muſt ſhew the Death of both to enable him to bring the Action alone.

2 Lev. 82. Vent. 236.

If there are three in Execution jointly at the Suit of *A.* and all eſcape, the Plaintiff may declare for the Eſcape of all, and it will not be double, though the Eſcape of any one of them will be (*b*) ſufficient to intitle him to the Action.

Keilw. 68. Stile 82.

(*b*) For this *vide* Sid. 5. Skin. 583. and Title *Eſcape*.

In Detinue by Dame *Audley* the Defendant pleads, that after Bailment of the Goods to him by the Plaintiff ſhe married Lord *Audley*, and that during ſuch Marriage the Lord *Audley* releaſed to him all Actions, *&c.* It was objected that this Plea was double, *viz.* Property in the Huſband by the Intermarriage, and a Releaſe by him; but it was reſolved not double, becauſe he could not plead the Releaſe without ſhewing the Marriage.

Moor 25. pl. 85. Dame *Audley*'s Caſe. Daliſ. 30. pl. 9. S. C.

3. Of pleading double by Leave of the Court.

This depends on the Statute 4 & 5 *Ann. cap.* 16. for Amendment of the Law, by which it is enacted, "That any Defendant or Tenant in any "Action or Suit, or any Plaintiff in Replevin in any Court of Record "may, with Leave of the ſame Court, plead as many ſeveral Matters "thereto as he ſhall think neceſſary for his Defence; and if any ſuch "Matter ſhall on a Demurrer joined be judged inſufficient, Coſts ſhall be "given at the Diſcretion of the Court; or if a Verdict be found upon any "Iſſue in the ſaid Cauſe for the Plaintiff or Demandant, Coſts ſhall alſo "be given in like Manner, unleſs the Judge who tried the ſaid Iſſue ſhall "certify that the ſaid Defendant, or Tenant, or Plaintiff in Replevin had "a probable Cauſe to plead ſuch Matter, which upon the ſaid Iſſue ſhall "be found againſt him."

In the Conſtruction of this Branch of the Statute the following Opinions have been holden:

That a Perſon cannot plead and demur to the ſame Part of the Declaration; alſo it is held, that pleading double is at the Peril of the Pleader; and

Caſes in Law and Equity 281, 327.

and that if the Court give him Leave in Caſes where they have no Power by the Act ſo to do, the other Party may demur. ‡

‡ *Qu.* If the proper Method is not to move the Court to diſcharge the Rule?

T. 5 Geo. 2. in *B. R. Warren* v. *Ives.*—

It is held, that theſe double Pleas muſt be to the Plaintiff's Declaration, and that therefore the Defendant cannot rejoin two ſeveral Matters to the Plaintiff's Replication.

Whether to a Writ of Error to reverſe a common Recovery the Defendant may plead double, Caſes in Law and Equity 326. *Dubitatur.*

T. 2 Geo. 1. in *B. R. Carrington* v. *Warren.*

It was moved, that an Executor being likewiſe Heir at Law might have Leave to plead double, *viz. Solvit ad diem*, and *Riens per deſcent*, to an Action of Debt upon a Bond; but the Court refuſed the Motion, without an Affidavit that he had *Riens per deſcent*, and ſaid, that there is the ſame Law in Caſe of an Adminiſtrator, who ſhall not be allowed to plead *Plene adminiſtravit*, and no Aſſets, without Affidavit †.

† The common Plea of *Plene Adminiſtravit*, as now uſed, includes an Allegation that the Defendant hath not, nor at the Commencement of the Suit had, any Aſſets, and the whole makes but one Plea, and is not double.

H. 7 Geo. 2. in *B. R* Sir *Charles Peers* v. *Whale.*

So in Covenant for Non-payment of Rent, as Aſſignee of ſeveral Terms the Plaintiff ſet out his Title under ſeveral Deeds, and the Defendant moved to plead Eight Pleas; but becauſe he had not an Affidavit to prove them material to the Merits of his Cauſe, the Motion was denied; and here the Court obſerved, that this Statute was not * deſigned to put the Plaintiffs under unneceſſary Difficulties in proving Iſſues foreign to the Merits of the Matter in Queſtion; and though they are to allow any Perſon that aſks the Favour of pleading double, to uſe the Benefit of the Act, yet are they to ſee the Deſign of it is not abuſed in multiplying fruitleſs and impertinent Iſſues.

*Page 122

It hath been frequently inſiſted upon, that a Defendant could not within this Act plead contradictory and inconſiſtent Pleas; as *Non aſſumpſit* and the Statute of Limitations, *&c.* But the Court obſerving, that if the Benefit of the Statute was to be confined to ſuch Pleas as are conſiſtent, it would hardly be poſſible to plead a ſpecial Plea and a general Iſſue, the one always denying the Charge, the other generally confeſſing and avoiding it; and as the Statute itſelf makes no Diſtinction herein, hence it hath been held,

Stra. 496. H. 8 Geo. 1. in *B R Cary* v. *Jenkins.*

That in Debt for Rent the Defendant may plead a Tender and Eviction.

Iſaac and Sir *William Gordon* in *Scaac.*

So in an Action upon Articles under Hand and Seal relating to *South-Sea* Stock, Defendant had Leave to plead *Non eſt factum*, *Non obtulit*, *Non dedit notitiam ſecundum* the *Proviſo* in the Deed, and that the Deed was not regiſtered.

M. 2 Geo. 2. in *B. R. Smith* v. *Smallwood.*

So not guilty and *Son aſſault demeſne* was pleaded by Leave of the Court ‖.

‖ And is now the common Practice, without Exception.

2 Stra. 871. T. 3 Geo. 2. in *B. R.*

So in Debt upon a Bond the Defendant was permitted to plead *Non eſt factum* and Bankruptcy.

Atkinſon v. *Atkinſon*, and M. 8 Geo. 2. S. P. between *Phillips* and *Wood.* 2 Stra. 1000.

In

In an Action on the Caſe againſt the Poſt-Maſter-General, it was allowed him to plead *Non culp' & Non culp' infra ſex annos.* H. 4 Geo. 2. in *B. R. Deceſta* v. *Carteret.* 2 Stra. 889. Fitzgib. 189. Barnard. K. B. 407.

In Treſpaſs the Defendant had Leave to plead a Licence and juſtify the cutting down ſome Boughs, becauſe they hung over his Gardens; though it was objected, that theſe Pleas were inconſiſtent, the Licence being a tacit or implied Acknowledgment, that he had no Right to cut the Boughs, whereas the Juſtification aſſerts one. T. 5 Geo. 2. in *B. R. Bohun* v. *Morgan.*

In Debt upon a Bond given by a Woman, conditioned that ſhe ſhould marry the Plaintiff, if he requeſted, within ten Days after his Return from Sea, Leave was given to plead *Non eſt factum*, and that ſhe was never requeſted. 2 Stra. 908. T. 5 Geo. 2. in *B. R. Dun* v. *Vauacher.*

In Debt for Rent upon a parol Demiſe, Defendant had Leave to plead *Nil habuit in tenementis & Non demiſit.* M. 6 Geo. 2. in *B. R. Semining* v. *Bygrove.*

(L) Departure in Pleading.

A Departure in Pleading is when the ſecond Plea contains Matter not (*a*) purſuant to the former, and which does not fortify the ſame; and when the Rejoinder contains Matter ſubſequent to the Bar, and not fortifying the ſame, this is regularly a Departure. 2 E. 4. 12. Plow. 105. Co. Lit. 304. Doct. pl. 119.

(*a*) But where a Man pleads any Thing which he could not have ſhewed at firſt, it ſhall never be reckoned a Departure; ſo where he fortifies it in the ſame Manner that he pleaded it; but if he fortifies in another Manner, as by a ſpecial Cuſtom, it will be a Departure. For this *vide* Yelv. 14. Dyer 253. Style 260. Jon. 262. Leon. 156. 2 Leon. 199. 3 Leon. 3, 203. Cro. Car. 257. Finch 392.

* In an Aſſiſe the Tenant pleads a Deſcent from his Father, and gives Colour, the Demandant intitles himſelf by a Feoffment from the Tenant himſelf, the Tenant cannot ſay that the Feoffment was on Condition, and ſhew the Condition broken; for that were a Departure, as containing new Matter, and ſubſequent to the Matter of his Bar; but in Aſſiſe, if the Tenant plead in Bar, that *J. S.* was ſeiſed, and infeoffs him; the Plaintiff ſhews, that he himſelf was ſeiſed in Fee till *J. S.* diſſeiſed him, who infeoffed the Tenant; the Tenant may plead a Releaſe of the Plaintiff to *J. S.* for this fortifies his Bar. *Page 123 Doct. pl. 120. Plow. 104.

If a Man plead an Eſtate generally, as a Feoffment in Fee, he, without a Departure, cannot maintain it in his ſecond Plea by Matter tantamount; as by a Diſſeiſin and Releaſe, or by a Leaſe and Releaſe, or a Giſt in Tail and a Recovery in Value; nor when a Man pleads an Eſtate made by the Common Law, can he make it good by an Act of Parliament in his ſecond Plea. Co. Lit. 304.

So when a Matter is pleaded as at Common Law, he cannot maintain it in his Replication by Cuſtom; as in Covenant on an Indenture of Apprenticeſhip to ſerve ſeven Years, and Breach aſſigned, that he did not ſerve, *&c.* the Defendant pleads Infancy; the Plaintiff replies the Cuſtom of *London*; and adjudged a Departure. Lev. 81. Keb. 376, 469, 512.

Nor can Action at Common Law be made good in the Replication by Statute; as in Treſpaſs for taking his Beaſts, the Defendant juſtifies as Damage-feaſant; the Plaintiff replies he drove them out of the County; and adjudged a Departure; for driving out of the County was not prohibited by the Common Law, but by the Statute of *Marl.* (52 *H.* 3.) and 1 & 2 *Ph. & M. cap.* 12. 3 Lev. 48.

But

Lev. 81. But if one pleads a Statute, the other ſays it is repealed, he may reply that it is revived by another; for this fortifies the firſt Matter.

Co. Lit. 304. a. If a Man plead Performance of Covenants, the Plaintiff replies, he did not do ſuch an Act according to the Covenant; the Defendant ſays, he offered to do it, and he refuſed; this is a Departure, it being one Thing to do a Thing, and another, that he offered to do it, but he refuſed.

Vent. 121. 2 Lev. 5. Debt againſt a Clerk upon an Obligation conditioned to perform Covenants, one of which was to account for all Money he ſhould receive; the Defendant pleads Performance; the Plaintiff replies, that ſuch a Day ſuch a Sum came to his Hands, which he had not accounted for; the Defendant rejoins, that he accounted *modo ſequente*, *viz.* that Thieves broke into the Counting-houſe and ſtole it, and that he acquainted the Plaintiff, & *hoc paratus eſt*, &c. And on Demurrer it was reſolved, that the Rejoinder was no Departure, for though it contained new Matter, yet it was purſuant to the former; for ſhewing that he was robbed, amounted to giving an Account, *2dly*, That the Rejoinder, though an expreſs Affirmative, *viz.* that he did account, in Contradiction to what was ſaid in the Replication, *viz.* that he did not account, was yet good with an Averment, without concluding to the Country; for new Matter being alledged in the Rejoinder, the Plaintiff ought to have Liberty to come in with a Sur-rejoinder and anſwer it, *viz.* by traverſing the Robbery.

2 Lev. 67. Debt on an Obligation for Performance of Covenants, one of which was, to return certain Goods from *D.* the Defendant pleads Performance; the Plaintiff aſſigns a Breach in not returning ſuch Goods; the Defendant rejoins he had no Order; and held a Departure, for there was no Mention of Order in the Covenant; but it ſeems, had the Covenant been to return them on Order, the Plea had been good; for then the Covenant were not to be performed without Order, and *performavit omnia* may be taken, that he performed all that he ought to perform, he not having Orders.

*Page 124. Lev. 85, 127, 133, 300. Mod. 289. *Reberts* v. *Marriot.* * In Debt upon an Obligation for Performance of an Award, the Defendant pleads no Award; the Plaintiff replies, and ſhews the Award and Breach; if the Defendant rejoin, and ſhew that it is void, either becauſe that there was an Award of mutual Releaſes to the Time of the Award, or that the Award was all on one Side, or that it was not made of all Matters ſubmitted, and whereof the Arbitrators had Notice, or the like, in all ſuch Caſes the Rejoinder is a Departure; for no Award pleaded is no Award at all, either in Fact or in Law, which is not to be maintained by ſhewing the Award to be void, but he ſhould at firſt plead the Award, and alſo the Matter whereby it was void.

3 Lev. 239, 241. In Debt for not performing an Award, the Defendant pleads no Award, the Plaintiff replies, and ſhews one, but does not ſhew where it was made; the Defendant demurs; and reſolved that that could not be objected after no Award pleaded, for that were a Departure.

2 Saund 80. Sid. 444. Mod. 43. 2 Keb. 612, 619. *Richards* v. *Hodges.* In Debt on a Bond, conditioned to ſave a Pariſh harmleſs concerning a Baſtard-Child which the Obligor was forced to Father, he pleads *Non damnificat'*; they reply, that the Child was ready to ſtarve, and that therefore they put it out to nurſe, which coſt them 4*l.* Defendant rejoins, that he was ready to repay the Money and ſave the Pariſh harmleſs: Upon this they demurred, and had Judgment, becauſe the Rejoinder is a Departure; for the Defendant ought to have taken Iſſue upon the Child's being ready to ſtarve; if the Plaintiff had once been at any Expence about the Child, and were thereupon actually damnified, the Defendant being ready to repay the Money will not ſave the Condition of the Bond.

In

In Debt on a Bond for Performance of an Award the Defendant pleads no Award; the Plaintiff replies and ſhews it, and the Breach; the Defendant pleads, that it was not tendered, *&c.* this is a Departure; for though both be neceſſary by the Condition of the Bond to charge the Defendant, *viz.* that an Award be made, and that it be alſo tendered, yet he ought to rely on either one or other, either being ſufficient to bar the Plaintiff; then, when he chuſes one in his Plea, *viz.* that no Award was made, he cannot after waive that in his Rejoinder, and have Recourſe to the other, *viz.* that the Award was not tendered. 2 Sand. 189 Sid. 10.

In Treſpaſs for breaking his Houſe and carrying away his Goods, the Defendant juſtifies as a Diſtreſs Damage feaſant; the Plaintiff replied, that after the Diſtreſs, *viz.* the ſame Day, the Defendant converted them to his own Uſe; and on Demurrer the Replication was held no Departure; for he who abuſes a Diſtreſs is a Treſpaſſer *ab initio*, and the Converting is a Treſpaſs or Trover, at Election; and the bringing Treſpaſs determines his Election, and the Matter in the Replication makes good that Election; for it proves it a Treſpaſs as well as Trover. Salk. 221. pl. 1. *Gargrave* v. *Smith.*

In Covenant for further Aſſurances, *&c.* the Defendant by Proteſtation ſays, that the Plaintiff's Counſel did not adviſe, *&c.* and for Plea ſaith, that he was not required; the Plaintiff replies, that *J. S.* his Counſel, adviſed a Releaſe, and that he required the Defendant to ſeal it, which he refuſed; the Defendant rejoins, that he did not refuſe; this is a Departure. Dyer 31. b. Doct. pl. 120.

The Defendant pleads in Bar a Leaſe for fifty Years made by a Corporation, and after in the Rejoinder pleads the Proviſo in the Statute 31 *H.* 8. *cap.* 13. which makes ſuch Leaſes good for 21 Years; it was held, that the Pleading the Proviſo was a Departure, as not enforcing that which went before in the Bar. § Dyer 102. Doct. pl. 121.

§ This was a Spiritual Corporation, that was diſſolved after granting the Leaſe.

If it be pleaded, that the Parties to a Fine *Nihil habuerunt*, which is denied, and the Defendant rejoins, that the Party had only a Uſe in the Land; this is a Departure. Dyer 291. Doct. pl. 121.

* If in Bar to an Action on a Bond, conditioned to ſave the Plaintiff harmleſs, the Defendant pleads, that he did ſave harmleſs; and the Plaintiff in his Replication ſhews a Damnification; to which the Defendant rejoins, that he had not Notice thereof; this Rejoinder is a Departure. * Page 125 Sand. 117. Lev. 194.

If a Man lay a Day in his Declaration that is not material, and the Defendant by his Plea makes it material, and then the Plaintiff in his Replication varies from the Day in the Declaration, it will be a Departure; otherwiſe (*a*) if the Day had not been material by the Plea. 6 Mod. 115. *per Holt.* C. J.

(*a*) For this *vide* Cro. Car. 229. 2 Mod. 31. Title *Traverſe.*——And that a Departure in ſuch Caſe may be cured by pleading over and Verdict. Lev. 110. Raym. 86. Keb. 566.

To an Information exhibited againſt the Defendant, for not taking upon him the Office of Sheriff of *Norwich*, the Defendant, pleaded the Statute of 13 *Car.* 2. (*ſt.* 2. *c.* 1. *ſ.* 12. †) by which it is enacted, that a Perſon elected into any Office in a Corporation ſhall be ſuch as within one Year before hath taken the Sacrament according to the Church of *England*, or elſe the Election ſhall be void, and averred, that he had not taken the Sacrament, *&c.* at any Time within one Year next before the Carth. 306. *The King* v. *Larwood.* Ld. Raym. 29. 4 Mod. 269. Salk. 167. pl. 1. Skin. 574.

pl. 1.——† *Vide* 5 Geo. 1. c. 6. ſ. 3. & 11 Geo. 1. c. 4. ſ. 6.

Election

Election of him to be Sheriff, &c. wherefore the Election was void: The Attorney General replied, and ſet forth that Part of the Act of Uniformity, by which every Perſon is obliged to take the Sacrament three Times a Year according to the Liturgy, &c. The Defendant rejoined, and ſet forth the Act of Parliament for tolerating Diſſenters; to which there was a Demurrer; and it was held, that the Defendant's Rejoinder was a Departure from his Plea.

M. 6 Geo. 2. in *C. B. Owen* v. *Reynolds.* See 2 Barnard. *K. B.* 193.

In Debt upon a Bond, conditioned to indemnify the Plaintiff from all Tonnage of certain Coals bought of the Defendant due to *W. B.* the Defendant pleaded *Non damnificat'*; to which the Plaintiff replied that for 5 *l.* for Tonnage of Coals bought of the Defendant the Day of the Date of the Bond, his Barge was diſtrained, and that the Defendant had not paid the ſaid 5 *l.* the Defendant rejoined, that no Tonnage was due for the Coals; to which the Plaintiff demurred, ſuppoſing the Rejoinder to be a Departure from the Plea; for the Defendant having pleaded generally, that the Plaintiff was not damnified, and the Plaintiff having aſſigned a Breach, the Matter of the Rejoinder is only by way of Excuſe, confeſſing and avoiding the Breach, which ought to have been done at firſt, and not after a general Plea of Indemnity; for Rejoinders it was inſiſted ſhould ſtrengthen the Bar, whereas this is a plain Retraction of the Plea, that denying the Plaintiff has ſuffered any Damage, this confeſſing and excuſing it. On the other Side it was inſiſted, that it was not neceſſary for the Defendant to ſet out all his Caſe at firſt; and it ſuffices that his Bar is ſupported and ſtrengthened by his Rejoinder, which it was urged had been done in this Caſe; for the Plea being only to enforce the Plaintiff to aſſign a Breach, the Defendant may come afterwards and ſhew the Breach aſſigned is not within the Meaning of the Condition; as here the Condition is to ſave the Plaintiff harmleſs from all Tonnage due to *W. B.* Plaintiff replies, his Barge was diſtrained for Tonnage, but does not aver it was due; then the Defendant rejoins, there was no Tonnage due, which being confeſſed by the Demurrer, it is certain the Plaintiff could not be prejudiced within the Tenor of the Condition, by which the Defendant is obliged only to indemnify the Plaintiff againſt ſuch Tonnage, ſo the Plea is directly confirmed by the Rejoinder; and of this Opinion was the Court. Another Point was made in this Caſe by Defendant's Counſel, *viz.* admitting there was a Departure, yet if the Plaintiff has aſſigned for a Breach of the Condition what is really no Breach, whereby it appears he has no Cauſe of Action, Judgment ſhall be entred for the Defendant; as in this Caſe Plaintiff has inſtanced a Di-

Page 126 ſtreſs of his Barge for Tonnage of Coals bought of the Defendant the Day of the Date of the Bond, and has not aſcertained what the Coals were, ſo that they do not appear to be the ſame Coals as are mentioned in the Condition, which the Court cannot intend, though they are ſaid to be bought upon the Day of the Date of the Condition; for he might buy other Coals for what appears to the contrary; and of this Opinion alſo was the Court.

(M) Repleader.

(M) Repleader.

1. Of the Nature of a Repleader, and Manner of awarding it.

WHEN Iſſue is joined on an immaterial Point, or ſuch a Point as after Trial thereof the Court cannot give Judgment, as being impertinent or uncertain, and not determining the Right, the Court regularly awards a Repleader, or gives *(a)* Judgment *Quod partes replacitent*; in which Caſe the Parties muſt begin again at the firſt Fault which occaſioned the immaterial Iſſue; and herein it hath been held, that *(b)* if the Declaration be ill, the Bar ill, and the Replication ill, the Parties muſt begin *de novo*; but if the Bar be good and the Replication ill, at the Replication; and if the Bar and Replication be both bad, and the Repleader is awarded, it muſt be as to both.

22 H. 6. 18. Doct. pl. 311. 2 And. 6, 7. 24-5. 4 Leon. 19. Skin. 570. 2 Lutw. 1622.

(a) The Judgment to replead was *Quia videtur Curiæ quod placitum prædictum et exitum ſuperinde junctum eſt minus ſufficiens in lege, ideo dictum eſt partibus quod replacitent*; and it was objected, that it was not any Judgment, but that it ought to have been *Ideo conſideratum eſt*, &c. But the Court held it a ſufficient Award to replead, and that this was the Form agreeable to the Courſe of the Court. Cro. Jac. 6. (b) For this *vide* Dyer 117. 5 E. 4. 108. 19 E. 4. 1. Doct. pl. 311. Dal. 17. pl. 8. 76. pl. 2. And. 31. Raym. 458. 3 Keb. 664. Ld. Raym. 707. Salk. 173. pl. 2. 216. 2 Salk. 579. 6 Mod. 2.

If a Repleader be denied where it ſhould be granted, or granted where it ſhould be denied, it is Error. 2 Salk. 579. 6 Mod. 2.

Upon an Iſſue joined in Chancery, on a *Scire Facias* upon a Recognizance, the whole Record was removed into *B. R.* and after a Trial had there the Judgment was arreſted, by reaſon of miſ-awarding the *Venire*; and the Parties being deſirous to replead, the Queſtion was, whether the Repleader ſhould be in Chancery or *B. R.* And it was held by the Judges of *B. R.* that it ſhould be in that Court. Rol. Rep. 287. *Biſhop of Briſtol* v. *Sir Stephen Proctor*. Daliſ. 15. pl. 6. Like Point.

——But I take it to be now the ſettled Rule, not to ſuffer the Court of *King's Bench* to alter or amend any Iſſue directed out of Chancery, but that for any Irregularity herein Application muſt be made to the Court of Chancery. *Vide* under Title *Courts, Juriſdiction of the Court of Chancery*.

It is held, that there can be no Coſts to either Party on a Repleader; (c) becauſe it is a Judgment of the Court upon the Pleading, and therefore differs from an Amendment, which cannot regularly be without Payment of Coſts. 2 Vent. 196. 2 Salk. 579. (c) 6 Mod. 2.

2. A Repleader in what Caſes to be awarded.

Herein the general Rule is, that if there be an immaterial Iſſue, and thereupon a Verdict, upon which the Court cannot know for whom to * give Judgment whether for the Plaintiff or the Defendant, a Repleader is regularly to be awarded; for ſuch immaterial Iſſue is not aided after Verdict by 32 *H.* 8. *cap.* 30. or any of the Statutes of Jeofail; for if what is material in the Pleadings be not put in Iſſue, it is not made neceſſary to be proved on the Trial; or if it be alledged and proved, yet if it appears inſufficient, ſo as not to be deciſive between the Parties, the Verdict will be no good Foundation for the Judgment; but an *(d)* informal Iſſue is helped by the Verdict.

*Page 127 Cro. Eliz. 227. Doct. pl. 312. 2 Mod. 137, 140. Lev. 32.

In ——Where Iſſue is joined upon a Matter not triable. Raym. 458. Cro. Eliz. 131.——Where the Time is immaterial, and yet made Part of the Iſſue. Latch 92. 2 Sand. 318. 2 Lev. 12. Hard. 40.—For an Iſſue on an immaterial Traverſe, Moor 693. pl. 959. Cro. Eliz. 456. Winch 76. Cro. Eliz. 228. Goulſ. 39. pl. 15. Savil 78. 1 Sand. 22. (d) If the Plea on which the Iſſue is joined hath no colourable Pretence in it to bar the Plaintiff,

or

Cro. Jac. 5. *Cox* v. *Cropwell.* [See 1 Rol. Abr. 6. l. 10. 1 Leon. 312.]

In Trover againſt Baron and Feme upon a Finding of the Goods by the Feme during Coverture, and a Converſion to her || Uſe, and they pleaded *Quod ipſi non ſunt culpabiles*; which was held ill, becauſe there was no Tort ſuppoſed in the Huſband, and therefore a Repleader was awarded, and the Plea made *Quod ipſa non eſt inde culpabilis.*

|| An Action for a Tort done by the Huſband and Wife jointly ſhall be againſt the Huſband alone; for the whole ſhall be intended to be the Act of the Huſband. 1 Rol. Abr. 348. l. 37. Pal. 343.

Owen 53. *Houſe* and *Elkin* v. *Grindon*, S. P. ſaid to have been adjudged between *Bret* v. *Shephard*, the ſame Term. Leon. 90.

If in Debt upon an Obligation by the Sheriffs of *London* againſt *J. S.* he pleads, that he being arreſted by Precept out of *B. R.* appeared at the Day according to the Condition of the Bond, and thereupon Iſſue is joined; in this Caſe there ſhall be a Repleader; for the Appearance being entered of Record, as it ought to be, the ſame is triable by the Record, and not by a Jury.

Cro. Eliz. 539. *Archbiſhop of Canterbury* v. *Kemp.*

In Trover for divers Trees, the Defendant pleads, that Queen *Mary* was ſeiſed in Fee of the Manor of *D.* where thoſe Trees were growing, and that ſhe granted it to the Defendant in Tail, whereby he was ſeiſed thereof, and that *J. S.* cut the ſaid Trees, and granted them to the Plaintiff, who loſt them, and the Defendant found them, and converted them, *&c.* the Plaintiff replies, *De injuria ſua propria, &c.* and thereupon Iſſue is joined; it was held, that pleading *De injuria ſua propria* was ill, where the Defendant makes Juſtification by claiming an Intereſt in the Freehold to himſelf; but that where one claims not any Intereſt, but juſtifies by Command or Authory derived from another, it is otherwiſe; wherefore a Repleader was awarded. †

† In ſuch a Caſe as this the General Iſſue Not guilty would be the proper Plea.

Cro. Jac. 239. *Watſon* v. *Thorpe and his Wife.*

In Battery the Baron juſtifies, for that the Plaintiff aſſaulted his Feme, in Aid of whom, *&c.* the Feme by herſelf pleads and juſtifies *De ſon aſſault demeſne*; the Plaintiff ſaith, *De injuria ſua propria abſque tali cauſa*; and both Iſſues found for the Plaintiff, and Damages intirely given; and now alledged in Arreſt of Judgment, that the Trial was ill; for the Feme by herſelf cannot plead, and the Damages being intirely aſſeſſed, all was ill; and of that Opinion was the Court, and awarded that they ſhould replead.

Cro. Jac. 435. *Holmes* v. *Brockett.*

If in Debt upon a Bond, conditioned for the Payment of 60 *l.* upon the 25th of *June*, the Defendant pleads Payment of the ſaid 60 *l.* upon the 20th Day of *June ſecundum formam & effectum conditionis*; and thereupon Iſſue is joined and a Verdict found, that he did not pay the ſaid 60 *l.* upon the 20th of *June*; the Plaintiff ſhall not have Judgment, for the Iſſue is taken *debors* the Matter of the Condition, and ſo void; and it might not be paid the 20th, and yet might be paid the 25th; but it is held, that if it had been found for the Defendant, *viz.* that the Money was paid the ſaid 20th Day, perhaps the Verdict would have made it good. ‡

‡ As Payment before the Day would have been Payment at the Day, and the Condition in Subſtance performed.

In

---

or if it be againſt an expreſs Rule in the Law; there the Iſſue is immaterial, and ſo as if there was no Iſſue, and therefore it is not aided by the Statute; but if it hath the Countenance of a legal Plea, though it want neceſſary Matter to make it ſufficient, there ſhall be no Repleader, becauſe it is helped after Verdict. Moor 867. pl. 925. & *vide* Lev. 32. Carth. 371.————Diverſity where an Iſſue is misjoined, and where there is no Iſſue. 2 Rol. Rep. 187. Cro. Jac. 580. 2 Leon. 195. 3 Leon. 67. Godb. 56.

In an Action of Debt upon a ſimple Contract, Payment was pleaded at *A.* Plaintiff traverſes, that the Payment was at *A.* and a Verdict, that the Defendant did not pay at *A.* And it was moved in a Writ of Error, that there ought to have been a Repleader, otherwiſe if the Verdict had been found for the Defendant; but the Court affirmed the Judgment. * Page 128 Keb. 662. *Lucas* v. *Harlow.* Q.

If in Debt upon a ſingle Bill the Defendant pleads Payment without an Acquittance, and thereupon Iſſue is joined, and found for the Plaintiff, he ſhall have Judgment; for though Payment without an Acquittance is no Plea to a ſingle Bill, yet becauſe Iſſue was joined upon an Affirmative and a Negative, and a Verdict for the Plaintiff, he ſhall have Judgment. ‡ 5 Co. 43. *Nichol's* Caſe.

‡ See the Stat. 4 Ann. c. 16. ſ. 12.

Debt for Rent againſt Leſſee for Years, Defendant pleads, that before any Rent due he aſſigned the Term to another, of which Plaintiff had Notice; Iſſue upon the Notice, and Verdict for the Defendant, but no Judgment was given, but a Repleader awarded, in regard the Iſſue was joined on a Thing not material. Lev. 32. *Serjeant* v. *Fairfax.*

In Debt on a Bond againſt the Defendant as Executor, Iſſue was joined, whether the Defendant had Aſſets or not, on the 30th Day of *November*, which was the Day on which he had the firſt Notice of the Plaintiff's original Writ; and it was found for the Defendant, that then he had not Aſſets; and this being held an immaterial Iſſue, for though he had not Aſſets then, yet if he had any afterwards, he is liable to the Plaintiff's Action, a Repleader was awarded. 2 Mod. 139. *Read* v. *Dawſon.*

If in Debt upon an Obligation, conditioned for the Payment of 100*l.* upon the 31ſt Day of *September* following, the Defendant pleads Payment the ſaid 31ſt Day according to the Condition; and thereupon Iſſue is joined, and found, that the Money was not paid upon the ſaid Day, the Plaintiff ſhall have Judgment; for though the Iſſue is upon an Impoſſibility, there being no ſuch Day, yet the Jury finding it not paid at the Day, or at any Time before, in Effect find it was never paid, which is a good Verdict. Cro. Car. 78. *Purchaſe* v. *Jegon.* Jon. 140. Latch 158. Noy 85. S.C.

Treſpaſs for Battery and falſe Impriſonment ſuch a Day and Place; the Defendant juſtified at another Day and Place by virtue of a Writ and Warrant from the Sheriff; *abſque hoc*, that he is guilty *aliter vel alio modo*, *vel* at any other Place; the Plaintiff replied, that he is guilty *aliter & alia modo*, and at another Place; whereupon Iſſue was joined, and Verdict for the Plaintiff; but for the Badneſs and Uncertainty of the Iſſue, upon Motion in Arreſt, Judgment was ſtaid, and a Repleader awarded. 2 Lev. 164. *Maſters* v. *Wood.*

In *Aſſumpſit* againſt an Adminiſtratrix, the Defendant pleaded *Quod ipſa Non aſſumpſit* inſtead of the Inteſtate; and after Verdict a Repleader was awarded. 2 Vent. 196.

But if on an Iſſue tendered by the Plaintiff the Defendant joins the *Scilicet* by the Plaintiff's Name, or the Plaintiff joins the *Scilicet* by the Defendant's to an Iſſue rendered by the Defendant; this ſhall be amended, there being a Negative and Affirmative before between the Plaintiff and Defendant, which is the Pattern from whence the Joining of that Iſſue is to be taken; and this being a plain Miſtake, as appears from the Nature of the Thing, of one Man's Name for another. Rol. Abr. 200. Yelv. 65. Cro. Jac. 67. S. C. and Cro. Eliz. 752. Stile 167. Palm. 524. L. P.

In an Action upon a penal Statute the Defendant pleaded *Non debit* to the Informer, *& de hoc ponit ſe ſuper patriam*; and Iſſue was joined Vent. 122. *Reynell* v. *Heal.* 2 Keb. 788. S. C.

& præ-

& *prædict'* the Informer *ſimiliter*, without mentioning the King; and after a Verdict for the Plaintiff a Repleader was awarded. †

† *Qy.* as to the Law in this Caſe, the King not being a Party to the Suit, but the Informer is the only Plaintiff, though he ſues for the King and himſelf?

40 E. 3. 15. Doct.pl 313. 6 Mod. 3. If the Jury do not find Aſſets to a certain Value, the Verdict is inſufficient, and a Repleader ſhall be granted, and the Iſſue tried by another Inqueſt.

*Page 129

* 3. Repleader at what Time to be awarded.

Salk. 579. (a) 3 Keb. 664. 6 Mod. 2. S. P. and that it is diſcretionary in the Court but not adviſeable, ſince the Verdict may cure immaterial or informal Iſſues. It ſeems that at Common Law a Repleader was as well allowed before as after Trial, becauſe a Verdict did not cure an immaterial Iſſue; but (a) it ſeems to be now ſettled, that no Repleader ought to be allowed before Trial, becauſe the Fault of the Iſſue may be helped by the Trial by the Statute of Jeofails.

5 Co. 52. *Ridgeway*'s Caſe. Doct.pl.311. It is held by a Multitude of Authorities, that after a Demurrer the Repleader is not to be admitted, becauſe by the Demurrer the Parties have put themſelves on the Judgment of the Court.

Poph. 42. Savil 89. Latch 148. Leon. 79. Moor 461. pl. 644. 867. pl. 925. Rol. Rep. 271. And. 168. Lev. 142. 6 Mod. 102.——But in 3 Lev. 20. there is an Inſtance of a Repleader after a Demurrer; and in 3 Lev. 440. it is ſaid, that there was a Repleader after Demurrer and ſolemn Argument; but theſe Caſes have of late been denied to be Law.

2 Sand. 319. 2 Lev 12. 2 Keb 789. 6 Mod. 102. It is ſaid to have been uſual in antient Times to award a Repleader upon a Writ of Error in *B. R.* but it ſeems to be now agreed, that there can be no Repleader upon a Writ of Error.

2 Salk. 579. 6 Mod. 3— It is held, that no Repleader can be awarded after a Default.

No Repleader after a Diſcontinuance. Comb. 323. Ld. Raym. 20. Salk. 219. pl. 4.

(N) Demurrer.

1. The Definition and Nature of a Demurrer.

Doct.pl.115. Finch c. 40. (b) Comes, ſays my Lord *Coke*, from the *Latin* Word *Demorari*, to abide, in Law. A (b) Demurrer in (c) Pleading is an Admiſſion by the adverſe Party of the Fact charged in the Count or Declaration, Plea, Replication, &c. (d) and refers the Law ariſing on ſuch Fact to the Judgment of the Court.

(c) As there may be a Demurrer upon Counts and Pleas, ſo there may be of Aid Prier, Voucher, Receit, Waging of Law, and the like. Co. Lit. 72. a.——For demurring on Evidence *vide infra* 136. (d) May be taken to the Rejoinder, &c. and to a Special as well as a General Plea; for all Parts of Pleading to Iſſue ought to be according to the Rules of Law; and if any Part fail the Whole is naught, and may therefore be demurred unto. Co. Lit. 72. a. Lil. Reg. 435.

Co. Lit. 71, 72. Doct. pl. 115. Lil. Reg. 438. 5 Co. 104. It is termed in ſome Books an Iſſue in Law, and therefore in a Declaration, Plea, &c. there may be two independent Iſſues, *viz.* a Demurrer, which is the Iſſue in Law, determinable by the Court; and an Iſſue

Iſſue in Fact, determinable by the Jury; but this muſt be underſtood as to diſtinct Parts of the ſame Declaration, Plea, &c. for it is never allowed the Defendant to plead and demur to the ſame Fact, being a Duplicity that would draw the Matter to different Judicatures, and would be vexatious and expenſive, were it admitted; for in ſuch Caſe the Party would demur Specially to Form, and if he was over-ruled there, then he would deny the Fact. Dyer 21. a. 87. b.

So on the Statute 4 & 5 *Ann. c.* 16. which enables Defendants by Leave of the Court to plead ſeveral Pleas, &c. it hath been refuſed to allow a Defendant to plead and demur to the ſame Declaration; for a Demurrer is ſo far from being a Plea, that it is an Excuſe for not pleading; and it would be abſurd for the Party to plead, and at the ſame Time pray that he might not plead. § *Page 130 Caſes in L. and Eq. 280. *Halſon* v. *Jefferies.*

§ But the Defendant may demur to one Count, and plead to another, for ſeparate Counts are as ſeveral Declarations.

If there be a Demurrer to Part, and an Iſſue for Part, the more orderly Courſe is to give Judgment upon the Demurrer firſt; but yet it is in the Diſcretion of the Court to try the Iſſue firſt if they will. Co.Lit.72.a. 125. b. Doct.pl.116. Palm. 517.

S. P. becauſe the Jury can then aſſeſs the Damages on the Whole.

If there be a Demurrer to Part, and an Iſſue upon other Part, and Judgment be given for the Plaintiff upon the Demurrer, he may enter a *Non pros* as to the Iſſue, and proceed to a Writ of Inquiry on the Demurrer, but without a *Non pros* he cannot have a Writ of Inquiry, becauſe on the Trial of the Iſſue the ſame Jury will aſcertain the Damages for that Part to which the Demurrer was. Salk. 219. pl. 6. *per Cur.*

2. The Manner and Form of demurring; and therein of joining in Demurrer, and waiving thereof.

The Words of a Demurrer, when to the Declaration, are *Quia narratio, &c. materiaque in eodem contenta minus ſufficiens in lege exiſtit, &c.* and to a Plea are *Quia placitum, &c. materiaque in eodem contenta minus ſufficiens in lege exiſtit, &c. unde pro defectu ſufficientis narrationis ſive placiti, &c. petit judicium, &c.* to which the adverſe Party replies *Quod narratio*, or *Placitum Prædictum, &c. materiaque in eodem contenta bon' & ſufficien' in lege exiſtunt, &c. & petit judicium*, and thereupon the Demurrer is ſaid to be joined. Co.Lit.71.b. Yelv. 5, 6. Where the ſubſtantial Part of the Demurrer was in, tho' ill in Form, the Court held it a Demurrer. *Vide* 5 Mod. 132.

In ſome Caſes a Man ſhall alledge ſpecial Matter, and conclude with a Demurrer, as in an Action of Treſpaſs brought by *J. S.* for the Taking of his Horſe, the Defendant pleads, that he himſelf was poſſeſſed of the Horſe until he was by one *J. S.* diſpoſſeſſed, who gave him to the Plaintiff, &c. the Plaintiff ſaith, that *J. S.* named in the Bar, and *J. S.* the Plaintiff, are all one Perſon and not divers; and to the Plea pleaded by the Defendant in the Manner, he demurred in Law; and the Court held the Plea and Demurrer good, and that without the Matter thus alledged he could not demur. Co.Lit.72.b

In a *Quare impedit* the Patron pleaded one Plea in Bar, and the Incumbent the ſame Plea by himſelf; the Queen demurred thus, *Quoad ſeparalia placita per Def' ſeparaliter placitat' dicta Domina Regina neceſſe non* Leon. 139. *The Queen* v. *Archbiſhop of Canterbury and others.*

non habet nec per legem terræ tenetur respondere; & *per Cur*, the Demurrer ought to have been several on each Plea by itself.

Salk. 220. pl. 7. *Docminique* v. *Davenant.* *Vide* 2 Hawk. C. P. 334.

If a Defendant demur in Abatement, the Court will notwithstanding give a final Judgment, because there cannot be a Demurrer in Abatement; for if the Matter of Abatement be extrinsick, the Defendant must plead it; if intrinsick, the Court will take Notice of it themselves.

Show. 213. Lil. Reg. 437.

After the Plaintiff and Defendant have joined in the Issue, which is to be tried betwixt them, neither of them (*a*) can demur without the Consent of the other; for by joining in the Issue they have admitted the Pleadings to be good, and sufficient to try the Issue.

(*a*) A Demurrer to an Appeal hath been received after Issue joined. Cro. Eliz. 196.—But it hath been adjudged, that a Demurrer to an Indictment ought not to be received after Verdict. Sid. 208.

So it hath been resolved, that after a Demurrer there cannot be a Repleader; for the Parties, by their mutual Consent, having put themselves on the Judgment of the Court, cannot without Leave of the Court replead.

*Page 131

Cro. Eliz. 62, 318. 3 Co. 52. b.

Salk. 219. pl. 4. Ld. Raym. 20.

There cannot be (*b*) a Demurrer to a Demurrer; and if there be, it makes a Discontinuance, for there is no Difference between pleading over when Issue is offered, and not joining in Demurrer, but pleading over, both are alike, and make a Discontinuance.

(*b*) It is said that one may demur to a Demurrer for the Doubleness of it, for a Demurrer ought to have Formality and Certainty in it to avoid Barbarism, and Inveigling of the Court; but if one that might demur doth not demur to it, but joins in the Demurrer, he cannot demur afterwards, for he hath slipped his Advantage. Lil. Reg. 438.—And in Case of a Demurrer to a Plea in Abatement, it is said one may demur upon that Demurrer. But *per Holt* C. J. that is where the Demurrer is not apposite; but if the Demurrer be proper and apposite, you must join. Comb. 306.

Skin. 217. pl. 1. *Vide Layer's* Trial, State Trials, 6 V. 229.

It is said, that there are the same Rules for joining in Demurrer as there are in Pleading; and that in criminal Cases, not capital, the Course is to allow the Party four Days to join in Demurrer; but it hath been held, that in capital Cases the Party must join in Demurrer *Instanter*.

Cro. Car. 513. Jenk. 128. 5 Mod. 18.

If a Demurrer be entered it cannot be waived, except both the Plaintiff and Defendant do consent unto it, nor then without Leave of the Court; because by the Demurrer both Parties have submitted the Matters in Law in Question betwixt them to the Judgment of the Court.

Lil. Reg. 436. But a Demurrer upon a Challenge to a Jury is good without a Counsel's or Serjeant's Hand; and as soon as it is agreed on at the Bar, the same is to be entered up without further Circumstances. 3 Lev. 222.

A Demurrer is not to be allowed unless it be signed by Counsel.

3. What Facts are admitted by a Demurrer.

Co. Lit. 72. a. Dyer 21. 5 Co. 69. Doct. pl. 119. Hob. 81. Sand. 353. Carth. 31.

It is laid down as a general and uncontested Rule, that a Demurrer admits all such Matters of Fact as are sufficiently pleaded.

34 H. 6. 5. Doct. pl. 117.

And therefore if in Waste the Defendant demurs to the Declaration, and it is adjudged against him, there shall issue no Writ of Waste, this being admitted by the Demurrer; but a Writ shall issue to enquire of the Damages.

But

But Matters not ſufficiently pleaded are not admitted by a Demurrer; ſo in a Demurrer upon a Matter in Law, ſays my Lord *Hobart*, though the Parties will join upon ſome one Point, upon which, if it ſtood alone, Judgment ſhould be given for the one Party, yet if upon the whole Record Matter in Law appears why Judgment ſhould be given againſt the ſaid Party, the Court muſt determine ſo; for it is the Office of the Court to determine the Law upon the whole Record, and the Conſent of Parties cannot prejudice their Opinions, nor diſcharge them of their Office in that Point. Hob. 56.

If in Covenant divers Breaches are aſſigned, ſome of which are good and others ill, and the Defendant demurs to the whole Declaration, the Plaintiff ſhall have Judgment for (*a*) thoſe which are well aſſigned, and for the others ſhall be barred. 2 Sand. 379, 380.

(*a*) In Trover for ſeveral Things,

and among the reſt *De duobus fulcris*, the Defendant demurred, and *Holt* Ch. J. refuſed to give Judgment *Quod Nil Capiat*, ſaying, the Plaintiff may take ſeveral Damages, and releaſe as to this, and then take Judgment as to the reſt, and all would be well. Salk. 218. pl. 1.

*4. How far a Judgment on a Demurrer is peremptory. *Page 132

It ſeems to be agreed as a general Rule, that a *(b)* Judgment on a Demurrer is as concluſive and binding, as if the ſame had been after a Verdict, *&c.*

(*b*) So where a Statute enacts, That a Perſon

convicted of ſuch an Offence ſhall forfeit ſo and ſo, a Conviction on a Demurrer hath been held ſufficient. 11 Co. 58. Rol. Rep. 89.

But upon a Plea to the Juriſdiction, Perſon, Writ, Aid prier, View, Eſſoin, (*c*) Voucher, and Demurrer joined upon ſuch Plea or Prayer, and ruled againſt him who demurs, there is only a Judgment to anſwer over. Jenk. 306.

(*c*) Dyer 69. pl. 35. 341. pl. 5.—In after a

Demurrer a Perſon ſhall have the Advantage of his Age, *Quære* 3 H. 6. 46. Doct. pl. 116.

It ſeems to be the better Opinion, that a general Demurrer, concluding in Bar of an Appeal or Indictment, or a Demurrer to a Plea in Bar which admits the Fact, or to a Replication to ſuch a Plea, is peremptory and concluſive; ſo that if the Indictment be good, Judgment and Execution ſhall go againſt the Priſoner. *Vide* 2 Hawk. P.C. 334.

But it hath been adjudged, that if an Appellee demur in Law to an Appeal by Reaſon of the Inſufficiency of the Declaration, or generally demur to the Declaration, with a Concluſion *Et petit judicium de narratione illa, & quod narratio illa caſſetur, &c.* ſuch Demurrer ſhall not conclude him from pleading over to the Felony, either at the ſame Time with the Demurrer, or after it ſhall be adjudged againſt him. Dyer 38. Cro. Eliz. 196.

But in criminal Caſes, not Capital, if the Defendant demur to an Indictment, *&c.* whether in Abatement or otherwiſe, the Court will not give Judgment againſt him to anſwer over, but final Judgment; for it ſeems, that in ſuch Caſes there can be no Demurrer properly in Abatement, except it be to a Plea in Abatement, or to a Replication to ſuch a Plea. Cro. Eliz. 196. Raſt. Ent. 160.

5. Of the Difference between a general and ſpecial Demurrer.

A Demurrer is ſaid to be General or Special; (*d*) General where no particular Cauſe is alledged; Special where the particular Thing objected Co Lit. 72. a.

(*d*) The Words of a

General Demurrer are, *Quod breve vel narratio vel placitum, &c. materiaque in eodem content' minus sufficien' in lege exist', &c.*

to is pointed out, and insisted upon as the Cause of Demurrer; and herein it is said, *(a)* that as a General Demurrer confesseth all such Matters of Fact as are sufficiently pleaded, so he that demurs Specially can take no Advantage of any other Matter of Form than what he hath expressed in his Demurrer; but he may of any other Matter of Substance.

——A Demurrer, because *Incerta & caret forma*, is a General Demurrer. Show. 242. Comb. 297. *(a)* 10 Co. 88.

Vent. 240. ——Good Rule to be observed in Demurrers, always to shew the Cause of Demurrer. 2 Bulst. 267. *per* Coke.

And herein it is said, that the antient Practice was to demur Specially, and that the Way was, when the Pleadings were drawn at the Bar, to make the Exception immediately, and the other Party might mend if he pleased, or might demur if he durst venture it; and *Hale* says, that though now they are put in Paper, yet such a Course should be observed, that Persons might not be caught by Demurrers contrary to the original Intention of them.

*Page 133 Yelv. 38. Cro. Jac. 13. Bulst. 204. 2 Vent. 142. 3 Lev. 39. 6 Mod. 263. 3 Mod. 235.

† Sometimes, where the Party demurring hath real Merits, the Court will, even after Argument, give Leave to withdraw a Demurrer, on Payment of Costs.

* But as the Law requires Regularity in its Proceeding, and that all Parts of Pleading should be according to approved Precedents it seems an established Rule, not to admit the Party to amend after a Demurrer entered of Record; but it hath been held, that if the Plaintiff declares and the Defendant pleads, and the Plaintiff replies and the Defendant demurs, and the Plaintiff joins in Demurrer, yet the Plaintiff may move to amend on Payment of Costs, if the Cause be still in Paper: So may he withdraw a Demurrer not entered of Record, and move to amend. †

Sand. 285. *Duppa* v. *Mayo.*

Also where a Person hath good Cause of Demurrer at the Time of his Demurring, no Act of the other Party afterwards will make it naught; as if in Debt for Rent, the Plaintiff declares for more than appears by his own shewing to be due to him, and for which the Defendant demurs, the Plaintiff cannot afterwards enter a *Remittitur* for the Overplus; for by this Means the Defendant, by relying on his Demurrer, might be tricked in his Defence

But for the better understanding the Difference between a General and Special Demurrer, we shall briefly consider,

6. What Things are good on a general Demurrer, that would be otherwise on a special one.

For this Distinction *vide* 10 Co. 88. Dr. *Leyfield's* Case. Doct. pl. 118. Style 41. Latch 185.

Herein the established Distinction is, that Matters of Substance, that is, the Omission of such material Things as are necessary to shew a Right in the Plaintiff, or material for the Defendant in his Plea, may be taken Advantage of on a General Demurrer; but Matters of Form merely must be specially alledged, and assigned as Causes of Demurrer; for the Law, says my Lord *(b) Hobart*, requires in Pleadings two Things; *1st*, That it be in Matter sufficient: *2dly*, That it be deduced and expressed according to the Forms of Law; and if either the one or the other of these be

Rol. Rep. 112. Co. Lit. 72. a. Hob. 127, 164. Hutt. 15. Savil. 78, 87. Palm. 368. Leon. 44. 2 Rol. Rep. 306. Sid. 308. Sand. 9, 81, 98, 337. 2 Sand. 190. 5 Mod. 18. Carth. 66, 88. Salk. 291. pl. 5. *(b)* Hob. 232. 2 Ld. Raym. 798. 7 Mod. 71. 2 Salk. 678. pl. 5.

wanting

wanting it is Cauſe of Demurrer, with this Diſtinction, which ſeems to be founded on the Common Law, and is fully explained and confirmed by the Statutes 27 *Eliz. c.* 5. & 4 *Ann. c.* 16.

By the 27 *Eliz. cap.* 5. *ſect.* 1. reciting, "That exceſſive Charges "and Expences, and great Delay and Hindrance of Juſtice hath grown "in Actions and Suits between the Subjects of this Realm, by Rea- "ſon that, upon ſome ſmall Miſtaking, or want of Form in Plead- "ing, Judgments are often reverſed by Writs of Error, and oftentimes "upon Demurrers in Law, given otherwiſe, than the Matter in Law "and very Right of the Cauſe doth require, whereby the Parties are "conſtrained either utterly to loſe their Right, or elſe after long "Time, and great Trouble and Expences, to renew again their Suits; "for Remedy whereof it is enacted, That after Demurrer joined, and "entered in any Action or Suit in any Court of Record within this "Realm, the Judges ſhall proceed and give Judgment according as "the very Right of the Cauſe and Matter in Law ſhall appear unto "them, without regarding any Imperfection, Defect, or Want of Form "in any Writ, Return, Plaint, Declaration, or other Pleading, Proceſs, "or Courſe of Proceeding whatſoever, except thoſe only which the Party "demurring ſhall ſpecially and particularly ſet down and expreſs, to- "gether with his Demurrer, and that no Judgment to be given ſhall "be reverſed by any Writ of Error for any ſuch Imperfection, De- "* fect, or Want of Form as is aforeſaid, except ſuch only as is before *Page 134
"excepted.

"And *Sect.* 2. it is further enacted, That after Demurrer joined and "entered, the Court, where the ſame ſhall be, ſhall and may, by vir- "tue of this Act, from Time to Time amend all and every ſuch Im- "perfections, Defects, and Wants of Form, as is before-mentioned, "other than thoſe only which the Party demurring ſhall ſpecially and "particularly expreſs and ſet down, together with his Demurrer as is "aforeſaid."

There is a Proviſo in this Act, that it ſhall not extend to criminal Proceedings.

It hath been frequently adjudged, that if a Plea be double no Advantage can be taken thereof on a General Demurrer; but the Party muſt ſhew (*a*) ſpecially in what the Doubleneſs conſiſts, being only Matter of Form, and clearly within the above-mentioned Statute 27 *Eliz. cap.* 5. Co. Lit. 72. Rol. Rep. 112. Lutw. 4.

(*a*) In Demurrer for Duplicity, it is not ſufficient to demur *Quia duplex eſt*, or *Duplicem habet materiam*, but the Party muſt ſhew wherein; for the Statute, by requiring to ſhew Cauſe, intended to oblige the Party to lay his Finger upon the very Point. Salk. 219. pl. 5. 2 Ld. Raym. 798. 7 Mod. 71. 2 Salk. 678. pl. 5. *per Holt* Ch. J.

As in Debt upon an Obligation for Performance of Articles, which was to pay ſo much at two Days in certain, the Defendant ſays he paid accordingly, the Plaintiff replied that he had not, this was held a double Plea, becauſe it went to both Days, yet aided on a General Demurrer. Rol. Rep. 112. *Saunders* v. *Crawley.*

So if the Defendant pleads a Plea which amounts to the General Iſſue, this is but Matter of Form, and muſt be taken Advantage of on a Special Demurrer; alſo at Common Law, if a Defendant had pleaded a Plea which amounted to the General Iſſue, and the Plaintiff had demurred thereupon; if the Defendant had refuſed to plead the General Iſſue, but inſtead thereof joined in Demurrer, the Court determined it againſt him. 10 Co. 94. a. Doct. pl. 116. Hob. 127. Jenk. 306.

Alſo it is held, that if a Special Matter is pleaded, which looks like the Colour of a Plea, but amounts to the General Iſſue, it is no Cauſe Mod. 18.

of

of Demurrer; as if in Debt you plead a Releaſe, though you might have given it in Evidence on *Nil debet*, yet it is no Cauſe of Demurrer; ſo in Debt for Rent, if you plead Entry and Expulſion, it is no Cauſe of Demurrer, though it may be given in Evidence on *Nil debet*.

Lil. Reg. 436. But where an Act of Parliament gives the Party Privilege to plead the General iſſue, and he pleads Specially, if ſuch ſpecial Plea be faulty the Plaintiff may demur to it; for though he needed not to have pleaded Specially, yet having done ſo, his Plea muſt be agreeable to the Rules of Law.

Lil. Reg. 437. There muſt be a Special Demurrer to a Negative Pregnant, that is, a Negative Plea, which doth alſo contain in it an Affirmative; and to an Argumentative Plea, that is, a Plea which concludes nothing directly, but only by Way of Argument or Reaſoning, for the Court will intend every Plea to be good till the contrary doth appear.

Cro. Eliz. *Oglethorp* v. *Hyde*; & *vide* Hob. 3. Moor 856. Co. Lit. 303. In Debt upon an Obligation to perform Covenants, the Defendant pleaded generally Performance of Covenants, where ſome are in the Negative, and ſome in the Affirmative; and this was held to be but Matter of Form, and aided by the Statute 27 *Eliz. c.* 5. except the Party ſheweth for Cauſe of his Demurrer, that ſome of the Covenants are in the Negative, and ſome in the Affirmative, for the Court ſhall adjudge according to the Truth of the Matter; but if any of the Covenants are in the Disjunctive it is otherwiſe, for the Court cannot know which of them in the Disjunctive he hath performed.

Comb. 297. *Gibbs* v. *Cope*. *Page 135 In Debt upon a Bond for Performance of Covenants in an Indenture of Apprenticeſhip, ſeveral Breaches were aſſigned, and the Defendant demurred generally; and *per Holt* C. J. you could not take Advantage of the Aſſignment of ſeveral Breaches even at Common Law, without ſhewing it for Cauſe; and though in this Caſe there were the Words *Incerta & caret forma*, yet it was held but a General Demurrer, and therefore ill.

Hob. 233. But though Matters of Form are aided upon a General Demurrer, yet there muſt be ſufficient appear to the Court to ground their Judgments upon; and it is not enough that the Party hath Right, but ſuch Right muſt be diſcloſed to the Judges in the Record ſo as to enable them to pronounce upon it.

Hob. 233. But this is now aided by the expreſs Words of 4 & 5 Ann. c. 16. which *vide* Title *Amendment*, Letter (B). And there it hath been held, that if an Executor or Adminiſtrator brought an Action of Debt, and did not produce their Probate or Adminiſtration, that this was not aided.

Hob. 233. 10 Co. 88. Cro. Jac. 172, 613. So if a Man plead a Conveyance of a Rent, or the like, that cannot paſs without Deed, without (*a*) producing the Deed in his Plea it is not aided; for it is not enough for the Party to ſay that he is Executor, or that the Rent was granted to him, but the Court muſt ſee and judge of it, or elſe the Right appears not; and the adverſe Party may cauſe the Deed to be inrolled, which makes it a Part of the Plea, whereupon the Court ſhall judge whether it maintain the Plea or not.

(*a*) That the Omiſſion of *Profert in Cur.* the Deed pleaded, is only Matter of Form, which the Party demurring cannot take Advantage of upon a General Demurrer, and that when Oyer of the Deed is demanded, it is preſumed that the Deed is in Court, and that *ei legitur*; the Reading is the Act of the Court. Sid. 308.

Hob. 233. So if the Means be wanting whereby the Right ſhould be made to appear, it is incurable; as if a Man bring an Action of Debt upon an Obligation and produce it, but ſays it was made beyond Sea, or does not alledge a Place † where it was made, a General Demurrer ſerves; and for the ſame Reaſon two Affirmatives without a Traverſe is not aided,

† Suppoſing a Bond made

aided, becauſe it admits no Trial, without which the Court cannot ſee the Right.

in and dated at *Fort St. George*, in the *Eaſt Indies*, it is uſual to alledge it made there, under a *Scilicet*, at *Weſtminſter*, or wherever the *Venue* is laid.

So in Debt upon an Obligation, conditioned for the Performance of an Award, the Defendant pleads *Nullum fecerunt arbitrium*, and the Plaintiff replies and ſhews the Award, he muſt alſo ſhew the Breach, without which he hath no Cauſe of Action, or it is ill on a General Demurrer; for though the Defendant can make no Anſwer to the Breach, yet it ought to appear to the Court that the Plaintiff hath Cauſe of Action. Hob. 233. Yelv. 152. Cro. Jac. 220. Sand. 102.

But if in Debt on an Obligation conditioned for the Performance of an Award, ſo as, *&c.* the Defendant pleads No Award made, and the Plaintiff replies, that *ante exhibitionem billæ, ſcilicet* the 24th of *June* (which was a Day within the Submiſſion) the Arbitrators made an Award, *&c.* and the Defendant demurs generally, the Plaintiff ſhall have Judgment; for tho' the Plaintiff ought to have replied, that the Arbitrators made their Award before the Day limited to them, yet this is Form only, and helped on a General Demurrer. Sid. 370.

If in Debt on a Bond for Performance of an Award, the Defendant pleads No Award, and the Plaintiff ſets forth an Award with a *Profert in Cur.* and the Defendant craves *Oyer*, and then demurs for Variance between the Award ſet out in the Replication and the *Oyer*, and the Variances appear material, the Defendant muſt have Judgment; otherwiſe if the Variance had been as to thoſe Parts in which the Award was void. Salk. 72. pl. 9. *Foreland* v. *Marygold.*

It hath been held, that a Declaration in Treſpaſs, not concluding *contra pacem Domini Regis* was ill on a General Demurrer; but this is now helped by the forementioned Statute 4 & 5 *Ann. cap.* 16. which *enacts, "That no Advantage or Exception ſhall be taken of or for an "immaterial Traverſe, or of or for the Default of alledging the Bring- "ing into Court any Bond, Bill, Indenture, or other Deed whatſoever "mentioned in the Declaration, or other Pleading, or of or for the "Default of alledging of the bringing into Court Letters Teſtamen- "tary or Letters of Adminiſtration, or of or for the Omiſſion of *Vi & "armis & contra pacem*, or either of them, or of or for the Want of "Averment of *Hoc paratus eſt verificare per recordum*, or of or for not "alledging *Prout patet per recordum*; but the Court ſhall give Judgment "according to the very Right of the Cauſe as aforeſaid, without re- "garding any ſuch Imperfections, Omiſſions, and Defects, or any other "Matter of like Nature, except the ſame ſhall be ſpecially and particu- "larly ſet down and ſhewn for Cauſe of Demurrer." Carth. 66. *cont.* Sid. 253. *Page 136

7. Demurrer to Evidence.

Demurrer to Evidence is an Admiſſion of the Truth of the Fact alledged by the adverſe Party, or an Acknowledgment, that the Evidence produced by him at the Trial of the Cauſe is true, but denies its Operation and Effect in Law, and thereupon he demurs, and prays the Judgment of the Court; for, the Fact being agreed on, the Judges are the proper Expoſitors of the Law, and are to determine the ſame, and not the Jury; but if a Matter of Evidence which is thought material be offered, and the Court diſallow or over-rule it, this is a proper Matter Co. Lit. 72. Allen 18. Godb. 10. Raym. 404. 2 Jon. 146. Doct. pl. 118.

Matter for a (*a*) Bill of Exceptions, † which the Judges are compellable to ſign; alſo (*b*) if the Court over-rules one who offers to demur upon Evidence, this is a proper Caſe for a Bill of Exceptions, and the Remedy which the Statute in that Caſe provides.

(*a*) For this *vide* Title *Bill of Exceptions.*

(*b*) 9Co. 13. 1 Inſt. 426. and Cro. Car. 341. *Cort* and *The Biſhop of St. David's* adjudged.——Jon. 331. S. C. by which it appears, that a Bill of Exceptions was tendered and ſigned.

† As to Bill of Exceptions, when proper, how to be made and its Form, *vide* Buller's Ni. Pri. 309, 311.

If in Ejectment, or any other Action, the Plaintiff gives in Evidence any Matter in Writing or Record, or a Sentence in the Spiritual Court, and the Defendant offers to demur thereupon, the Plaintiff cannot refuſe joining in Demurrer, but muſt do the ſame, or waive his Evidence.

5Co. 104. a. *Baker's* Caſe. Cro. Eliz. 751-2. S. C. adjudged. becauſe there cannot be any Variance of a Matter in Writing.

Alſo if the Plaintiff produce Witneſſes to prove any Matter of Fact, upon which any Queſtion of Law ariſes, and the Defendant admits their Teſtimony to be true, in ſuch Caſe likewiſe the Defendant may demur; ſo the Plaintiff may demur upon the Evidence offered by the Defendant *Mutatis mutandis.*

5 Co. 104. Cro. Eliz. 752. S. C.—— Where it is ſaid, that if either Party offers to demur upon any Evidence given by Witneſſes, the other, unleſs he pleaſeth, ſhall not be compelled to join; becauſe the Credit of the Teſtimony is to be examined by a Jury; and the Evidence is incertain, and may be inforced more or leſs, but both Parties may agree to join in Demurrer upon ſuch Evidence.——Alſo it is ſaid, that in a Demurrer upon Evidence the Party demurred unto may demand Judgment of the Court, whether he ought to join in the Demurrer; for if there be not a colourable Matter to ground the Demurrer upon, the Court will not force the Party to join in it, but will over-rule it, that Juſtice may not be frivolouſly delayed. Lil. Reg. 437.

But in the Caſe of the King, he by his Prerogative is not obliged to join in any Demurrer; but in caſe any Doubt ariſes, the Court may direct the Jury to find the Matter ſpecial, and thereupon determine what the Law is.

Co. Lit. 72. a. Dyer 53. pl. 8. Cro. Eliz. 752. 5 Co. 104. S. P.—The King by his Prerogative may waive his Iſſue and demur in Law, *& e cont.*' Plow. 85. a. 236.

*Page 137 Allen 18. *Wright* v. *Paul Pinder*, ſaid to be reſolved. Stile 22, 34. S. C.

* He that demurs upon Evidence ought to confeſs the whole Matter of Fact to be true, and not refer that to the Judgment of the Court; and if the Matter of Fact be uncertainly alledged, or that it be doubtful whether it be true or no, becauſe offered to be proved only by Preſumptions and Probabilities, and the other Party will demur thereupon, he that alledges this Matter cannot join in Demurrer with him, but ought to pray the Judgment of the Court, that he may not be admitted to his Demurrer, unleſs he will confeſs the Matter of Fact to be true.

Stile 22, 34. Allen 18.

As if it be alledged by one Party, that there is ſuch a Writ, which is denied by the other, and thereupon there is a Demurrer to the Evidence; upon this there can be no Judgment given, for the being or not being ſuch a Writ is Fact that the Jury ſhould determine; but in this Caſe a Writ ſhould have been admitted *tiel quel*, and then the Effect thereof might have been determined by the Court; and in this Caſe both Parties having miſbehaved themſelves, the one in offering, and the other in joining in Demurrer, the Court held, that Judgment could not be given for either, but that an (*c*) *Alias venire facias* ſhould be awarded.

(*c*) In Stile 34. it is ſaid by *Rolle*, that a new *Venire facias* ſhould go in the ſame Manner, as if a ſpecial Verdict be found inſufficient; but in Allen 18. the Opinion of the Court was, that an *Alias venire facias* ſhould be awarded, and not a *Venire de novo*, becauſe no Verdict was given.

Upon

Upon a Demurrer to Evidence, though the Matter of Fact be confeſſed, yet the Jury may enquire of the Damages, and aſſeſs them conditionally, *viz.* if upon the Argument of the Demurrer the Law ſhould be for the Plaintiff, then ſo much, *&c.* Alſo it hath been (*a*) reſolved, that the Damages may be enquired of by a Writ of Inquiry of Damages, when the Demurrer is determined; and it is ſaid to be the moſt uſual Courſe, when there is a Demurrer upon Evidence, to diſcharge the Jury without more Inquiry. Plow. 408. *Scholaſtica's* Caſe. Stile 22. (*a*) Cro. Car. 143. *Darroſe* v. *Newbott.*

Error of a Judgment in the Palace Court in *Aſſumpſit*, where to prove the Conſideration an Arreſt was to be proved by the Plaintiff; and for that he did not produce the Writ the Defendant demurred on the Evidence, and thereupon Judgment was given for the Plaintiff: Aud now to reverſe the Judgment it was ſaid for the Plaintiff in Error, that the King's Writs are Matters of Record, and are not to be proved but by themſelves; and it was agreed by the Court, that the Writ ought to have been produced in Evidence, but by the Demurrer it is confeſſed, the Arreſt being Matter of Fact, though it be to be proved by a Matter of Record; and the Jury might of their own Knowledge know that there was a Writ; and by the Demurrer on the Evidence all Matters of Fact are confeſſed that the Jury could know of their own Conuſance. Lev. 87. *Fitz-Harris* v. *Boiun.*

(O) Plea at what Time to be put in, and the Ceremony requiſite therein.

IF the Defendant neglects to put in his Plea, when the Rules for pleading are out, the Plaintiff may ſign Judgment for want thereof; but if the Matter which is to be pleaded is difficult, the Court will upon Motion grant the Defendant longer Time to put in his Plea than otherwiſe by the Rules of Court he ought to have; but without Leave * of the Court he cannot have longer Time, becauſe the Court is to judge whether it be neceſſary to plead ſuch a Plea as requires longer Time to conſider of than ordinary; and ſhould it be otherwiſe, the Defendant might upon ſuch Pretences delay the Plaintiff without Cauſe. ‖ Lil. Reg. 36, 37. *Page 138

‖ It is uſual now to grant Time, by Judges Order, obtained on Summons for that Purpoſe.

Alſo where the Plaintiff doth keep any Deed or Writing or other Thing from the Defendant which doth belong unto him, and whereby he is to make his Defence, and is diſabled by the Retaining thereof to plead for his beſt Advantage, the Court will upon a Motion grant an Imparlance to the Defendant till the Plaintiff do deliver it to him, or bring it into Court. and alſo a convenient Time after till he can draw up his Plea; for the Law gives every Defendant convenient Time to make his beſt Defence; and in this Caſe, if the Plaintiff be delayed it ſhall be adjudged his own Default Lil. Reg. 37.

So where an Executrix was ſued by ſpecial Original, it was moved, that being Executrix ſhe might impark till next Term, that ſhe might know how to plead with Safety; the Motion was granted for four Days to plead, and afterwards for three more; but the Court refuſed to enlarge it to the following Term, becauſe of the Inconveniency that H. 5 Geo. 2. in *B. R. Snellgrave* v. *Morris*, Executor of *H. Morris*, and S. P. ſo ruled between the Bank of *England* v. *Morris*. 2 Stra. 1002, 1028. Hardw. 165. 2 Barnard. K.B. 183.

might

might accrue to other Creditors; and in doing of it thus far obliged the Defendant to enter into Terms not to acknowledge Judgment in the mean Time to other Creditors that were in equal Degree with the Plaintiff, nor to do any Thing to his Prejudice. †

† Now, if Defendant obtains, by Judges Order, Time to plead, it is cuſtomary to inſert the like Conditions.

T. 5 Geo. 2. in *B. R. Knight* v. *Robinſon.* So a Defendant had Time to plead given till the ſecond Day of the next Term, upon Affidavit that four Days before the Declaration delivered he was and ſtill continued to be ſo indiſpoſed in Mind that he could not make his Defence.

5 Mod. 215. When a Perſon appears upon a Recognizance, or *in propria perſona*, or is a Priſoner in Cuſtody upon any Information for a Miſdemeanor, where no Proceſs iſſued out to call him in, by the Courſe of the Court, in theſe Caſes he muſt plead *inſtanter.*

Comb. 3. *per* Aſton. Thoſe that come in upon a *Habeas Corpus* or Attachment muſt plead the ſame Term without Imparlance, giving the ordinary Rules, which are eight Days. §

§ This muſt depend on the Situation of the Cauſe when removed, the Time when the *Habeas* is returnable, and the Perſon who ſues it forth, *&c.*

Comb. 251. A Plea in Abatement muſt be pleaded within four Days, without ſpecial Leave from the Court, becauſe the Perſon coming in by the Proceſs of the Court ought not to have Time to delay the Plaintiff; alſo ſuch Plea by the 4 & 5 *Ann. cap.* 16. being for Delay is not to be received, unleſs on Oath, and probable Cauſe ſhewn to the Court.

Comb. 19. Upon a *Reſpondeas Ouſter* they have uſually four Days Time to plead; but this is ſaid to be in the Diſcretion of the Court.

M. 4 Geo. 2. in *B. R. Andrews* v. *Dingley.* By the Rule of the Court, as many Days are allowed for the Defendant to plead after Oyer given, as he had by the Rule of the Court at the Time of Oyer demanded.

2 Stra. 877. Barnard. K. B. 368. S. C. but S. P. does not appear.

M 7 Geo. 2. in *B. R. Starkie* v. *Wilkes.* Defendant had an Order by Conſent from a Judge for eight Days Time to plead, and at the Expiration of the eight Days Plaintiff ſigned Judgment, without giving a Rule to plead; & *per Cur.* the Judgment is regular; Rules are only to give the Parties Notice when they are expected to plead, here the Defendant's praying Time to plead excludes any Preſumption that the Plaintiff has not given him ſuch Notice.

2 Lil. Reg. 298-9. If the Defendant doth not plead according to the Rules of the Court, ſo that the Plaintiff may enter Judgment upon a *Nil dicit*, yet if after the Rules are out the Defendant do put in his Plea into the Office before *Page 139* the Plaintiff hath entered his Judgment, this Plea is to be accepted, and the Plaintiff ought not then to enter his Judgment; and if he doth, the Judgment may be ſet aſide for Irregularity.

2 Lil. Reg. 299. Every ſpecial Plea muſt have Counſel's Hand, otherwiſe it will be rejected, and the Plaintiff may ſign Judgment; but if there be two Defendants, and one pleads a general Iſſue, and the other ſpecially, and both are on the ſame Paper; though the ſpecial Plea is not ſigned, the Plaintiff cannot reject the general Iſſue, and take Judgment againſt both; for if he does the Judgment is totally erroneous, and if Execution be ſued Reſtitution ſhall be awarded; but the Plaintiff may regularly take Judgment againſt him who pleaded ſpecially.

A fo-

A foreign Plea must be ingrossed in Parchment, and signed by Counsel, and put in upon the (*a*) Oath of the Defendant, that is, he must swear that his Plea is true, or such a Plea is not to be received; because thereby he endeavours to oust the Court of its Jurisdiction. Lil. Reg. 299. Stile 373, 435. *& vide* Het. 126.

(*a*) If one will not swear a foreign Plea, where he ought to do it, the Plaintiff may enter Judgment upon a *Nihil dicit*. Stile 225.

Error was assigned, that the Defendant in the Writ of Error was dead before the first Judgment given, and it appearing by Affidavits that he was alive, and that it was a Trick merely for Delay, the Court determined to over-rule the Plea, unless the Plaintiff would swear that it was true. Sid. 172. Keb. 477, 479, 658, 823.

(P) Continuance and Discontinuance in Pleading.

AT Common Law no Plea could be determined but in the Presence of the Parties, unless Default was made by one of the Parties, and not excused; and therefore by the Statute of *Westm. cap.* 28. to save Delays at the *Nisi prius*, they ordered, that the Inquest should be taken, though the Defendant made Default, and did not appear; from hence it became necessary, after Issue joined, that there should be Continuances from Time to Time till the Verdict was taken, as before Issue joined, a Continuance was given the Defendant from Term to Term until his Plea was put in; and if these Continuances were not entered from Term to Term, the Defendant was without Day in Court; and wherever he was so, there was an End of the Proceedings in that Writ; for he had fulfilled the Command of that Writ in appearing, and the Court might give Judgment against him if he did not plead; and if the Court neither gave him Leave to plead, nor gave Judgment against him for want of a Plea, he having fulfilled the Writ, the Matter was at an End; so if he had pleaded, and the Court had not given a Day to the Parties to prove their Allegations, there likewise, the Defendant having appeared, the Writ was complied with, and the Matter at an End, unless the Court gave farther Time to verify the Allegations; and therefore in such Cases there must be Continuances till the Verdict. Bro. *Discontinuance* (1). (2). 6 Mod. 283, Rol. Abr. 487-8. Cro. Jac. 528. Cro. Car. 236.

So upon a Demurrer, or after a Verdict given, if the Court give Time to consider of their Judgment they must give Day to the Parties, because they can determine nothing in the Absence of the Parties, and the Command of the Writ being complied with by the Defendant's Appearance, the Effect of the Writ being answered, it is at an End; and the Court can give Time only from one Term to another; for, if they could give Day to a second Term, they might give it to a 5th, 20th, or 100, and they would have Power to delay *ad infinitum*. Rol. Abr. 484. 3 Bulst. 233. Stile 339. *Vide* 1 Bulst. 144. S. P. *cont.* but is not Law.

* If a Man declares in an Action upon the Statute of Monopolies, as the King's Patentee of Soap, and after the Defendant in *Easter* Term pleads, that the King did not make any such Letters Patent, and Issue is joined thereupon, and Day given to the Plaintiff till *Mich.* Term, but there is no Continuance between *Easter* and *Trinity* Term, it is a Discontinuance; for though the Court might give Day to bring in the Letters Patent in *Mich.* Term, omitting *Trinity* Term, yet there ought to be a Continu- *Page 140 Rol. Abr. 483. Stile 339. *Friend* v. *Baker* adjudged.

Continuance between *Eaſter* and *Trinity* Term by a *Curia adviſare vult* till *Trinity* Term, or otherwiſe it is a Diſcontinuance.

Rol. Abr. 486. Lane 81, 86, 89. Sir *Hugh Brown*'s Caſe.

In Ejectment, if the Defendant at the Day of *Niſi prius* at the Aſſizes pleads, that the Plaintiff entered into Parcel of the Land pending the Writ, and the Juſtices of *Niſi prius* accept the Plea, and diſmiſs the Jury, though they do not give any Day to the Parties, *in Banco*, yet this is not any Diſcontinuance, although the Plea is collateral; for the Day of *Niſi prius* and the Day in Bank are but one Day, for the Court *in Banco* gave Day to the Jurors *in Banco niſi prius Juſticiarii ad aſſiſas venerint*, and to the (*a*) Parties Day is given there abſolutely.

(*a*) If the Iſſue is found againſt the Defendant, it is not material whether he had a Day given *in Banco* or not; becauſe he hath nothing further to do but to diſcharge himſelf. Palm. 333. Cro. Car. 236. & *vide* Cro. Jac. 528.

Rol. Abr. 485. *Pipe* v. *Agar*. Rol. Rep. 408. S. C. But 3 Bulſt. 208. S. C. is held by the Clerks,

If a Man recovers upon Demurrer, or by Default, &c. and a Writ of Inquiry of Damages is awarded, there ought to be Continuances from Term to Term between the firſt and ſecond Judgment, otherwiſe it will be a Diſcontinuance; for the firſt is but an Award, and not compleat till the ſecond Judgment upon the Return of the Writ of Inquiry of Damages.

that there is no Neceſſity to have a Continuance entered after the Writ of Inquiry awarded; and *per* Coke, it is good either Way.——If a Judgment be given in Treſpaſs, or other ſuch Action, by Default or upon Demurrer, and a Writ of Inquiry of Damages awarded, returnable the next Term, no Continuance *per idem dies* ſhall be given to the Defendant, becauſe he is out of Court by his own Default; ſaid to be the conſtant Courſe of the Court of King's Bench. Rol. Abr. 486. But for this *vide* 11 Co. 6. b. Cro. Eliz. 75, 144, 774. Rol. Rep. 31. Godb. 195. Sid. 16.‡

‡ See Com. Dig. 5 V. 155, 156.

Rol. Abr. 486. *Thornton* v. *Wade* adjudged.

In an Action of Debt in an (*b*) inferior Court, if the Defendant acknowledges the Action at one Court, and no Judgment is entered at this Court, but at the next Court Judgment is given for the Plaintiff; if there be no Continuance between the ſaid Courts, this is a Diſcontinuance.

(*b*) That the Proceſs in an inferior Court muſt be returned at a Day certain, and ought to be to the Court as well as to the Day. *Vide* Cro. Eliz. 105. Cro. Jac. 314. Stile 58, 66, 70, 122. Cro. Car. 254. 2 Bulſt. 36. Mod. 81. 2 Mod. 59.——But if a Continuance be made in an inferior Court *ad proximam Curiam ibidem tenendam*, without alledging any Day to which it is adjourned, yet if the Court be to be held by Cuſtom, not at any certain Day, as every Week, or *de tribus in tres*, &c. but *die lunæ*, when the Judges thereof pleaſe, this is a good Continuance. Cro. Car. 254.——In a Pie-Powder Court the Adjournment was entered *Idem dies datus eſt*, where it ſhould have been *Eadem hora*, yet adjudged good. Moor 459. pl. 637. §

§ As to the Courts in *London*, ſee 2 Sho. 424.

Cro. Jac. 357. *Peplow* v. *Rowley*.

If in an Action upon the Caſe in an inferior Court the Defendant is eſſoigned, and hath a Day *per eſſoigne*, and the Plaintiff *habet eundem diem*, at which Day the Defendant being demanded appears not, but makes Default, & *habet diem per defaltam ſecundum conſuetudinem villæ* given by the Court, &c. this is a Diſcontinuance; for when the Defendant made Default he was out of Court, and (*c*) ſo no Day could be given to him; and the Cuſtom alledged cannot help that which is againſt the Common Law.

(*c*) For this *vide* Cro. Car. 341. Jon. 331. Yelv. 155. Stile 328, 329.

If

* If in a *Quo warranto* againſt a Corporation, for uſing a Fair and Market and taking Toll, &c. Iſſue is taken, whether they have Toll by Preſcription, or not, and it is found for the Defendants; the Attorney General may yet proceed to take Iſſue upon the Reſt, for in the Caſe of the King there is no Diſcontinuance before Judgment. *Page 141 Hard. 504. *Attorney General* v. *Town of Farnham.*

That when the King is Party no Day is given to him, becauſe he is always preſent in Court. Rol. Abr. 486-7.

In an Action after Iſſue joined, and a Verdict for the Plaintiff, the Plaintiff cannot diſcontinue the Action without the Conſent of the Defendant; and if he will not enter the Judgment, the Defendant himſelf may enter it. Rol. Abr. 487. ——But for this *vide* Stile 346. Sid. 60.

Lev. 48. Mod. 13.——Where there has been a Diſcontinuance after a ſpecial Verdict. Latch 216. Hetl. 3. Cro. Car. 575. Salk. 178.——Where by the Courſe of the Court the Plaintiff may diſcontinue without Motion, paying Coſts. Stile 366. Leon. 105.——Where after a Demurrer by Leave of the Court. Cro. Jac. 317. Cro. Car. 195. March 24. Stile 120, 134, 306, 309, 310, 382. Allen 20. Sand. 23. 2 Sand. 74. Sid. 84, 306. Lev. 227, 298. 2 Lev. 118, 124. Mod. 41. Bulſ. 217.

If a Man vouches for Parcel, and as to the Reſt makes no Anſwer, and the Demandant does not take Advantage thereof by Prayer of Seiſin, but ſuffers the Proceſs to be continued againſt the Vouchee in Right of the Parcel, all is diſcontinued. 18 E. 3. 40. Rol. Abr. 487.

If the Tenant vouches for all the Demand, and the Proceſs upon the Voucher is made for leſs than it is, all is diſcontinued. 18 E. 3. 40. Rol. Abr. 487.

In an Action for Treſpaſs a Diſcontinuance in Parcel is a Diſcontinuance in the Whole. 7 H. 6. 27. Rol. Abr. 487.

In Treſpaſs for ſeveral Things the Defendant pleads a Plea in Bar for Part, and does not anſwer to the Reſt, and the Plaintiff demurs generally, the Plaintiff ſhall not have Judgment againſt the Defendant; for the Demurrer was by Intendment upon the Bar, and not for want of Pleading to the Reſidue; for he ought to have prayed Judgment upon *Nil dicit* for it, ſo all is diſcontinued. 4 Co. 62. Rol. Rep. 135, 176. 2 Bulſ. 325. ——But where for want of anſwering to Part all is diſcontinued, *vide* Brownl. 228. Carter 51. 2 Mod. 259. Yelv. 65. Sid. 223.

If a Plea begins with an Anſwer to the Whole, but in Truth the Matter pleaded is only an Anſwer to Part, the whole Plea is naught, and the Plaintiff may demur; but if a Plea begin only as an Anſwer to Part, and is in Truth but an Anſwer to Part, it is a Diſcontinuance, and the Plaintiff muſt not demur, but take his Judgment for that as by *Nil dicit*; for if he demurs or pleads over, the whole Action is diſcontinued. Salk. 179. pl. 6. Ld. Raym. 679. & *vide* Salk. 180. pl. 9. S. P.

In *Indebitatus Aſſumpſit* the Defendant pleaded an Attainder of High Treaſon in Diſability; the Plaintiff replied a Pardon, *prout per exemplification' inde*, &c. (which was held good) & *petit judicium & damna ſua*; to which it was demurred; and held that there was a Diſcontinuance by the Miſconcluſion of the Replication, for an ill Prayer of Judgment is as none. Salk. 177. pl. 1. *Biſſe* v. *Harcourt.* Ld. Raym. 338.

It is ſaid, that the Courſe of the Court of *King's Bench* is to enter no Continuance on the Roll till after Iſſue or Demurrer, and then to enter the Continuance of all upon the Back (*a*) before Judgment. Rol. Abr. 485. (*a*) A Diſcontinuance can never be objected *pendente placite*, for before Judgment it may be continued at the Pleaſure of the Court, though not after Judgment in another Term. Cro. Jac. 211.——But at what Time Continuances may be entered, *vide* Savil 54. Lit. Rep. 4. Cro. Car. 236.

In

Salk. 179. pl. 7. *Curtius* v *Padley*. Ld. Raym. 872.

In Debt the Declaration was of *Michaelmas* Term, and the Plea Roll of *Easter*, and no Continuance entered, and this upon Demurrer was ſhewed to the Court as a Diſcontinuance; but they ſaid the Practice is never to enter Continuances till the Plea Roll be entered up, though the Declaration be of four or five Terms ſtanding.

*Page 142

Rol. Abr. 487. Like Point in Godb. 219. Cro. Jac. 35, 316, 317.

* If the Plaintiff be Nonſuit, by which the Defendant is to recover Coſts, if the Plaintiff will not enter his Continuances, on Purpoſe to ſave the Coſts, the Defendant ſhall be ſuffered to enter them, and ſo recover his Coſts.

Yelv. 5, 6. Brownl 192. S. C. *Johnſon* v. *Turner* adjudged.

If in Treſpaſs for breaking his Houſe, and taking and carrying away his Goods, the Defendant juſtifies the Whole, and the Plaintiff *quoad fractionem domus*, and the taking the Goods, *nec non materia in ea contenta*, demurs upon the Defendant's Bar, and the Defendant joins in Demurrer in this Manner, *Quia placit' prædict' quoad fractionem domus*, and the taking the Goods *ſufficiens*, *&c.* and thereupon Judgment is given, here is a Diſcontinuance; for in the Offer of the Demurrer *ex parte querentis* nothing is alledged Specially, but only *quoad* Breaking of the Houſe, and Taking the Goods; and though the ſubſequent Words *nec non materia in ea contenta* go to all the Matter in Bar, *viz.* the Aſportation; yet, when the Defendant joins in Demurrer, he joins but Specially *quoad* the Breaking the Houſe, and Taking the Goods, but ſays nothing as to Carrying them away.

Yelv. 117. *St. John* v. *Comyn* adjudged, and the Judgment upon a Writ of Error in *B. R.* in *Ireland* reverſed upon a Writ of Error here accordingly, *&* *vide* Yelv. 138.

If upon a Writ of Error upon a Judgment in Ejectment the Plaintiff aſſigns for Error the Want of an Original, and the Defendant pleads, that ſuch a Day an Original was delivered to, *&c.* and concludes to the Country, and thereupon the Judgment is reverſed; here is a Diſcontinuance; for when the Defendant concludes to the Country where the Matter of his Plea, *viz* the Delivery of the Original, was triable by Record, and the Plaintiff does not reply or demur upon the Defendant's Plea, here is not any perfect Record.

11 Co. 5, 6. Rol. Rep. 30. S. C.

In an Action of Treſpaſs againſt *A. B.* and *C. A.* confeſſed Judgment, and *B.* and *C.* pleaded ſeverally Not guilty, and ſeveral *Venires* were awarded to try theſe Iſſues, *&c.* but no Day given to *A.* and it was reſolved upon a Writ of Error upon a Judgment *in Banco*, that it was according to the Courſe of that Court, and that if it was a Diſcontinuance it was helped by the (*a*) Verdict againſt *B.* and *C.*

(Q) Plea

(*a*) By the 32 H. 8. c. 30. Diſcontinuances are aided, ſo that there be a Verdict for the Plaintiff or Defendant; in the Conſtruction of which it hath been held, that if as to Part the Defendant joins Iſſue, but ſays nothing as to the Reſt, and this Iſſue is found for the Plaintiff, he ſhall have Judgment. 11 Co. 6. b. 2 Leon. 194 Godb. 55. Rol. Rep. 161. Cro. Jac. 353. Hob. 187. Golſb. 109. Bulſ. 25. Carter 51. 3 Lev. 39. Salk. 179. pl. 8. 180. pl. 9. 2 Ld. Raym. 856, 1121. 7 Mod. 24.——But if the Matter is pleaded to the Whole, though in Fact but an Anſwer to Part, this is a bad Plea, and not helped by the Statute. Hard. 331.——That Diſcontinuances, as well on the Part of the Plaintiff as Defendant, are aided. Cro. Eliz. 489. Cro. Jac. 528.——That Diſcontinuances, in inferior Courts as well as Superior, are aided, being within this Act. Salk. 177. pl. 2. †

† CONTINUANCE of SUIT or PROCESS.

When neceſſary.——Defendant in Cuſtody on *Capias ad Satisfaciendum* diſcharged on written Agreement; above a Year after new *Capias ad Satisfaciendum* iſſues without Continuance on the Roll; it ſhall be ſet aſide. Barnes 205.—On *Nul tiel Record*, Plaintiff may continue the Day for bringing in the Record. Barnes 84.—*When not.*—Continuance need not be entered in Record of *Niſi Prius*; therefore,

(Q) Plea Puis darrein Continuance.

THE Defendant can regularly have but one Plea, on which, if there be an Iſſue or Demurrer, the Cauſe is to be determined, becauſe there can be but one Verdict in a Cauſe; but if any new Matter happens pending the Writ, he may plead it after a former Plea pleaded, provided he plead it before the next Continuance after ſuch new Matter has happened, which is called a Plea *Poſt darrein Continuance*, becauſe ſuch Matter being new it was not in his Power to plead it when his former Plea was pleaded; and it would be hard, becauſe he had pleaded to elude him from an Advantage which he had not at * the Time of Pleading, ſince there was no Laches in him; but this he cannot plead after a Continuance, becauſe having ſuffered the former Plea to continue he reſts upon it, and waives the Benefit of any new Matter. Doct. pl. 297. Salk. 178. pl. 5. Ld. Raym. 693. *Page 143

In Debt againſt an Adminiſtrator, after Demurrer joined, the Adminiſtration was repealed, and granted to another, for which the Defendant Moor 871. pl. 1210.

---

fore, if after Iſſue joined, and before Day of *Niſi Prius*, one of Defendants dies, Suggeſtion of it, and *Venire facias* between Plaintiff and ſurviving Defendant, & *jurata* at the Foot, agreeable thereto, is good. Barnes 469.——*How it ſhall be entered.*—When the Trial is deferred, if the *Venire facias* is returned and filed, the proper Entry is, that the Jury *ponitur in reſpect*'; if it be not filed, enter a *non miſit breve*; either Way will prevent a Diſcontinuance. *Rex* v. *Hare & Man*, H. 6 G. Stra. 266. ——If proper Continuances are entered on the Plea-Roll, the Want of them on the *Niſi Prius* Roll is not material. *French* v. *Wiltſhire*, M. 11 Geo. 2. Andr. 67.——If to Declaration of *Trinity*, there is Imparlance to *Michaelmas* Term, and Defendant procures Judge's Order for Time to plead till the 15th of *December*, the Imparlance ſhall be continued to *quinden. Mart.* Barnes 161.——*At what Time.*——If Bill is of *Eaſter*, and in *Trinity* Defendant pleads, and Iſſue joined, and Paper Book delivered without Continuance from *Eaſter* to *Trinity*, it ſhall not be ſet aſide; for it may be entered at any Time on the Roll. *Wilkes* v. *Wood*, M. 4 Geo. 3. 2 Wilſ. 203.

DISCONTINUANCE.

What ſhall be.——It is not a Diſcontinuance, though no Day is given to the Tenants in Dower to appear on the Return of the Writ of Inquiry; or it is aided by Statute 4 & 5 Ann. c. 16. *Dobſon* v. *Dobſon*, P. 7 Geo. 2. Ca. B. R. Temp. Hardw. 19.——*To Part.*——Though a Plea doth not anſwer the whole Promiſe, and is therefore a naughty Plea, yet if it is pleaded *quoad* the whole Promiſe, it will not make a Diſcontinuance; and *vice verſa*. *Woodward* v. *Robinſon*. P. 6 Geo. Stra. 302.——In *Aſſumpſit* for three ſeveral Sums of 36 *l.* the Defendant pleads as to two ſeveral Sums of 36 *l.* it is a Diſcontinuance. *Ibid.*——If the Plea does not cover the whole, and Plaintiff replies, and Defendant demurs; though it is a Diſcontinuance, yet if it be a Record of the ſame Term, Paintiff may take Judgment by *Nil dicit* for what is uncovered. *Ibid.*——*When it ſhall be by Leave of the Court.*——After Demurrer argued and allowed on Payment of Coſts. *Butler* v. *Maliſſy*, H. 4 Geo. Str. 76. *Henderſon* v. *Williamſon*, M. 5 Geo. Stra. 176.——The Court may grant it after ſpecial Verdict argued, but will not do it in a hard Action. *Boucher* v. *Lawſon*, H. 9 Geo. 2. Ca. B. R. Temp. Hardw. 194.——The Court will not permit an Executor to diſcontinue in any Caſe where he has *knowingly* brought his Action wrong, but on Payment of Coſts. *Harris* v. *Jones*, H. 4 Geo. 3. 3 Burr. 1451.——After Judgment on Demurrer for Plaintiff, and Error brought, Plaintiff may diſcontinue on Coſts in Action and Error. Barnes 169.——Plaintiff may diſcontinue, though Defendant has been arreſted a ſecond Time before Diſcontinuance. Barnes 169.——After Judgment on Demurrer in Replevin for avowant, Plaintiff cannot diſcontinue. Barnes 169.——Rules ſhould be drawn up, "*have Leave* or *be at Liberty*" to diſcontinue, not *ſhall* diſcontinue." Barnes 170.——Whether Diſcontinuance may be entered without Leave. *Q.* Barnes 170.——Alſo whether Plaintiff in Replevin can diſcontinue. *Q.* Barnes 171.——Plaintiff cannot move to diſcontinue after Defendant has moved for Judgment, as in Caſe of a Nonſuit. Barnes 316. Plaintiff may enter *Nil capiat per breve* on a Plea in Abatement without Leave, but not in other Caſes. Barnes 257.——*When it ſhall be aided.*——If after Judgment by Default on a Bill againſt an Attorney in *C. B.* where the Proceedings are on a Day certain, the Writ of Inquiry is returnable at a general Return, it is a Miſcontinuance, and aided by the Statutes. *Launder* v. *Cripps*, H. 6 Geo. 2. Stra. 947.—The Statute 32 H. 8. c. 30. extends to Diſcontinuances *made* after Verdict; as if the original Proceſs is returnable at a common Return, and the *Scire facias* in Error is returnable at a Day certain, this Diſcontinuance is aided by the Statute. *Bern* v. *Bern*, M. 8 Geo. 2. Ca. B. R. Temp. Hardw. 72.

Stonner v. *Gibbons.* ant would have pleaded this Matter, *Puis Darrein Continuance*; but it was reſolved not to be pleadable after Demurrer, though it might after an Iſſue joined.

21 H. 6. 10. Bro. *Cont.* 27. 2 Lutw. 1143, 1174. So if a Releaſe be given after the Day of *Niſi prius*, and before the Day in Bank, he cannot plead it, becauſe there is a Verdict already in the Cauſe, and upon another Plea; and therefore the Cauſe is determined, ſo that he is put to his *Audita querela* to hinder the Execution of the Judgment.

21 H. 6. 10. Doct. pl. 297. Lev. 80. Sid. 93, 133, 143, 185. 2 Lutw. 1143, 1174. 5 Mod. 12. But there are two Caſes where a Man may plead, though it be not after the laſt Continuance, *viz.* Outlawry, and the Death of the Plaintiff: As to Outlawry, it is upon the Prerogative that the Debt itſelf is forfeited to the King, and by virtue of the Prerogative *Nullum tempus occurrit regi*, and therefore he may plead it though a Continuance has happened after the Outlawry; ſo he may plead the Death of the Plaintiff, becauſe, though a Continuance has been entered, yet the Continuance is a Nullity, becauſe there was no Plaintiff in Being to whom Day could be given; ſo it may be pleaded if the Plaintiff died after the Day at *Niſi prius*, † and before the Day in Bank; and the Reaſon is, that there is no Cauſe in Court, for no Judgment can be given for a Perſon who is not *in rerum natura*, and if it be given it is erroneous; and if the Plaintiff's Attorney will traverſe the Plea, he cannot ſay the Plaintiff comes *per Attorn*,' becauſe that would be to forejudge the Matter in Iſſue; but the Attorney by his Name, *viz. J. S. venit pro magiſtro ſuo & dicit*, may appear, and ſo traverſe it.

† Death of a Party between Verdict and Judgment, not to be Error, provided Judgment be entered within two Terms. 17 Car. 2. c. 8.

15 E. 4. 4. But a Releaſe may it ſeems be pleaded, though there have been Imparlances between, becauſe there is no Continuance of a former Plea pleaded; and by the *Libertas loquendi* the Defendant has Time given to plead what makes moſt for his Advantage.

2 H. 6. 13. Sid. 143. But if the Writ be only abateable, as if the Plaintiff be made a Knight, ‖ or the Plaintiff being Feme Sole takes a Huſband, this muſt be pleaded after the laſt Continuance, or otherwiſe he depends on his firſt Plea, and waives the Benefit of his new Matter; but it cannot be pleaded between the Day at *Niſi prius* and the Day in Bank, becauſe there has been a Trial in the ſame Cauſe before.

‖ Certain Suits not to be abated for Acceptance of Knighthood. 4 H. 6. c. 4.

Hob. 5. But if the Leſſor of the Plaintiff dies, this cannot be pleaded *Puis Darrein Continuance*, becauſe the Right is ſuppoſed in the Leſſee.

15 E. 4. 149. Allen 66. 2 Lutw. 1143. The Pleas of this Kind are twofold, *viz.* in Abatement and in Bar; if any Thing happens pending the Writ to abate it, this may be pleaded *Poſt Darrein Continuance* though there is a Plea in Bar, for this can only waive all Pleas in Abatement that were in Being at the Time of the Bar pleaded, but not any ſubſequent Matter; but though it be pleaded in Abatement, yet after a Bar is pleaded it is peremptory, as well on Demurrer as on Trial, becauſe, after a Bar pleaded he has anſwered in Chief, and therefore can never have Judgment to anſwer over; ſo it may be pleaded in Bar; but as to the Manner of its being pleaded in Bar or Abatement herein it is to be obſerved, that in the firſt Caſe it muſt be pleaded *Quod breve caſſetur*, and in the other *Quod actionem ulterius manutenere non debet*, and not that the former Inqueſt ſhould not be taken, becauſe it is not a ſubſtantive Bar in itſelf, and comes in the Place of the former, and therefore muſt be pleaded to the Action.

There

* There can be but one Plea *Puis Darrein Continuance*, that the Plaintiff may not be delayed *ad Infinitum*; for if he made a second Change he might make a third, and so *in Infinitum*; but some have held, that he might plead an Outlawry after the last Continuance, because *Nullum tempus occurrit regi*; but *Quære* whether the Subject shall after Plea *Puis Darrein Continuance* partake of the Prerogative, or whether it shall be presumed, after such Trifling, that it is frivolous and untrue, and therefore to be rejected. * Page 144 Bro. *Continuance* 40. Fitz. *Continuance* 5.

If a Matter happens after Plea pleaded, and before Issue joined, it shall be pleaded to be done pending the Writ; but if it happen after Issue joined it shall be pleaded *Post ultimam continuationem*. Bro. *Continuance* 1. 26 H. 8. 2.

If the Plaintiff release to the Defendant after the Award of the *Nisi prius*, and at the Day of *Nisi prius* the Jury remains *propter defectum*, the Defendant may plead it the Day in Bank; because the Cause was not determined by the Jury, and therefore he is at Liberty to plead it at any other Day of Continuance; and it may be tried by the Jury, when they appear. Bro. *Continuance* 30. 22 H. 6. 1.

If the Plaintiff, after a Writ of Inquiry awarded, release to the Defendant, he cannot plead this Release at the Day in Bank; because there is no Day given him, and Judgment is already; but if the Plaintiff dies, such Death may be pleaded; because there is no Person in Court for whom Judgment can be given; but now by the 8 *W.* 3. *cap.* 11. the Executors, *&c.* may have a *Scire fac.* on such an interlocutory Judgment. †

† By this Statute the Death of one Plaintiff or Defendant, where there is another surviving, shall not abate the Suit.

Time and Place must be laid in this as in other Pleas, and must have the same Certainty with other Pleas. Doct. pl. 297. Allen 66. 2 Lutw. 1143.

It is no good Plea to say *Post darrein continuance*, such a Thing happened, but ought to be precise in the Day. 5 Mod. 12. Yelv. 141.

One may plead *Puis darrein continuance*, that the Plaintiff brought a second Action for the same Cause, and recovered, though he might have pleaded the former in Abatement to the second. Comb. 357.

Plea *Puis darrein continuance* put in at the Assizes must be certified as Part of the Record, and cannot be then tried. 2 Mod. 307.

If after a Plea in Bar the Defendant pleads a Plea *Puis darrein continuance*, this is a Waiver of his Bar, and no Advantage shall be taken of any Thing in the Bar. ‡ Salk. 178. pl. 5. Ld. Raym. 693. *Barber* v. *Palmer*, & *vide* Hob. 81.

‡ A Plea *Puis darrein Continuance* must be verified, or it will be set aside. *Martin* v. *Wyvill*, H. 8 G. Stra. 492.——On an Imparlance to next Term, and Plaintiff gives a Release to Defendant in the mean Time, he may plead the Release in Bar as an original Plea, as it is before Issue; but if after Issue joined, it must be pleaded *Puis darrein Continuance*. *Price* v. *Kenrick*, Fort. 338.—— *It cannot be rejected by the Court if it be verified by Affidavit*; and they cannot determine whether it is a good Plea or not, but on Demurrer. *Paris* v. *Salkeld*, H. 2 Geo. 3. 2 Wils. 137.

*Page 145 * # PREMUNIRE.

(A) What Offences come under the Notion of a Premunire. 145.
(B) Of the Punishment therein. 147.

(A) What Offences come under the Notion of a Premunire.

Hawk. P.C. 48, &c. (a) So called from the Word in the Writ, which is used for *præmonere*. Co. Lit. 129. 3 Inst. 120.

THE Offences coming under the Notion of a (a) *Præmunire*, or for which the Party incurs a *Præmunire*, are reduced by Serjeant *Hawkins* to the following Particulars:

Vid. Reg. 54. 3 Inst. 127. 1. The Offence of making Use of Papal Bulls is made a *Præmunire*, by many ancient as well as later Statutes, to which Purpose it is enacted by 25 *E.* 3. *st.* 6. *f.* 4. called the Statute of Provisors, "That whoever shall "by a Papal Provision, disturb any Patron to present to a Benefice, &c. "shall be fined and imprisoned till he make full Renunciation. And it is "further enacted by 25 *E.* 3. *stat.* 5. *cap.* 22. that if any one purchase a "Provision of an Abby or Priory, he shall be out of the King's Protection; "and by 38 *E.* 3. *stat.* 2. *cap.* 1. and 12 *Rich.* 2. *cap.* 15. and 13 *Rich.* 2. "*stat.* 2. *cap.* 2. that whoever shall accept a Benefice, contrary to 25 *E.* 3. "*stat.* 5. shall be banished; and by 13 *Rich.* 2. *stat.* 2. *cap.* 3. that whoever "shall bring a Sentence of Excommunication against any Person for ex- "ecuting the said Statute of 25 *E.* 3. *st.* 5. shall suffer Pain of Life and "Member; and by 16 *Rich.* 2. *cap.* 5. that whoever shall purchase or pur- "sue, or cause to be purchased or pursued, in the Court of *Rome* or else- "where, any Translations, Processes, Sentences of Excommunication, Bulls, "Instruments, or other Things contrary to the Tenor of that Statute, "which touch the King, against him, his Crown, his Regality, or his "Realm, or bring them within this Realm, or receive them, &c. shall be "out of the King's Protection; and their Lands and Tenements, Goods "and Chattels, forfeited to the King, and they shall be attached by their "Bodies; and by 2 *H.* 4. *cap.* 3. that whoever shall purchase from "*Rome* a Provision of Exemption from ordinary Obedience; and by "2 *H.* 4. *cap.* 4. that whoever shall put in Execution Bulls pur- "chased by those of the Order of *Cisteaux*, to be discharged of Tithes "shall incur the like Penalty; they are further restrained by 6 *H.* 4. "*cap.* 1. 7 *H.* 4. *cap.* 8. 9 *H.* 4. *cap.* 8. and 3 *H.* 5. *stat.* 2. *cap.* 4. by "which the Statutes abovementioned are inforced and explained; and "it

" it is further enacted by 23 *H.* 8. *cap.* 2. *ſect.* 22. that whoever ſhall ſue " for or execute any Licence, Diſpenſation or Faculty from the See of " *Rome*; and by 28 *H.* 8. *cap.* 16." (by which all Bulls, Briefs, *&c.* heretofore obtained from *Rome* are * made void) " that whoever * Page 146 " ſhall (*a*) uſe, alledge, or plead the ſame in any Court, unleſs they are " confirmed by that Statute, or afterwards by the King, ſhall incur the " like Penalty."

(*a*) Yet it hath been holden that the Alledging an ancient Bull in order to induce another principal Matter whereon to ground a Title, without claiming any Thing from the Bull itſelf, is not within this Statute. 2 Lev. 251.

By the 13 *Eliz. cap.* 2. thoſe who purchaſe any Bull, *&c.* from *Rome*, Davis 84. are guilty of High Treaſon; but thoſe ancient Statutes continue ſtill in Force, and it is in the Election of the Crown to proceed either upon them or 13 *Eliz. c.* 2. Alſo by the ſaid Statute of 13 *Eliz. c.* 2. the Aiders, Comforters, and Maintainers of ſuch Offenders, after the Offence, to the Intent to uphold the ſaid uſurped Power, incur a *Præmunire.*

Secondly, The Derogating from the King's Common Law Courts, is ſaid to have been an high Offence at Common Law, and is made a *Præmunire* by many ancient Statutes; for by 27 *E.* 3. *cap.* 1. of Proviſors, " If any Subject draw any out of the Realm in Plea, whereof " the Cognizance pertains to the King's Court, or of Things whereof " Judgments be given in the King's Courts, or ſue in any other Court " to defeat or impeach the Judgments given in the King's Courts, he " ſhall be warned to appear, *&c.* in proper Perſon, at a Day containing " the Space of two Months, at which if he appear not, he and his " Proctors, *&c.* ſhall be put out of the King's Protection, his Lands and " Chattels forfeited, his Body impriſoned, and ranſomed at the King's " Will, *&c.*"

And by 16 *Rich.* 2. *cap.* 5. " Both thoſe who ſhall purſue or cauſe to " be purſued in the Court of *Rome*, or elſewhere, any Proceſſes, or In- " ſtruments, or other Things whatſoever which touch the King, againſt " his Crown and Regality or his Realm, and alſo thoſe who ſhall bring, " receive, notify, or execute them, and their Abettors, *&c.* ſhall be put " out of the King's Protection."

In the Conſtruction of theſe Statutes it hath been holden, that certain Commiſſioners of Sewers, for ſummoning one before them who had got a Judgment at Law, and impriſoning him till he would releaſe it, were guilty of a *Præmunire.* 2 Bulſ. 299. 3 Inſt. 125. Cro. Jac. 336.

Alſo Suits in the Admiralty or Eccleſiaſtical Courts within the Realm, for Matters which upon the Face of the Libel itſelf appear to belong only to the Cognizance of the Temporal Courts, are ſaid to be within 16 *Rich.* 2. *c.* 5. by Force of the Words, *or elſewhere.* Hawk. P.C. 51, 52. and the Authorities there cited.

And it hath been formerly holden, that even Suits in a Court of Equity, to relieve againſt a Judgment at Law, are within the Danger of theſe Statutes, eſpecially if they tend to controvert the very Point determined at Law, or to relieve in a Matter relievable at Law. But for this *vide* Title *Court of Chancery.*

Thirdly, Appeals to *Rome* are made *Præmunires* by 24 *H.* 8. *cap.* 12. and 25 *H.* 8. *cap.* 19. by which it is enacted, " that ſuch Appeals as for- " merly were made to *Rome*, ſhall be made from henceforth to Chancery."

Fourthly, The exerciſing the Juriſdiction of a Suffragan without the Appointment of the Biſhop of the Dioceſe, is made a *Præmunire* by 26 *H.* 8. *cap.* 14. which ſets forth at large how Suffragans are to be nominated, *&c.*

Fifthly, By 25 *H.* 8. *cap.* 20. " If a Dean and Chapter refuſe to elect " one named in the King's Letter for a Biſhoprick, and to certify ſuch " Election to the King withing twenty Days after the Licence ſhall come

" to his Hands, or if any Archbiſhop or Biſhop after ſuch Election (or " Nomination by the King in Default thereof, &c.) refuſe to confirm and " conſecrate within twenty Days the Perſon ſignified to them by the King's " Letters Patents, they incur a *Præmunire*."

*Page 147 * Sixthly, Maintaining the Pope's Power is made a *Præmunire* by 5 *Eliz. cap.* 1.

Seventhly, By 13 *Eliz. cap.* 7. " If any one ſhall bring into the Realm, " &c. any *Agnus Dei*, Croſſes, Pictures, Beads, or ſuch like ſuperſtitious " Things, pretended to be hallowed by the Biſhop of *Rome*, &c. and " ſhall deliver or offer the ſame to any Subject to be uſed in any wiſe; or " if any one ſhall receive the ſame to ſuch Intent, and not diſcover the " Offender, &c. or if a Juſtice of Peace, having any Offence in that Act " declared to him, do not within ſixteen Days declare it to a Privy Coun- " ſellor, he incurs a *Præmunire*."

Eighthly, by the 27th *Eliz. cap.* 2. " Sending Relief to any Jeſuit, " Seminary Prieſt, or College of Prieſts or Jeſuits beyond the Seas, or to " one not returning out of ſuch College into *England*, ſhall incur a " *Præmunire*."

Vent. 171. Raym. 212, 374. 2 Keb. 825. Ninthly, Perſons refuſing to take the Oaths, incur a *Præmunire* by ſeveral Statutes, as 1 *El. cap.* 1. and 5 *Eliz. cap.* 1. and 3 *Jac.* 1. *c.* 4. and 7 *Jac.* 1. *c.* 6. and 1 *W. & M. &c. cap.* 1.

Tenthly, By the 6 *Ann. cap.* 7. it is enacted, " That if any Perſon " ſhall maliciouſly and directly, by Preaching, Teaching, or adviſed " Speaking, declare, maintain and affirm, that the pretended Prince of " *Wales* hath any Right or Title to the Crown of theſe Realms, or that " any other Perſon or Perſons hath or have any Right or Title to the " ſame, otherwiſe than according to 1 *W. & M cap.* 2. and 2 *W.* 3. " *cap.* 2. and the Acts then lately made in *England* and *Scotland* mutually " for the Union of the two Kingdoms; or that the Kings or Queens of " this Realm with the Authority of Parliament are not able to make " Laws to limit the Crown and the Deſcent, &c. thereof, ſhall incur a " *Præmunire*." ‡

‡ So by Stat. 6 Geo. 1. c. 18. called the *Bubble Act*, Projectors of unlawful Undertakings are within the Penalty; but the Court has a Power to moderate. *Rex* v. *Caywood*, M. 8. Geo. Stra. 472. 2 Ld. Raym. 1361. See *infra* 148.

(B) Of the Puniſhment therein.

MOST of the Statutes of *Præmunire* refer the Puniſhment to 16 *Rich.* 2. *cap.* 5. which enacts, " That thoſe who offend " againſt the Purport thereof, ſhall be put out of the King's Protection, " and their Lands and Tenements, Goods and Chattels, forfeited to our " Lord the King; and that they be attached by their Bodies if they " may be found, and brought before the King and his Council, there to " anſwer to the Caſes aforeſaid; or that Proceſs be made againſt them " by *Præmunire Facias*, in Manner as is ordained in other Statutes of " Proviſors.

Co. Lit. 129. b. 3 Inſt. 125, 218. 2 Hawk. P. C. 444. The Judgment in *Præmunire* at the Suit of the King, againſt the Defendant being in Priſon, is, that he ſhall be out of the King's Protection; and that his Lands and Tenements, Goods and Chattels, ſhall be forfeited to the King; and that his Body ſhall remain in Priſon at the King's Pleaſure; but if the Defendant be condemned upon his Default of not appearing, whether at the Suit of the King or Party, the ſame Judgment ſhall be given as to the being out of the King's Protection and the Forfei-

Forfeiture; but inſtead of the Clauſe, that the Body ſhall remain in Priſon, there ſhall be an Award of a *Capiatur*.

As the above-mentioned Statute 16 *Rich.* 2. *cap.* 5. expreſsly ſaith, that ſuch Offenders ſhall be put out of the King's Protection; and alſo the Statute of 25 *E.* 3. *ſtat.* 5. *cap.* 22. had farther added, that any one might do with a Purchaſer of the Proviſions therein prohibited, as with the King's Enemy; and that he who ſhould offend againſt ſuch * an one in Body, Lands, or Goods, ſhould be excuſed; it was formerly holden, that a Perſon attainted in a *Præmunire* might lawfully be ſlain by any one, as being the King's Enemy and out of the Protection of the Laws; but the latter Opinions ſeem to have diſapproved of this Severity; and it is now expreſly enacted by 5 *Eliz. cap.* 1. *ſect.* 21, 22. "That it ſhall not be "lawful to kill any Perſon attainted in a *Præmunire*, ſaving ſuch Pains of "Death or other Hurt or Puniſhment, as heretofore might without Dan-"ger of Law be done upon any Perſon that ſhall ſend or bring into the "Realm, or within the ſame ſhall execute any Proceſs, *&c.* from the "See of *Rome*."

*Page 148

Co. Lit. 130. 12 Co. 68. 3 Inſt. 128. Bro *Cor.* 197. Jenk. 199.

It is clearly agreed, that a Perſon attainted in a *Premunire* can bring no (*a*) Action whatſoever; neither is it ſafe for any one, knowing him to be guilty, to (*b*) give him any Aid, Comfort, or Relief.

Co. Lit. 130. (*a*) Whether is intitled to Surety of the Peace. Hawk. P. C. 126. (*b*) That it ſeems doubtful whether there can be any Acceſſaries in *Præmunire*, *vide* Stamf. P. C. 44. Plow. 97.

It hath been reſolved, that a Statute, by appointing that an Offender ſhall incur the Penalty and Danger mentioned in the 16 *Rich.* 2. *cap.* 5. does not confine the Proſecution for the Offence to the particular Proceſs thereby given.

Vent. 173.

It is holden, that the Statutes of *Præmunire* which give a general (*c*) Forfeiture of all the Lands and Tenements of the Offender, extend not to Lands in Tail.

Co. Lit. 130. (*c*) Whether the Forfeiture of any Lands, *&c.* ſhall relate to the Time of the Offence, or only to that of the Judgment. Q. *et vide* Cro. Car. 172. Jon. 217.

It hath been adjudged, that a Pardon of all Miſpriſions, Treſpaſſes, Offences, and Contempts, will pardon a *Præmunire*.

Cro Jac. 336. 2 Bulſt. 299.

The Defendant in a *Præmunire* muſt regularly appear in Perſon, whether he be a Peer or Commoner, unleſs he is diſpenſed with by ſome Writ or Grant for that Purpoſe; but in the Caſe of (*d*) Sir *Anthony Mildmay*, he was allowed to plead a Pardon to a *Præmunire* by Attorney; but (*e*) it has been thought that there was ſome Clauſe to this Effect in the Pardon.

3 Inſt. 125. (*d*) 1 Rol. Rep. 190. 2 Bulſt. 290. (*e*) 2 Hawk. P. C. 273.

Upon an Indictment of a *Præmunire*, a Peer of the Realm ſhall not be tried by his Peers.

12 Co. 92. Ld *Vaux's* Caſe.

Upon an Information on the Statute 6 *Geo.* 1. *cap.* 18. for ſetting up a Bubble called the *North Sea*, it was determined, that the Court was not obliged by that Act to give the whole Judgment, as in Caſe of a *Præmunire*, againſt the Defendant, but only ſuch Parts of it as in their Diſcretions they ſhould think fit; and accordingly a Fine of 5*l.* was ſet on the Party convicted, and Judgment that he ſhould remain in Priſon during the King's Pleaſure.

2 Ld. Raym. 1361. *The King* v. *Canwood.* Stra. 472.

* PREROGATIVE.

Vide Stamf. *Prero.* c. 1. Co. Lit. 90. (a) That the King's Prerogative is Part of the Law of *England*, and comprehended within the ſame. 2 Inſt. 496.

PREROGATIVE is a Word of large Extent, including all the Rights and Privileges which by *(a)* Law the King hath, as Head and Chief of the Commonwealth, and as intruſted with the Execution of the *Laws*.

And. 153. Co. Lit. 19, 73. 4 Co. 124. —That he is to defend his Subjects. 7 Co. 4.—That he cannot change the Law. 5 Co. 55. 2 Inſt. 36. 11 Co. 70.—

The Nature of our Conſtitution is that of a limited Monarchy, in which the Legiſlative Power is lodged in the King, Lords, and Commons; but the King is intruſted with the executive Part, and from whom all Juſtice is ſaid to flow; hence he is ſtiled the Head of the Commonwealth, Supreme Governor, *Parens Patriæ*, *&c.* but ſtill he is to make the Law of the Land the Rule of his Government; that being the Meaſure as well of his Power, as of the Subjects Obedience: For as the Law aſſerts, maintains, and provides for the Safety of the King's Royal Perſon, Crown, and Dignity, and all his juſt Rights, Revenues, Powers, and Prerogatives; ſo it likewiſe declares and aſſerts the Rights and Liberties of the Subject.

Ld. Ch. J. *Hale* ſaith, it is regularly true, that the Law preſumes the King will do no Wrong, neither indeed can he do any Wrong ‡; and therefore, if the King command an unlawful Act to be done, the Offence of the Inſtrument is not thereby indemnified: For though the King is not under the coercive Power of the Law, yet, in many Caſes, his Commands are under the directive Power of the Law, which conſequently makes the Act itſelf invalid, if unlawful; and ſo renders the Inſtrument of the Execution thereof obnoxious to the Puniſhment of the Law; yet in Time of Peace, if two Men combat together at Barriers, or for Trial of Skill, if one kill the other, it is Homicide; but if it be by the Command of the King, it is only Felony. Hal. Hiſt. P. C. 43, 44.

---

‡ Becauſe acting by his Officers, and limited by Law.

Moor 672. Show. P. C. 75.

Hence it hath been eſtabliſhed as a Rule, that all Prerogatives muſt be for the Advantage and Good of the People, otherwiſe they ought not to be allowed by the Law.§

§ And moſt undoubtedly this is the great End of the King's Prerogative, who is not the Sovereign of the State, but the People's executive Magiſtrate: For as to Sovereignty, that reſides where the Conſtitution has placed the Legiſlative Power, *i. e.* in King, Lords, and Commons, in Parliament aſſembled; ſo that the King, in his political Capacity, as one of the States of the Realm, poſſeſſes a Part and only a Part of the Sovereignty, but is not Sovereign, any more than a Part is equal to the Whole. But, as executive Magiſtrate, he is inveſted with great Power, Pre-eminence, and many Prerogatives; all intended by the Conſtitution to be employed for the Good of the People; none to their Detriment; nor can any Prerogative be legally ſo employed.

Bendl. 117. 2 Inſt. 263, 496. 10 Co. 64.

The Rights and Prerogatives of the Crown are in moſt Things as ancient as the Law itſelf; for though the Statute 17 *E.* 2. *ſt.* 1. commonly called the Statute *De Prærogativa Regis*, ſeems to be introductive of ſomething new, yet for the moſt Part it is but a Sum or Collection of certain Prerogatives that were known Law long before: As, that the King's Wardſhip of Lands *in Capite*, did attract the Wardſhip of Lands held of others; that the Grant of a Manor did not paſs an Advowſon appendant,

appendant, unleſs named; that the King had a Right to Eſcheats, Wrecks, Royal Fiſhes, and many others which were ancient Prerogatives of the Crown.

But for the better underſtanding hereof, I ſhall conſider,

(A) **When the King commences his Reign, and the Ceremony requiſite therein.** 151.

(B) **Of the King's Prerogative as univerſal Occupant.** 153.

And herein,

* 1. That he is univerſal Occupant, and intitled to all derelict Lands. 153. *Page 150
2. Of his Prerogative in Eſcheats. 154.
3. Of his Prerogative in Seas and Navigable Rivers. 156.
4. Of his Prerogative in Swans and Royal Fiſhes. 157.
5. Of his Prerogative in *Beacons* and Light-Houſes. 158.
6. Of his Prerogative in Wreck. 158.
7. Of his Prerogative in relation to Coins and Mines. 160.
8. Of his Prerogative in derelict Goods; and therein of Waifs, Strays, and Treaſure Trove. 164.
9. Of his Prerogative in Fines and Forfeitures. 165.

(C) **Of his Prerogative over the Perſons of his Subjects.** 166.

And herein,

1. Who ſhall be ſaid his Subjects. 166.
2. That he is intitled to the Service and Allegiance of his Subjects; and therein of the Oaths injoined them. 167.
3. That he may reſtrain his Subjects from going abroad; and herein of the Writ *de Ne exeat Regno.* 168.
4. That he may command his Subjects to return Home; and therein of awarding a Privy Seal. 169.

(D) **Of the King as the Fountain of Juſtice, and intruſted with the Execution of the Laws.** 171.

And herein,

1. That all Civil Juriſdiction flows from the King. 171.
2. Of the King's Prerogative in Eccleſiaſtical Matters. 172.
3. Of his Prerogative in creating Officers. 174.
4. Of his Prerogative in making War and Peace. 174.

5. Of

5. Of his Prerogative in taking Care of Infants, Ideots, Lunatics, and Charitable Uſes. 176.
6. Of his Prerogative in Pardoning. 176.
7. Of Diſpenſations and *Non obſtantes*. 177.
8. Of his Proclamations. 188.

(E) **How the Rules of Law differ with reſpect to the King and a private Perſon.** 190.

And herein,

1. Of what Things incapable from the Dignity of his Perſon and Office. 190.
2. What Things enure to him in his natural, what in his political Capacity. 191.
3. Of the Difference in the Rules of Law as directing the King's Property, otherwiſe than that of a Subject. 192.
4. That his Rights ſhall be preferred to the Subjects where they happen to meet. 198.
5. Of Acts of Parliament which extend to or bind not the King. 198.
6. That no Laches can be imputed to him; and therein of the Maxim, *Nullum Tempus occurit Regi*. 200.

*Page151 * 7. Of his Prerogative in his Suits and Proceedings in Courts of Juſtice. 202.

(F) **Of the King's Grants and Letters Patent.** 203.

And herein,

1. What Things the King may grant. 203.

And therein,

1. Of Grants ariſing from his Prerogative of Power, and which are inſeparably annexed to the Crown. 203.
2. Of Grants ariſing from his Intereſt. 205.
3. How far the King muſt have an Intereſt, in order to enable him to grant. 206.
4. Grants tending to a Monopoly; and therein of Things of a new Invention. 206.
5. Grants of the ſole Liberty of Printing. 207.

2. Of the Conſtruction of the King's Grants and Letters Patent, as to their being good or void; and herein of the King's being deceived in his Grant. 210.
3. Where the King's Grantee ſhall partake of his Prerogative. 214.

(A) When

(A) When the King commences his Reign, and the Ceremony requiſite therein.

UPON the Death or Demiſe of the King, his Heir is that Moment inveſted with the Kingly Office and Regal Power, and commences his Reign the ſame Day his Anceſtor dies; whence it is held as a Maxim, *(a)* that the King never dies. 7 Co. 12. in *Calvin's* Caſe. 6 Co. 27. 7 Co. 30.

(a) And therefore if Lands are given to the King by Deed inrolled, without the Words *Heirs or Succeſſors*; yet a Fee Simple paſſeth, for that in Judgment of Law he never dies. Co. Lit. 9.

And herein we muſt take Notice, that the Rules of Deſcent are the ſame with thoſe that govern private Inheritances, except only as to the Rule of *Poſſeſſio Fratris*; which does not hold in the Deſcent of the Crown or its Poſſeſſions: Neither is Half Blood any Impediment in ſuch Caſe; for the Brother of the Half Blood ſhall be preferred to the Siſter, in the Enjoyment of the Crown, as the moſt capable of the two, by the Advantages and Prerogative of his Sex. Co. Lit. 15. b.

Therefore, if the King hath Iſſue a Son and a Daughter by one *Venter*, and a Son by another *Venter*, and purchaſes Lands and dies, and the eldeſt Son enters, and dies without Iſſue, the Daughter ſhall not inherit thoſe Lands, nor any other Fee-Simple Lands of the Crown, but the younger Brother ſhall have them together with the Crown. Co. Lit. 15. b.

As the King commences his Reign from the Day of the Death of his Anceſtor, it hath been held, that Compaſſing his Death before Coronation, yea before Proclamation of him, is a Compaſſing of the King's Death within the Statute of 25 *E.* 3. *ſtat.* 5. *cap.* 2. he being King preſently, * and the Proclamation and Coronation only *(b)* Honourable Ceremonies for the further Notification thereof. 3 Inſt. 7. Hal Hiſt. P. C. 101. *Page 152

(b) The late Mr. Juſtice *Foſter* is however very far from thinking that the Solemnity of a Coronation is to be conſidered *among us* merely as a Royal Ceremony, or as a bare Notification of the Deſcent of the Crown, as Authors of high Diſtinction have been pleaſed to expreſs themſelves: He admits that it is, on the Part of the Nation, a public ſolemn Recognition that the regal Authority, and all the Prerogatives of the Crown, are veſted in the Perſon of the King, antecedent to that Solemnity; but the Solemnity of a Coronation *with us* goeth a great deal farther; the Coronation Oath importeth, on the Part of the King, a *public ſolemn Recognition* of the *fundamental Rights of the People*; and concludeth with an Engagement under the *higheſt* of all *Sanctions*, that *he* will *maintain* and *defend thoſe Rights*; and to the *utmoſt of his Power make* the *Laws* of the *Realm* the *Rule* and *Meaſure* of his *Conduct*. Foſt Rep. 189. See Sid. on Gov. 91, 92. S. 7.

Alſo it is held, that every King for the Time being, in the *(c)* actual Poſſeſſion of the Crown, is a King within the Intention of the above-mentioned Statute; for there is a Neceſſity that the Realm ſhould have a King, by whom, and in whoſe Name, the Laws are to be adminiſtred; and the King in Poſſeſſion, being the only Perſon who either doth or can adminiſter thoſe Laws, muſt be the only Perſon who hath a Right to that Obedience which is due to him who adminiſters thoſe Laws; and ſince, by virtue thereof, he ſecures to us our Lives, Liberties, and Properties, and Hawk. P. C. 35.

(c) As to the Diſtinction between a King *de facto* and *de jure*, my Ld. *Hale* ſays, a King *de facto*, but not *de jure*, ſuch as were H. 4. H. 5. H. 6. R. 3. H. 7. being in the actual Poſſeſſion of the Crown, is a King within this Act; ſo that Compaſſing his Death is Treaſon within this Law; and therefore the 4 E. 4. 20. a Perſon that compaſſed the Death of H. 6. was attainted for that Treaſon in the Time of the rightful King; but had it been an Act of Hoſtility in Aſſiſtance of the rightful Heir of the Crown, which afterwards obtained, this had not been Treaſon; but *e converſo*, thoſe that aſſiſted the Uſurper, though in the actual Poſſeſſion of the Crown, have ſuffered as Traitors; as appears by the Statute of 1 E. 4. and as was done upon the Aſſiſtants of H. 6. after his temporary Readeption of the Crown, in 10 E. 4. and 39 H. 6. Hal. Hiſt. P. C. 102, 103.

all

all other Advantages of Government, he may juſtly claim Returns of Duty, Allegiance, and Subjection.

Hawk. 36. and the Authorities there cited.

It hath been ſettled, that all judicial Acts done by *Henry* the Sixth, while he was King, and alſo all Pardons of Felony and Charters of Denization granted by him, were valid; but that a Pardon made by *E.* 4. before he was actually King, was void even after he came to the Crown.

Hal. Hiſt. P. C. 104.

The right Heir of the Crown, during ſuch Time as the Uſurper is in plenary Poſſeſſion of it, and no Poſſeſſion thereof in the Heir is not a King within this Act; as was the Caſe of the Houſe of *York*, during the plenary Poſſeſſion of the Crown in *H.* 4. *H.* 5. *H.* 6. But if the right Heir had once the Poſſeſſion of the Crown, as King, though an Uſurper had afterwards gotten the Poſſeſſion thereof, yet the other continues his Style, Title, and Claim thereto, and afterwards re-obtains the full Poſſeſſion thereof; a Compaſſing the Death of the rightful Heir, during that Interval, is a Compaſſing of the King's Death within this Act; for he continued a King ſtill, *quaſi* in Poſſeſſion of his Kingdom; which was the Caſe of *E.* 4. in that ſmall Interval wherein *H.* 6. re-obtained the Crown; and the Caſe of *E.* 5. notwithſtanding the Uſurpation of his Uncle *Rich.* 3.

Keling 14, 15. Keb. 315.

It was reſolved by the Judges, in the Caſe of Sir *H.* (*a*) *Vane*, that King *Car.* 2. was King *de facto* as well as *de Jure*, from his Father's Death; and that therefore all thoſe who acted againſt and kept him out of Poſſeſſion, in Obedience to the (*b*) Powers then in Being, were Traitors.

(*a*) Mr. Juſtice *Foſter* ſays, that the Rule laid down by the Court in this Caſe, involved in the Guilt of Treaſon, every Man in the Kingdom who had acted in a public Station under a Government poſſeſſed *in Fact* for 12 Years together of Sovereign Power; and that Ld. Ch. J. *Hale*, when of high Rank at the Bar, took the Engagement "To be true and faithful to the Commonwealth of *England*, *without a King or Houſe of Lords.*" *This*, *in the Senſe of thoſe who impoſed it*, was plainly an Engagement for aboliſhing kingly Government, at leaſt for ſupporting the Abolition of it; and with regard to thoſe who took it, it might, upon the Principles of Sir *H. Vane*'s Caſe, have been eaſily improved into an overt Act of Treaſon againſt King *Charles* the Second. Foſt. Rep. 402. (*b*) That no Perſon was in Poſſeſſion of any Sovereign Power known to our Laws. Hawk. P. C. 36.

By the 1 *Mar. ſtat.* 3. *cap.* 1. *ſect.* 3. "The kingly Office of this Realm, "and all Prerogative, Royal Power, Authorities, and Juriſdiction there-"unto annexed, being inveſted in (*c*) either Male or Female, are as ab-"ſolutely inveſted in the one as the other."

(*c*) The Queen Regent, as were Q. *Mary* and Q. *Elizabeth*, is a King within the 25 E. 3. ſtat. 5. c. 2. Hal. Hiſt. P. C. 101. but a titular King, as the Huſband of a Queen Regnant, is not. 3 Inſt. 8. Hawk. P. C. 36.

By the 1 *W & M. ſtat.* 2. *cap.* 2. *ſect.* 9. "Every Perſon that ſhall be "reconciled to, or hold Communion with, the See or Church of *Rome*; "or ſhall profeſs the Popiſh Religion; or ſhall marry a Papiſt; ſhall be "incapable to inherit or enjoy the Crown of this Realm and *Ireland*; and *Page 153 "in ſuch Caſe the People ſhall be abſolved of their *Allegiance, and the "Crown ſhall deſcend to ſuch Perſons, being Proteſtants, as ſhould "have inherited the ſame, in caſe the Perſon ſo reconciled, &c. were "dead."

And by *Sect.* 10. "Every King and Queen, who ſhall come to and ſuc-"ceed in the Imperial Crown of this Kingdom, ſhall, on the firſt Day of "the Meeting of the firſt Parliament, next after his or her coming to the "Crown, ſitting in the Throne of the Houſe of Peers, in the Preſence "of the Lords and Commons, or at his or her Coronation, before ſuch "Perſon as ſhall adminiſter the Coronation Oath, at the Time of taking "the ſaid Oath, (which ſhall firſt happen) make, ſubſcribe, and repeat "the Declaration mentioned in the Statute 30 *Car.* 2. *ſtat.* 2. *for preſerv-*

"*ing*

" *ing the King's Perſon and Government, by diſabling Papiſts from ſitting* " *in either Houſe of Parliament.*"

The King, as King, cannot be a Minor; ſo that Grants, Leaſes, *&c.* made by him, though under Age, bind preſently, and cannot be avoided by him, either during his Minority, or when he comes of Age; for the Politic Rules of Government have thought it neceſſary, that he who is to govern and manage the whole Kingdom, ſhould never be conſidered as a Minor incapable of governing himſelf and his own Affairs. Dyer 209. pl. 22. Plow. 209. Caſe of the Dutchy of *Lancaſter.* Co. Lit. 43. 5 Co. 27. Raym. 90.

(B) Of the King's Prerogative as univerſal Occupant: And herein,

1. That he is univerſal Occupant, and intitled to all derelict Lands.

THE King by our Law is univerſal Occupant, and all Property is preſumed to have been originally in the Crown; † and that he partitioned it out in large Diſtricts to the great Men who had deſerved well of him in the Wars, and were able to adviſe him in Time of Peace. Hence it is ſaid, that the King hath the direct Dominion; and that all Lands are holden mediately or immediately from the Crown. Co. Lit. 1. Dyer 154. Bendl. 237. Seld. *Mare Clauſ.* 223.

† A Fiction of Law, adopted by the Conſtitution to anſwer the Ends of Government, but for the Good of the People, the great Object of the Law and Conſtitution of this Country.——The Right of the People of *England* to their Property does not depend upon nor was in Fact derived from any Royal Grant. The Reception of the Feudal Policy, in this Nation, exactly anſwers the Definition of a Fiction; which is ſome Suppoſition in Law, for a good Reaſon, againſt the real Truth of a Fact, in a Matter poſſible to have been actually performed, according to that Suppoſition. *Conſ. on Law of Forfeiture* 55.

Hence it is, that if the Sea leaves any Shore by a ſudden falling off of the Water, ſuch derelict Lands belong to the King; but if a Man's Lands, lying to the Sea, are increaſed by inſenſible Degrees, they belong to the Soil adjoining. Dyer 326. 2 Rol. Abr. 170.

So if a River, ſo far as there is a Flux of the Sea, leaves its Channel, it belongs to the King; for the *Engliſh* Sea and Channels belong to the King; and he hath a Property in the Soil, having never diſtributed them out to his Subjects. 2 Rol. Abr. 170.

But if a River, in which there is no Tide, ſhould leave its Bed, it belongs to the Owners on both Sides; for they have in that Caſe the Property of the Soil; this being no original Part or Appendix to the Sea, but diſtributed out as other Lands. 2 Rol. Abr. 170.

If Land be drowned, and ſo continue for divers Years; if it be after regained, every Owner ſhall have his Intereſt again, if it can be known by the Boundaries. 8 Co. Sir *Francis Barrington's* Caſe.

It is ſaid that there is a Cuſtom in *Lincolnſhire*, that the Lords of Manors ſhall have derelict Lands; and that ſuch is a reaſonable Cuſtom; for if the Sea waſh away the Lands of the Subject, he can have no Recompence, unleſs he ſhould be intitled to what he regains from the Sea. 2 Mod. 107.

* Information by *Engliſh* Bill in the Exchequer Chamber for one hundred Acres of derelict Lands in *Lincolnſhire*; the Caſe was this: K. *Ja.* 1. * Page 154 2 Lev. 171. 2 Mod 106. Raym. 241. S. C. *Attorney General* v. *Sir Edward Farmer.*

granted

granted to *J. S.* the Manor of *Holbeck*, with the Appurtenances, by expreſs Words; and in the Letters Patent there was the following Clauſe, *Nec non totum illud fundum et ſolum et terras ſuas contigue adjacen'* to the Premiſſes, *quæ ſunt aquâ cooperta, vel quæ in poſterum de aqua poſſunt recuperari, &c. non obſtante non nominando valorem, qualitatem ſive quantitatem, &c.* and theſe hundred Acres being afterwards improved and recovered from the Sea, the Queſtion was, Whether they paſſed to the Patentee; and tho' it was urged in his Behalf, that theſe Words were as general as they well could be; that the King was intitled to the Soil of the Sea, not as a Matter of Prerogative only, but as an Intereſt which he might grant; that in ſome Caſes the King may grant a Poſſibility; that the *Non Obſtante* was ſo particular in this Caſe, as if intended to cure all Defects; and that the King's Grants ought to be conſtrued liberally, as moſt for his Honour: Yet it being urged on the other Side, that theſe Words were too general; that though they might be intended to paſs ſome ſmall Parcels or Lines of Land which may become derelict, yet not ſo as to paſs any great Tracts of Land; and that, by the Conſtruction intended for, all the Lands between that and *Denmark* might paſs; and admitting the King might grant Part of his Seas, yet that muſt be by expreſs Name: It was held by *Montague* Ch. B. with the Advice of *Rainsford* and *North* Ch. Juſtices, that the Patent, as to theſe hundred Acres which became derelict, was void.

Of his Prerogative in Eſcheats.

Co. Lit. 13, 92. Godb. 211. An Eſcheat may be either *per defectum ſanguinis*, or *per* (*a*) *delictum tenentis*; but it is ſaid, that in Caſe of an Attainder of Felony, the Eſcheat to the Lord is *pro defectu tenentis*; and the not deſcending, the Conſequence of the Corruption of the Blood; but in Caſe of Treaſon, the Lands come to the Crown as an immediate Forfeiture, and not as an Eſcheat.

(*a*) That if the Party be pardoned there can be no Eſcheat. Owen 87.

2 Inſt. 64. Keilw. 104. 2 Rol. Rep. 251. If the King's Tenant dies without Heir, the Lands ſhall eſcheat and revert again to the Crown; but the Lands holden of any (*b*) other Lord ſhall, for Want of the Heirs of the Tenant, eſcheat to the Lord.

4 Inſt. 224. (*b*) That the Lord by Eſcheat is in the *Poſt*, and cannot vouch. 1 Co. 1.

2 Inſt. 64. If Lands held of the King as of an Honour come to him by a common Eſcheat, as the Tenants dying without Heir, or committing Felony, theſe Lands are Part of the Honour; otherwiſe if forfeited for Treaſon, for then it comes to the King by reaſon of his Perſon and Crown; and if he grants them over, *&c.* the Patentee ſhall hold of the King in Chief.

Cro. Eliz. 120. *May* v. *Street.* It was found by ſpecial Verdict, that the Prior of *Merton* was ſeiſed of a Houſe in *Southwark*, held of the Archbiſhop of *Canterbury*, as of his Borough of *Southwark*; and 30 *Hen.* 8. ſurrenders it to the King who granted the ſaid Meſſuage and divers other Lands in *London*, *Middleſex* and *Eſſex*, to *J. S.* and his Heirs, to hold of him *in Libero Burgagio*, by Fealty, for all Services and Demands, and not *in Capite*; that afterwards Q. *Mar.* granted the Manor and Borough of *Southwark* to the Mayor and Commonalty of *London*; and the Tenant of the ſaid Meſſuage died without Iſſue; and the Queſtion was, whether Q. *Eliz.* or the Patentees of the Borough ſhould have the Eſcheat;

Page 155 and adjudged for the Queen; for the firſt Patentee of the Meſſuage held

held it of the Queen in Socage *in Capite*, as of a Seignory in groſs; and the Words *in libero Burgagio* are merely void; for the Land out of the Borough cannot be held *in libero Burgagio*; and there ſhall not be ſeveral Tenures; for one Tenure was reſerved by the King for all; and therefore of Neceſſity it ſhall be a Tenure in Socage of the King.

Upon an Attainder of High Treaſon, the King by his Prerogative ſhall have all the Lands of Inheritance whereof the Offender was ſeiſed in his own Right; and alſo all Rights of *(a)* Entry to Lands in the Hands of a Diſſeiſor or other Wrong-Doer; tho' ſuch Lands are holden of another; but, in Caſe of Petit Treaſon and Felony, they go to the Lord of whom they are holden; for the Blood being corrupted ſo that no Perſon can repreſent him, it is the ſame as if he had died without Heir; and conſequently the Lord is in by Eſcheat. Co. Lit. 8. 3 Inſt. 19.

(a) But a Right of Action which conſiſts only in Privity, cannot eſcheat. 3 Co. 2. b.

But the Lord cannot enter into the Lands holden of him upon an Eſcheat for Petit Treaſon or Felony, without a ſpecial Grant; 'till it appears by due Proceſs, that the King hath had his Prerogative of the Year, Day, and Waſte. Stamf. P. C. 191.

If one attainted of Felony commits Treaſon afterwards, and is thereof attainted, as he may be, becauſe the Offence is of a higher Nature than Felony; yet this ſhall not diveſt the Right of Eſcheat, which by the Felony was lawfully veſted in the Lord, contrary to the Opinion of *Stamford*; for the Act of the Party ſhall not diveſt the lawful Eſcheat of the Lord. 3 Inſt. 213.

If one ſeiſed in Fee of a Fair, Market, Common, Rent-Charge or Seck, Warren, Corrody, or other Inheritance not holden, is attainted of Felony, the King ſhall have the Profits of them during his Life; but after his Death they cannot deſcend, becauſe his Blood is corrupted; nor eſcheat, becauſe not holden; but periſh and are extinct by Act in Law. 3 Inſt. 21.

If a Man grant an Advowſon in groſs to another in Fee, and the Grantee die without Heir, it ſeems that this ſhall revert to the Grantor, not being held of any Man; for 'tis a Thing that cannot vaniſh, but ought to be in ſome Perſon; but in that Caſe, if the Grantor cannot have it, the King ſhall have it as Supreme Patron; and for that Reaſon ought to preſent where none hath Right. Rol. Abr. 816. Comp. Incumb. 75.

If a Diſſeiſor makes a Feoffment, or dies ſeiſed; and after the Diſſeiſee dies without Heir, there ſhall be no Eſcheat, becauſe the Lord hath a Tenant by Title. Co. Lit. 268. b.

Though the Lord hath not been ſeiſed of his Services within the Time of Limitation, yet if the Tenant dies without Heir, the Land ſhall eſcheat; for at the Time of the Eſcheat the Seignory remained, though Seiſin or the Services was wanting. 4 Co. 11.

If an Infant or *Non Compos* in Perſon make a Feoffment, and after die without Heir, *(b)* the Land ſhall not eſcheat; otherwiſe if made by Letter of Attorney, for then the Feoffment is void. 4 Co. 125.

(b) Dyer 10. pl. 38. S. P. becauſe the Lord hath a Tenant by Title.——If *J. S.* conveys Lands to Truſtees and their Heirs, to the Uſe of himſelf for Life, Remainder to his firſt and every other Son, &c. Remainder to his own right Heirs, and *Ceſtui que Truſt* dies without Heirs, *Quære*, Whether the Lands ſhall eſcheat or remain with the Truſtees?——[If the Editor is not miſtaken it was determined ſome Years ago in Chancery, in the Caſe of *Burgeſs* and *Wheat*, that the Truſtee ſhould hold till the proper Heir appeared, as the Crown hath in the Truſtee, its Tenant.]

If he who hath Title to a Writ of Eſcheat accepts Homage or Fealty of the Tenant, this will bar him; otherwiſe if he accepts Rent of the Tenant; for that may be done by a Bailiff. Co. Lit. 268.

If

Co. Lit. 268. If there be Lord and Tenant, and the Tenant is diſſeiſed, and the Diſſeiſee dies without Heir; and after the Lord accepts the Rent from the Diſſeiſor, this is no Bar to him; otherwiſe if he avows upon the Diſſeiſor for the Rent.

*Page 156 Co. Lit. 268. * But if, after Title of Eſcheat accrued, the Diſſeiſor makes a Feoffment or dies ſeiſed, the Acceptance of the Rent from the Feoffee or Heir, will be a Bar.

2 Inſt. 146. (a) After the Death of the Tenant for Life, the Leſſor may have a Writ of Eſcheat, and the Words of the Writ are true, *viz.* that the Tenant that died, *&c.* held the Lands of him. Keilw. 114. a.——The Tenancy comes in Lieu of Seignory. Co. 122.

If one leaſe a Manor for Life or Years, and a Tenancy eſcheats (a) this belongs to the Manor held in Farm; and for which the Leſſor ſhall have a General Writ, and ſuppoſe a Leaſe by him made of the Lands eſcheated, and maintain it by the Special Matter.

Co. Lit. 13. b. (b) By the 14 E. 3. c. 8. to be choſen by the Chancellor, *&c.* as Sheriffs; by 12 E. 4. c. 9. muſt have a Freehold in the ſame County worth 20 *l. per Ann.*——by the 1 H. 8. c. 8. muſt have 40 Marks yearly—by the Statute 14 E. 3. ſt. 1. c. 8. there ſhall be as many Eſcheators as when King *Edward* came to the Crown, *viz.* one in every County.—But anciently there were but two, one on this Side *Trent*, and the other beyond *Trent*, but they had Sub-eſcheaters. Co. Lit 13. b. (c) To enquire of caſual Profits, and ſeize them into the King's Hands, that they may be anſwered to him. Co. Lit. 92. b.

For the better taking Care of the King's Eſcheats there is an ancient Officer named (b) by the Lord Treaſurer, and called ſo becauſe his Office is properly to (c) look to Eſcheats, Wardſhips, and other Caſualties belonging to the Crown.

Vern. 357. *Att. Gen.* v. *Thruxton.* If the Inheritance of Lands eſcheat to the King, although he is in the *Poſt*, yet he ſhall have a Term that was limited to attend the Inheritance.

3. Of his Prerogative in Seas and Navigable Rivers.

Seld. *Mar. Cl.* 251, *&c.* Rol. Abr. 168, 169. 5 Co. 106. 10 Co. 141. It is univerſally agreed, that the King hath the Sovereign Dominion in all Seas and great Rivers; which is plain from *Selden*'s Account of the ancient *Saxons* who dealt very ſucceſsfully in all naval Affairs, and therefore the Territories of the *Engliſh* Seas and Rivers always reſided in the King.

Dyer 326. 2 Rol. Abr. 170. And as the King hath a Prerogative in the Seas, ſo hath he likewiſe a Right to the Fiſhery and to the Soil; ſo that if a River as far as there is a Flux of the Sea leaves its Channel, it belongs to the King.

4 Inſt. 142. Molloy 66. For this Court and its Juriſdiction, and how far it extends, *vide* Title *Court of Admiralty*. Hence the Admiralty Court, which is a Court for all Maritime Cauſes or Matters ariſing upon the High Sea, is deemed the King's Court; and its Juriſdiction derived from him who protects his Subjects from Pirates, and provides for the Security of Trade and Navigation.

10 Co 141. Caſe of Iſle of *Ely*. From the King's Dominion over the Seas it was holden, that the King as Protector and Guardian of the Seas might, before any Statute made for Commiſſions of Sewers, provide againſt Inundations by Lands, Banks, *&c.* and that he had a Prerogative herein as well as in defending his Subjects from Pirates, *&c.*

8 E. 4. 18, 19. Bro. *Cuſtom* 46. Fitz. *Bar.* 93. Mod. 105. 2 Salk. 637. pl. 4. But notwithſtanding the King's Prerogative in Seas and Navigable Rivers, yet it hath been always held, that a Subject may fiſh in the Sea; which being a Matter of Common Right, and the Means of Livelihood, and for the Good of the Commonwealth, cannot be reſtrained by Grant or Preſcription.

Alſo

Alſo it is held, that every Subject of Common Right may fiſh with lawful Nets, *&c.* in a Navigable River as well as in the Sea; and the King's Grant cannot bar them thereof; but the Crown only has a Right to Royal Fiſh; and that the King only may grant. 6 Mod. 73. *Warren* v. *Matthews.* Salk. 357. pl. 4. S. C. and S. P. *per Holt* Ch. J. on a Claim of *Solam Piſcariam* in the River *Ex* by Grant from the Crown.

*4. Of his Prerogative in Swans and Royal Fiſhes. *Page 157

The King, as a perpetual Sign and Acknowledgment of his Dominion of the Seas, hath ſeveral Creatures reſerved to him under the Denomination of Royal Creatures, as Swans, Sturgeons, and Whales; all which are the Natives of Seas and Rivers. 7 Co. 16.

But a Subject may have a Property in Swans three Manner of Ways:

Firſt, by the Acquiſition of tame Swans; *viz.* by buying of tame Swans, or by Grant of the King of wild Swans, and taming of them; and then the Subject ſhall have the Property in them whereſoever they are, as of any other tame Animal. 7 Co. 16. b.

If the Cock Swans of one Man get into the Hen Swans of another, by the Cuſtom of *England* this Brood ſhall be divided; and it ſhall not follow the Female, according to the common Right of Acceſſion; and this is founded on a Natural Obſervation on the Moderation of this Sort of Creatures, that they will not couple with more than one; and ſo if they were to be ſeparated they could never be propagated. 7 Co. 17. a.

A Cuſtom that the Owner of Swans ſhould have two Cygnets, and the Owner of the Manor the Reſt, has been held good. 7 Co. 17. a.

Swans that are not the King's may be Strays in a Manor as well as any other Creatures; and a Man may preſcribe to have Swanning for them in another Manor. 7 Co. 17. a.

Secondly, the Property of wild Swans may be in the Subject by a Grant of Swan-Mark from the King; for, in this Caſe, all the Swans marked with ſuch Mark ſhall be the Subjects whereſoever they fly. 7 Co. 17. a.

A Swan-Mark may be granted over as well as the Privilege of a Park or Warren. 7 Co. 17.

By the 22 *E.* 4. *cap.* 6. "No Perſon, other than the Son of the "King, ſhall have any Mark or Game of Swans, except he have Lands "of Freehold to the yearly Value of five Marks; and if any Perſon, "not having Lands to the ſaid yearly Value, ſhall have any ſuch "Mark or Game, it ſhall be lawful to any of the King's Subjects, "having Lands to the ſaid Value, to ſeize the Swans as forfeit; whereof "the King ſhall have the one Half, and he that ſhall ſeize the "other."

Thirdly, Swans may be the Subject's *ratione Privilegii*; as if the King grants to the Subject the Game of wild Swan in ſuch a River; but in ſuch Caſe, the Subject cannot bring an Action of Treſpaſs, *Quare Cygnos ſuos ibid' nidificant'* or *gignent' cepit*; for a Man cannot call that his own, which he hath only during particular Occupancy and Poſſeſſion in a certain Place. 7 Co. 17.

If a Man take away Swans marked or pinioned, or thoſe which are unmarked, if they be kept in a Pond or private River, it is Felony. Hawk. P.C. 94.

The King ſhall have Wreck of the Sea, Whales, and Great Sturgeons taken in the Sea and elſewhere throughout the whole Realm; except in Places privileged by the King. Molloy 291.

5. Of

*Page 158

* 5. Of his Prerogative in *Beacons* and Light-Houſes.

4 Inſt. 148. 12 Co. 13. Carter 90. 2 Keb. 114. 3 Inſt. 204.

It is clearly agreed, that the King only has a Prerogative in (*a*) Beacons and Light-Houſes; and that he may erect any ſuch, and in ſuch Places as will be moſt convenient for the Safety and Preſervation of Ships, Mariners, and Navigation; alſo it ſeems to be the better Opinion, that this being for the publick Utility, and one of the Prerogatives that he is intruſted with for the Safety of the whole Realm, he may erect ſuch Beacon, *&c.* as well in the Soil or Ground of a Subject as in that of the Crown; and that he may do this without the Subject's Conſent.

(*a*) Before the Reign of E. 3. there were but Stacks of Wood ſet upon high Places, which were fired when the Enemy was deſcried; but in his Reign, Pitch-Boxes were inſtead of theſe Stacks of Wood ſet up; and this is properly a *Beacon*. 4 Inſt. 148.

Vide the Authorities *ſupra*, and Carter 90.

Alſo it is clear, that the Subject hath not any Power to erect any ſuch Beacon, *&c.* without the King's Licence and Authority for that Purpoſe.

But by the 8 *Eliz.* it is enacted, "That the Maſter, Wardens and "Aſſiſtants of the Trinity-Houſe of *Deptford Strond*, ſhall and may law-"fully from Time to Time at their Will and Pleaſure, and at their "Coſts, make, erect and ſet up ſuch and ſo many Beacons, Marks, and "(*b*) Signs for the Sea, in the Sea-Shores and Upland near the Sea "Coaſts or Forelands of the Sea only, for Sea-Marks, as to them ſhall "ſeem meet; whereby the Dangers may be avoided, and the Ships the "better come to their Ports; and all ſuch *Beacons*, Marks, and Signs ſo "by them to be erected, ſhall be continued, renewed, and maintained "from Time to Time at the Coſts and Charges of the ſaid Maſter, "Wardens and Aſſiſtants."

(*b*) Reſolved by the two Ch. Juſtices, Att. and Sol. Gen. that this Act extended as well to Light-Houſes in the Night, as to Beacons, *&c.* by the Day. 4 Inſt. 149. in Marg.

Vide Title *Court of Admiralty.*

And although by the Common Law none but the King could erect *Beacons*, Light-Houſes and Sea-Marks, yet of later Times, by Letters Patent granted to the Lord High Admiral, he hath Power to erect *Beacons*, Sea-Marks and Signs for the Sea; which Power is now veſted in the Lords of the Admiralty.

Sid. 158. *Croſs* v. *Liggs.*

And therefore a Suit for the Profits of the Beaconage of a Rock in the Sea near———in *Cornwal*, may be in the Court of Admiralty; for as the Profits of the Beacons belong to the Admiral, ſo the Suit for them ought to be in his Court; though the Rock be the Freehold of another, and Part of his Inheritance.

Raym. 448. the Caſe of the Town of *Winchelſea.*

It hath been reſolved, that an Order or Decree for raiſing a Tax for repairing a *Beacon*, without ſetting forth, that it was in Decay or out of Repair, is good, in that it would be dangerous to wait 'till it became in Decay: the Conſequence of which would be, that there would be no *Beacon* in the mean Time and during the Reparation; beſides that it cannot be preſumed that the Parties who contribute to the Tax will tax themſelves unneceſſarily.

6. Of his Prerogative in Wreck.

Cro. *Jac.* *Belli* 117, 132, 141. 2 Inſt. 167. Molloy 237. Moor 224.

By the Common Law the King hath an undoubted Right to Wrecks; and his Prerogative herein is founded on the Dominion he has over the Seas; and being Sovereign thereof, and Protector of Ships

* Ships and Mariners, he is intitled to the derelict Goods of the Mer- *Page 159
chant; which is the more reasonable, as it is a Means of preventing the barbarous Custom of destroying Persons who in Shipwrecks approach the Shore, by removing the Temptations to Inhumanity.

There are four Sorts of shipwrecked Goods, *Flotsham*, *Jetsham*, *Ligam*, and *Wreck*.

Flotsham, is when the Ship is split, and the Goods float upon the Water between High and Low Water Mark.

Jetsham, is when the Ship is in Danger to be drowned, and for saving the Ship the Goods are cast into the Sea.

Ligam, *Ligan* or *Ligan*, is when the heavy Goods are cast into the Sea with a Buoy, that the Mariners may know where to retake them.

Wreck, is where Goods shipwrecked are cast upon the Land.

The *Flotsham*, *Jetsham* and *Ligan*, do in Shipwrecks belong to the 5 Co. 106.
King as well as the *Wreck*; for when the Mariners are cast away, there is the same Reason that the Prerogative should take Place in these Goods as in the *Wreck*.

But though the King hath a Prerogative herein, yet *Wreck* may be in 5 Co. 107.
a Subject by Grant or Prescription; but if the Subject prescribes in *Wreck* alone, he shall not have *Flotsham*, *Jetsham* or *Ligan*; for the King's Grant shall not be taken to be more extensive than the natural Import of the Words will bear.

Goods are said to be wreckt at Common Law when there are no Marks 2 Inst. 167.
or Signs of their Property whereby to prove an Owner; which anciently, and before the Methods of Trading were well known, was very difficult to do; unless some living Animal escaped to the Shore, whereby they might take the Tokens of a Property. Hence ancient Authors Bract. lib. 3.
define it to be no Wreck if a Dog or a Cat escape alive; or if certain fol. 120.
Signs were placed on the Goods whereby they might be known. And because this Prerogative of Wreck was abused, to the Prejudice of the Merchant, the Statute *Westm.* 3. *Ed.* 1. *cap.* 4. has provided, that if a Dog or Cat escape alive (which in these Cases they took to be the most certain Proofs of Property) that then the Sheriff, Coroner, or Lord of the Isle might claim them; and if the Owner came and made his Claim within a Year and Day, he should have his Goods, otherwise they remained to the King.

The Instance of a Dog or Cat are only for Examples; for if any liv- 2 Inst. 167.
ing Thing escapes, the Claim may be made.

If the Mariners are pursued by Enemies, and come ashore and leave 2 Inst. 167.
the empty floating Ship, which comes to Land without any Person; yet Molloy 239.
shall they claim the Ship when it comes on Shore.

The Year and the Day mentioned in the Statute, shall be from the 2 Inst. 168.
Time of the Seisure; for from the Time of Seisure there is a Notoriety, in order for the Party to make his Claim.

But the Property is in the King or the Lord of the Manor, against 5 Co. 107.
all but the right Owner, from the Time that the Goods touch Land, even before Seisure; for the King's Interest herein is different from that of another Occupant, who only acquires a Right by the Seisure; for he is intrusted with this Prerogative in order to prevent any other Occupant.

If the Owner dies within the Year and the Day, his Executors or 2 Inst. 168.
Administrators may make Claim thereto; because it is not limited by the Statute to the Owner at the Time of the Wreck.

* This Law extends not only to Wreck but to *Flotsham*, *Jetsham*, and *Page 160
Ligam; but the Wreck must be claimed by Action at *(a)* Common Law, 5 Co. 107.
2 Inst. 167.

(a) By the express Words of the Statute 15 R. 2. c. 3 the Admiralty cannot take Cognizance of Goods wreckt.

the *Flotſham*, &c. by Suit in the Admiralty; becauſe the Wreck is on the Land, the *Flotſham*, &c. in the Seas.

5 Co. 108. If the Suit be commenced before the Year and the Day, it ſufficeth, tho' the Verdict be not given; for the Delay of the Law muſt do no Man an Injury.

2 Inſt. 168. If Wreck be embezzled both from the King and the Owner, this may be inquired into on a Commiſſion of *Oyer* and *Terminer*, and the Party fined.

2 Inſt. 168. If a Lord of the Manor takes the King's Goods as Wreck the King may claim them after the Year and the Day; becauſe the King being perpetually employed in the Buſineſs of the Publick cannot be bound to a Time.

If Goods wreckt be *Bona Peritura*, the King or Lord may ſell them before the Year and the Day be paſt; for the Statute ſhall not be underſtood to reſtrain them to keep theſe Things that of their own Nature cannot be kept.

5 Co. 107. 108. *Sir Henry Conſtable*'s Caſe. If Wreck be granted to the Lord of the Manor, and he take *Flotſham* and Wreck, and the Jury find this whole Matter, and aſſeſs intire Damages, Judgment ſhall be given againſt the Plaintiff; for the Court will not give their Judgment, when for Part of the Matter claimed the Plaintiff hath no Title; and it being Matter of Fact, the Court cannot apportion the Damages.

Vaugh. 164 to 172. Tunnage is granted to the King for all Goods imported into the Realm as Merchandiſe, by any Merchant whatſoever; certain Goods are wreckt, and the Queſtion was, whether they ſhall pay this Duty? And reſolved by *Vaughan*, that they ſhould not. *1ſt*, Becauſe they could not be ſaid to be imported: for Importation is the Bringing in of Goods by artificial Means, as by Ships, &c. with Deliberation, in order for ſome Uſe; therefore theſe Goods caſually caſt up cannot be ſaid to be imported. *2dly*, They cannot be ſaid to be imported for Merchandiſe, for they are now as Goods deſtined for Sale; but they may be reſerved to the Proprietor. *3dly*, They are not brought in by any Merchant, for they are preſumed to be deſerted and derelict, and from thence the Property changed; and the King having a Property in the Whole, it is to no Purpoſe to give him a Part.

6 Mod. 149. *per Cur.* Originally all Wrecks were in the Crown, and the King has a Right to a Way over any Man's Ground for his Wreck; and the ſame Privilege goes to the Grantee thereof. †

† Directions for preſerving Ships in Diſtreſs, 12 Ann. ſt. 2. c. 18. 26 Geo. 2. c. 19. ſ. 6.——Salvage to be paid, 12 Ann. ſt. 2. c. 18. ſ. 2. & *vide* thoſe Statutes.

7. Of the King's Prerogative in relation to Coins and Mines.

Dav. 19. 2 Rol. Abr. 166. 5 Co. 114. Co. 146. It is clearly agreed, that by the Common Law the King hath a Prerogative in, and is intitled to, all Royal Mines of Gold and Silver and Treaſures of Gold and Silver hid in the Earth; and that he is intruſted with the (*a*) Coinage and making Money current; and that he alone can bring the Mines and Treaſures of any conquered Country into Uſe, by coining them out into his Money; and this Prerogative is lodged in the King as he adminiſters Juſtice to all; and therefore the
*Page 161 * Power and Regulation of that which is the (*b*) common Standard and Meaſure of all Bartering and Commerce is committed to his Care.

(*a*) The Legitimation of Money, and the giving it its denominated Value, is juſtly reckoned *inter Jura Majeſtatis*; and in *England* it is one ſpecial Part of the King's Prerogative. Hal. Hiſt. P.C. 188. (*b*) Money is the common Meaſure of all Com-

Alſo

Alſo this Prerogative is given to the King as a neceſſary Conſequence of the Power of War and Peace; for there can be no Wars made without the Expence and Conſumption of Treaſure. Plow. 315. —frequently called the Sinews of War. Co. Lit. 90. b. 11 Co. 91. 2 Rol. Rep. 298.

Beſides it was thought, that if any other Perſons had the Power of Mines of Gold and Silver, they might by theſe immenſe Treaſures grow too formidable, and wreſt that Authority from the King which was depoſited in his Hands only. Plow. 316.

The Uſe and Neceſſity of Money aroſe from the Nature of Trade; but more eſpecially from this, that the ſeveral Proviſions of Life are in their own Nature periſhable, and not to be laid up in Specie; this made it neceſſary that ſome Things ſhould be fixed on to paſs as Tickets of Credit in Exchange for thoſe Commodities; hence the Thing agreed on muſt have theſe Qualities; *1ſt*, It muſt be durable, becauſe otherwiſe it would not be more eaſily laid up than the Proviſions themſelves; *2dly*, It muſt be ſcarce, that a little of it might ſerve to be carried from Place to Place in order to ſupply Men's ſeveral Occaſions; and upon theſe two Accounts Gold and Silver were pitched on as the two Metals moſt ſcarce and moſt durable, and therefore beſt able to anſwer both the Purpoſes. If therefore Gold and Silver be taken up as the Meaſures of all other Things, it follows, that the Compariſon of their Value will ſtand thus; when the Labour ſpent in digging, refining, and importing an Ounce of Silver, is equal to the Labour in ſowing, reaping, and threſhing of a Buſhel of Corn, then is an Ounce of Silver equal to a Buſhel of Corn; the Induſtry in the acquiring is equal, and conſequently Mens Property in them is the ſame, that is, their Values are equal; for if the Corn be more plenty than the Silver, then a Buſhel and a half of Corn will poſſibly be worth an Ounce of Silver; if on the other Hand, the Silver be more plenty than the Corn, then poſſibly an Ounce and a half of Silver will amount to no more than a Buſhel of Corn; and what is done by coining of Silver is no more than aſcertaining the Value of ſeveral Pieces in order for Commerce; as that the Crown ſhall contain an Ounce and the like, that the People may not be compelled to uſe their Scale and Touchſtone on every Bargain. Cotton 4. *Lock of Coin.*

The Policy in relation to the Coin is, that the Value remains unalterable; for the Standard cannot be varied without manifeſt Injuſtice; as ſuppoſe a Man contracts for ten Crowns, which is equal to ten Ounces of Silver, that ſuppoſe equal to ten Buſhels of Corn, and before Payment the publick Standard ſhould alter; for Inſtance, that the Crown were leſſened to half an Ounce, and yet we ſuppoſe that the Induſtry in the Acquirement is the ſame in relation to the Ounce of Silver and the Buſhel of Corn; it then follows that the ten Crowns paid in publick Money will be equal to but five Buſhels of Corn, and conſequently the Man by the publick Act will loſe half the Value in which he had a Property, by the Contract: So in Caſes of foreign * Trade where the *Page 162 *Lock of Coin.*

Commerce almoſt through the World; it conſiſts principally of three Parts; 1. The Materials whereof it is made; 2. The Denomination or extrinſic Value; 3. The Impreſſion or Stamp. Hal. Hiſt. P. C. 188.——Sir *John Davis* mentions ſix Things as Eſſentials to the Legitimation of Coin; 1. Weight; 2. Fineneſs; 3. Impreſſion; 4. Denomination; 5. Authority of the Prince; 6. Proclamation. Davis 19. in the Caſe of *mixed Money*——which laſt, *viz.* the Proclamation, is not always neceſſary to the Legitimation, ſays my Ld. Ch. J. *Hale*; for the Currency of Money is a Queſtion of Fact, and may be proved by the Officers of the Mint or their Indenture, on an Indictment for Clipping and Counterfeiting the King's Coin. Hal. Hiſt. P. C. 196. 2 Salk. 446. S. P.

Measure of Commerce is the intrinsic Value of the Silver or Gold, there can be no Variation of such Measure without Injustice.

2 Inst. 575. And indeed the keeping to the common Standard is of that Importance, that my Lord *Coke* seems to be of Opinion, that the Alteration of Money in Weight or Allay cannot be without an Act of Parliament; and in this grounds his Opinion on the Statutes of 25 *E.* 3. *cap.* 13. and 9 *H.* 5. *sess.* 2. *cap.* 6. but herein the Law seems to be as laid down by my Lord *Hale*.

Hal. Hist. P. C. 191. 1. That at the first Institution of any Coin within this Kingdom, the King, and he alone, sets the Weight, the Alloy, the denominated Value of all Coin; and this is done commonly by Indenture between the King and the Master of the Mint.

Hal. Hist. P. C. 192. 2. He may by his Proclamation legitimate foreign Coin, and make it Current Money of this Kingdom according to the Value imposed by such Proclamation; but the Counterfeiting such Money was not Treason till the Statute of 1 *Mar. cap.* 6. made it so; nor the Clipping, Washing, Impairing thereof was not Treason 'till 5 *Eliz. cap.* 11. and 18 *Eliz. cap.* 1. but all these Statutes allow the Power of Legitimation thereof to the King by Proclamation.

Hal. Hist. P. C. 192. 3. He may inhanse the external Denomination of any Coin already established, by his Proclamation; and thus it hath been gradually done almost in all Ages *(a)*; this is sometimes called Imbasing of Coin and sometimes Inhansing of it; and it is both; it is an Inhansing of Coin in respect of the intrinsick Value or Denomination, but an Imbasing in respect of the intrinsick Value; as for Instance, when in the Time of *E.* 4. a Noble was raised to a higher Rate by twenty Pence.

(*a*) Though it be not absolutely an Imbasement of the Coin in the Species, yet it hath very near the same Effect. Hal. Hist. P. C. 194.

Hal. Hist. P. C. 192. Dav. 18. 2 Rol. Abr. 166. 4. He may by his Prerogative imbase the Species or Material of the Coin, and yet keep it up in the same denominated or extrinsic Value as before; namely to mix the Species of Money with an Allay below the Standard.

Hal. Hist. P. C. 194. As to my Lord *Coke*'s Opinion, all he says that can be inferred from it is, that it is not safe nor honourable for the King to debase his Coin below Sterling; and that if it be at any Time done, it is fit to be done by Assent of Parliament; but certainly all it concludes is that *fieri non debet*, but *factum valet*.

Hob. 270. *Courteen*'s Case, and Poph. 149. where it is held, that ingrossing a great Quantity of Money is an Offence; & *vide* Rol. Rep. 299. From the King's Prerogative in Coins it hath been adjudged, that at Common Law, and without any Statute, an Information lay against Persons for transporting large Quantities of Money, being against the Policy of the State and Government.

Plow. 323. 2 Inst. 578. 12 Co. 12. But though Mines of Gold and Silver belong to the King, yet Mines of Tin and Copper belong to the Subject; for by none of the abovementioned Reasons are these to be annexed to the Crown.

Plow. 323, 328, 336. But herein there hath been a great Question, *viz.* Whether if the Mine of Copper or Tin contained Gold or Silver, as they often do, whose it should be, the King's or the Subject's? And the Judges here made a very extended Construction, and held, that Gold and Silver being the nobler and more valuable Metals should attract the less valuable, and belong to the King; as likewise for the following Reason, that the King's Property cannot be held in Jointure with the Subject, and that the King's Property, though ever so small, shall not be lost by Mixture with the Subject's.

* But upon this Caſe the Reporter very juſtly obſerves, that in all baſe Metals of Copper, Tin, &c. there is a Mixture of Gold and Silver, which Mixture is of no Value in Compariſon to the other Metal, and the Gold or Silver is the Life of the Mine, without which it cannot be worked; ſo that this was declaring all Copper and Tin Mines in the King. *Page 163 Plow. 339.

And therefore by the Statute 1 *Will. & Mar. ſtat.* 1. *cap.* 30. *ſect.* 4. it is enacted, "That no Mine of Copper, Tin, Iron or Lead, ſhall be "adjudged a Royal Mine, although Gold or Silver may be extracted out of "the ſame."

And by the 5 *Will. & Mar. cap.* 6. *ſect.* 2. "All Proprietors of Mines "wherein any Ore ſhall be found in which there is Copper, Tin, Iron or "Lead, ſhall hold and enjoy the ſame, notwithſtanding that ſuch Mines or "Ores ſhall be claimed to be Royal Mines; *Provided* that their Majeſties, "and all claiming Royal Mines under them, may have the Ore of ſuch "Mines (other than Tin Ore in the Counties of *Devon* and *Cornwal*) "paying to the Proprietors within thirty Days after the Ore is laid on the "Banks, and before the ſame is removed, the Rates following, *viz.* for "all Ore waſhed wherein is Copper, 16 *l. per* Ton; and for all Ore waſhed "wherein there is Tin, 40 *s. per* Ton; and for all Ore waſhed wherein "there is Iron, 40 *s. per* Ton; and for all Ore waſhed wherein there is "Lead, 9 *l. per* Ton; and in Default of Payment it ſhall be lawful for the "Proprietors to diſpoſe of the Ore."

The King by expreſs Words may grant away Royal Mines as well as inveſt a Subject with any Property in the aforementioned Chattels, but then it muſt be by expreſs Words; for if the King grants to *J. S.* Lands and the Mines therein contained, and Royal Mines are found in them, they ſhall not paſs to the Subject; for the King's Grant ſhall not be taken to a double Intent, becauſe they are Records that ought to have the ſtricteſt Truth and Certainty; and the moſt obvious Intent is, that they ſhould only paſs the common Mines that are grantable to a common Perſon. Plow. 336. & *vide poſtea.*

It hath been held by the Judges aſſembled at *Serjeant's Inn*, that the King may enter into any Man's Ground and dig Salt-petre for making of Gunpowder; and that the King hath a Prerogative herein, being neceſſary for the Safety of the Realm, although it be a Thing of a new Invention. 12 Co. 12.

And herein my Lord *Coke* obſerves, 1*ſt*, That it muſt be done with as much Conveniency and as little to the Prejudice of the Owner of the Ground as poſſible; and conſequently that the Digging in a Man's Houſe, Barn, Outhouſe, &c. or weakening the Walls of any ſuch Houſe, &c. is unlawful. 12 Co. 13, 14.

2. That the Soil or Ground muſt be made and left as commodious to the Owner as it was before. 12 Co. 12.

3. That this is in Nature of a Purveyance, and an Incident inſeparable to the Crown, and cannot be granted, demiſed or transferred over to another. 12 Co. 13.

4. That the Owner of the Land cannot be reſtrained from digging and making Salt-petre; the King not having an Intereſt in it as he hath in Gold and Silver in the Land of the Subject. 12 Co. 14.

*Page 164 *8. Of his Prerogative in derelict Goods; and therein of Waifs, Strays, and Treaſure Trove.

Bro. Tit *Prero.* pl. 12. 2 Vent. 267-8.

All derelict Goods, and in which no Man hath a Property, belong to the King as well as derelict Lands; ſo (*a*) of extraparochial Tithes, though Things of an Eccleſiaſtical Nature.

(*a*) 5 Co. 18. 2 Inſt. 646.——That a Perſon may be guilty of Felony in taking Goods, the Owner whereof is unknown, in which Caſe the King ſhall have the Goods, and the Offender ſhall be indicted for taking *Bona cujuſdam ignoti.* Hawk. P. C. 94.

Salk. 37. pl. 3.

So if a Perſon dies inteſtate and without Kindred, his Goods and Chattels belong to the King; and herein the uſual Courſe is ſaid to be for a Perſon to procure the King's Letters Patent, and then the Ordinary admits the Patentee to Adminiſtration.

5 Co. 109.

As to Goods waived, theſe belong to the King, and are in him without any Office; becauſe the Property is in Nobody, and therefore by public Agreement is put out of the Finder, in whom it was by the State of Nature, and is veſted in the King in Recompence for his Trouble and Charge in the Execution of Juſtice.

How far a Sale in a Market overt alters the Property in thoſe Caſes, *vide* Title *Fairs and Markets.*

But at the Common Law, the Owner purſuing the Felon, and the Felon waiving the Goods, the Owner may retake them; alſo upon an Appeal of Felony the Owner is intitled to a Writ of Reſtitution; and as a farther Encouragement for the Proſecution of Felons by the 21 *H.* 8. *cap.* 11. it is provided, that if the Party comes in as Evidence on the Indictment and attaint the Felon, he ſhall have a Writ of Reſtitution awarded by the Judge of Aſſize.

Bro. *Eſtray.* (9). 29 E. 3. 19.

If a Felon in Flight waive his own Goods, and the King ſeize them, theſe alſo are Waifs; for they are relinquiſhed, and the Property is in Nobody.

5 Co. 109. Cro. Eliz. 694. *Foxley's* Caſe.

In Trover the Defendant pleads in Bar, that the Queen was ſeiſed of the Manor of *Newport Pannel*, and that in the ſaid Manor the Goods were found waived, and doth not ſay, that they were waived in Flight, this is no Bar; for if the Goods were only laid upon the Manor, and not waived in the Purſuit, they are no ſuch waived or derelict Goods as the King may claim by his Prerogative.

21 E. 4. 16. Kitchen 82.

The Owner may at any Time retake the Goods waived, if they are not ſeiſed by the King or Lord of the Manor; for the Lord's Property begins from the Seiſure; for ſince there is no Property altered by the Wrong and Theft of the Felon, it follows that the Right remains 'till they are ſeiſed for the King as Guardian of the Public Safety, upon the Purſuit, or forfeited to him upon the Conviction.

8 H. 7. 1. Bro. *Eſtray* 15.

Waifs and Strays are not neceſſarily incident to a Leet, but they may be appurtenant to it by Grant from the King; for the original Prerogative is in the Crown, and comes from thence to the Subject at the Pleaſure of the King.

Bro. *Eſtray* 13. 5 Co. 109. 43 E. 3. 16.

And though a Lord of a private Manor may have Waifs and Strays by Preſcription, yet he cannot hove *Bona Felonum* and *Fugitivorum* without Grant from the King; becauſe no Man can preſcribe for them, for every Preſcription muſt be immemorial, and the Goods of Felons and Fugitives cannot be forfeited without Record, which preſuppoſes the Memory of that Continuance.

44 E. 3. 29. 5 Co. 105. Kitchen 81.

The King may grant the Privilege of Strays to the Lord of a Manor, or he may claim it by Preſcription, which ſuppoſeth a Grant loſt; but

no

no Lord of a Manor can take the King's Beasts as Strays, because the * Grant of the King must be supposed to extend no farther than this particular Prerogative of the King, that is to take the Cattle of common Persons. *Page 165

Where the Lord of a Manor hath not a Grant or Prescription for Stray, there the Sheriff shall seise it in Behalf of the King, and shall account for it to the King in the Exchequer. 24 H. 6. 5. Bro. Title *Estray* (5).

If *A.* be seised of a Manor whereunto the Franchises of Waif and Stray be appendant, and the King purchases the Manor with the Appurtenances, the Royal Franchises are re-united to the Crown, and not appendant; because the Stray belongs to the King by his Prerogative, and when the Manor comes to him, the Strays are in him *Jure Coronæ*; but if he grants the Manor in as ample a Manner as *A.* had it, this grants the Strays by Reference to the former Grant. Co. Lit. 121. b.

In the Case of the King, if a Man justifies, as Beasts taken in Behalf of the King, yet he must say that the Beasts were taken and proclaimed; for otherwise the King's mere Seisure shall not be a sufficient Presumption in Behalf of his Property. 29 E. 3. 3. Bro. Title *Estray* 4.

The Sheriff or Bailiff of the King cannot pray in Aid of the King in an Action of Trespass brought against him; for the Aid of the King cannot be demanded to come in to justify the Acts of his Ministers, but they are answerable for their own Acts; and the taking any Chattels is only a Fact of the King's Ministers; but in Matters of Titles of Land which is no Fact of the King's Ministers, but relate to his permanent Revenue, the particular Tenant shall pray in Aid of the King in Reversion. Bro. *Estray* (5). 24 H. 6. 5. Cro. Eliz. 694.

Also the Pleading of the Officer is not good unless he says, he hath answered the Value of them to the King; for the Officer cannot justify the Taking in his own Right. Cro. Eliz. 694.

The King or Lord of the Manor hath Property from the Time of the Stray's coming upon the Manor against all others but the right Owner; but in Relation to the right Owner he hath only the Custody, and not the Property. Yelv. 96.

The King hath a Prerogative in Treasure Trove, that is, Treasures of Gold and Silver which must be hid in the Earth, and in which no Man hath a Property; but Treasures of Gold and Silver found on the Surface of the Earth, or found in the Sea, belong to the Finder. 3 Inst. 133. Kitch. 80.

This Prerogative was thought to be of that Consequence to the Crown, that it is said, that anciently the concealing of Treasure Trove was punished with Death; but it is now only punishable with Fine and Imprisonment. 3 Inst. 133. Hal. Hist. P. C. 506.

9 Of his Prerogative in Fines and Forfeitures.

Fines and Forfeitures for Offences at Law, go to the King as the Head of the Government; and are given to him as well for the public Good as for the Increase of his Revenue. 2 Vent. 268. *Vide* Title *Forfeiture*.

Hence it is held, that if a Person be attainted of High Treason, ‡ all his Lands of whomsoever holden are forfeited to the King, and that tho' the Lands are immediately held of the King, yet he hath them not as Royal Escheats, but *Jure Coronæ* or *Prærogativæ regalis*. Hal. Hist. P. C. 253.

‡ *Vide Consideration on the Law of Forfeitures, &c.* where this Subject is treated of in a very elaborate and masterly Manner, and the Justice, Propriety, and good Policy of the Law set in the clearest Light.

Also

Moor 238. 7 Co. 36. 11 Co. 68.

Alſo where a Statute giveth a Forfeiture, either for Nonfeazance or Misfeaſance, the King ſhall have it, unleſs it be otherwiſe particularly directed by the Statute.

And on this Foundation it hath been adjudged, that an Archdeacon having ſold the Office of Regiſter of the Archdeaconry, which being a *Page 166 * Forfeiture within the Statute 5 & 6 *E.* 6. *cap.* 16. the Right of Nomination belonged to the Crown, and not to the Biſhop of the Dioceſe.

2 Vent. 267. *Woodward* v. *Fox.*

Vide plus Titles *FORFEITURE* and *OUTLAWRY.*

(C) Of his Prerogative over the Perſons of his Subjects: And herein,

1. Who ſhall be ſaid his Subjects.

7 Co. 1, &c. *Calvin's* Caſe. Molloy 370. Co Lit. 129. Dyer 300. *vide* Title *Aliens.*

ALL Perſons born in any Part of the King's Dominions and within his Protection are his Subjects, as all thoſe born in *Ireland*, *Scotland*, *Wales*, the King's Plantations, or on the *Engliſh* Seas; who by their Births owe ſuch an inſeparable Allegiance to the King that they cannot by any Act of theirs renounce or transfer their Subjection to any foreign Prince.

3 Inſt. 4, 5. Dyer 145. Hob. 271. 2 Salk. 630. pl. 2. Hawk. P.C. 35. Hal. Hiſt. P. C. 59.

Alſo the Subjects of a foreign Prince, coming into *England* and living under the Protection of our King, may, in reſpect of that local Ligeance which they owe to him, be guilty of High Treaſon, and indicted that they *contra dominum regem* (the Words *naturalem dominum ſuum* being omitted) did compaſs, &c. *contra Ligentiæ ſuæ debitum*; and it is ſaid that even an Ambaſſador, committing a Treaſon againſt the King's Life, may be condemned and executed here, and that for other Treaſons he ſhall be ſent Home.

Hawk. P.C. 35.

But Aliens who in an hoſtile Manner invade the Kingdom, whether their King were at War or Peace with ours, and whether they come by themſelves or in Company with *Engliſh* Traitors, cannot be puniſhed as Traitors, but ſhall be dealt with by Martial Law.

Dyer 224. Vaugh. 281.

If the King of *England* makes a new Conqueſt of any Country, the Perſons there born are his Subjects; for by ſaving the Lives of the People conquered he gains a Right and Property in ſuch People, and may impoſe on them what Law he pleaſes.

2 Will. Rep. 75, 76.

But until ſuch Laws given by the conquering Prince, the Laws and Cuſtoms of the conquered Country ſhall hold Place; unleſs where theſe are contrary to our Religion, or enact any Thing that is *Malum in ſe*, or are ſilent (*a*); for in all ſuch Caſes the Laws of the conquering Country ſhall prevail.

(*a*) That where the Laws are rejected or ſilent, the conquered Country ſhall be governed according to the Rule of natural Equity. 2 Salk. 412.

2 Will. Rep. 75. 2 Salk. 411. pl. 1. Like Point. See 2 Ld. Raym. 1245.

If there be a new and uninhabited Country found out by *Engliſh* Subjects, as the Law is the Birthright of every Subject, ſo wherever they go they carry their Laws with them; and therefore ſuch new found Country is to be governed by the Laws of *England*; though, after ſuch Country is inhabited by the *Engliſh*, Acts of Parliament made in *England*, without naming the foreign Plantations, will not bind them.

2. That

* 2. That he is intitled to the Service and Allegiance of his Subjects; and therein of the Oaths injoined them. *Page 167

It is clearly agreed, that the King hath an Intereſt in all his Subjects, and is intitled to their Services, and may employ them in ſuch Offices as the public Good and the Nature of our Conſtitution require; and on this Foundation it hath been held, that the King may oblige a Perſon to ſerve the Office of Sheriff, and that no Perſon can be exempt from ſuch Office but by Act of Parliament or Letters Patent. Sav. 43. Moor 111. 2 Vent. 247-8. 4 Mod. 269. Salk. 167. pl. 1. Ld. Raym. Carth. 306. 29. Skin. 574. pl. 1.

The Allegiance that is due from every Subject to the King is of two Kinds. 1*ſt*, Original, virtual and implied. 2*dly*, Expreſſed or declared by Oaths or Promiſes. The firſt of theſe ariſes from that Protection which every Subject hath from the King and the Laws, and is (*a*) ſaid to be due to the Natural and not to the Politick Perſon of the King; and from the Breach whereof ariſeth the Crime of High Treaſon. 7 Co. *Calvin's* Caſe. Hal. Hiſt. P. C. 59, 61. (*a*) 1 Vent. 3. —That the Obligation of Allegiance is not to be applied nor laid upon private Cauſes; for no Man can make a Cauſe of Allegiance other than ſuch as the Law makes, and as concerns the Faith and Loyalty that the Subject oweth to his Sovereign in Points of State. Hob. 271, 272.

The expreſs Allegiance, or by Oaths and Promiſes, is either by the Common Law, or by particular Acts of Parliament. By the Common Law, beſides the Oath due by Tenure or *ratione Feodi*, all Perſons above the Age of Twelve were obliged in the Torn or Leet to take an Oath of Fidelity and Allegiance, whether ſuch Perſon held any Lands of the King or not; and in all Oaths of Fealty, as likewiſe in the Profeſſion of Homage to any inferior or ſubordinate Lord or Prince, it was with a *ſalva fide et Ligeantia domini regis*, which Saving to omit was puniſhable in ſuch Lord. Spelm. Title *Fidelitas*. Co. Lit. 85. Finch of Law 241. 2 Inſt. 147. Hal. Hiſt. P. C. 64, &c.

The particular Acts of Parliament relating to this Matter are the 1 *Eliz. cap.* 1. which enjoins the Oath of Supremacy, 3 *Jac.* 1. *cap.* 4. which inſtituted the Oath of Obedience, the Statutes 7 *Jac.* 1. *cap.* 2. & 6. 13 *Car.* 2. *ſtat.* 2. *cap.* 1. 13 & 14 *Car. cap.* 3 & 4. 25 *Car.* 2. *cap.* 2. 30 *Car.* 2. *ſtat.* 2. *cap.* 1. which are abrogated by 1 *W. & M. ſeſſ.* 1. *cap.* 1 & 8. and new ones appointed in their Room by the 1 *W. & M. ſeſſ.* 2. *cap.* 2 & 3. 3 *W. & M. cap.* 2. 13 *W.* 3. *cap.* 6. 8 *Ann. cap.* 22. 4 *Ann cap.* 8. 6 *Ann. cap.* 7, 14, 23. 1 *Geo.* 1. *cap.* 13. 13 *Geo. cap.* 29. 2 *Geo.* 2. *cap.* 31. 9 *Geo.* 2. *cap.* 26.

By the 2 *Geo.* 2. *cap.* 31. it is enacted, "That all Perſons that ſhall "be admitted into any Office Civil or Military, or ſhall receive any "Pay by reaſon of any Grant from his Majeſty, or ſhall have Com- "mand or Place of Truſt under his Majeſty, or by Authority derived "from him, in *England*, or in his Majeſty's Navy, or in *Jerſey* or "*Guernſey*; or that ſhall be admitted into Office in the Houſehold of "his Majeſty, or of the Prince of *Wales*, or any other of his Majeſ- "ty's Iſſue; and all Eccleſiaſtical Perſons, Heads and other Members "of Colleges and Halls in the Univerſities, that are of the Foundation "or enjoy any Exhibition, being of the Age of eighteen Years; and "all Perſons teaching or reading to Pupils, and all School-Maſters "and Uſhers, and all Preachers of ſeparate Congregations, High Con- "ſtables, and every Perſon who ſhall act as a Serjeant at Law, Coun- "ſellor, Barriſter, Advocate, Attorney, Solicitor, Proctor, Clerk or "Notary, by practiſing as ſuch in any Court in *England*, who ſhall "after the 21*ſt* of *January*, 1728. be admitted into any of the above-

"mentioned

" mentioned Preferments, &c. or ſhall come into any ſuch Capacity, &c.
*Page 168 " ſhall take the Oaths appointed by 1 *Geo.* 1. *cap.* 13. as by * the ſaid
" Statute is directed in the Court of Chancery, King's Bench, Common
" Pleas, or Exchequer, at any Time (*a*) before the End of the next
" Term after he ſhall be admitted, &c. or before the End of the next
" Quarter-Seſſions where ſuch Perſons ſhall reſide."

(*a*) By the 9 Geo. 2. c. 26. the Time is enlarged to ſix Calendar Months after ſuch Admittance, &c. ‡

‡ There are ſeveral Statutes to enlarge the Time. *Vide* the Index to the Statutes, Title *Oaths.*

Perſons neglecting, to incur the Penalties in 1 *Geo.* 1. *cap.* 13. *viz.* Diſability to, &c. or to be Guardian or Executor, or capable of any Legacy or Deed of Gift; or to be in any Office, or to vote at any Election for Members of Parliament, and ſhall forfeit 500 *l.* †

† The Form of the Oath of Abjuration is altered, by 6 Geo. 3. c. 53.

3. That he may reſtrain his Subjects from going abroad; and herein of the Writ *de Ne exeat Regno.*

F. N. B. 85. Dyer 165, 296. 2 Rol. Rep. 12. 3 Mod. 131. Lit. Rep. 27. Stile 442. By the Common Law every Subject may go out of the Kingdom for Merchandiſe or Travel, or other Cauſe, as he pleaſes, without any Licence for that Purpoſe; this appears from the (*b*) *Statute* 5 *R.* 2. *cap.* 2. made to reſtrain Perſons paſſing out of the Realm, but excepts Lords, great Men, and notable Merchants; as alſo by the Statute 26 *H.* 8. *cap.* 10. which gave Power to the King during his Life to reſtrain Perſons from trading to ſome certain Countries (*c*); which Acts had been vain and idle, if the King by his Prerogative might have done it.

(*b*) This Statute is repealed by 4 Jac. 1. c. 1.

But notwithſtanding this general Freedom and Liberty allowed by the Common Law, it appears plainly that the King by his Prerogative, and without any Help of an Act of Parliament, may prohibit his Subjects from going out of the Realm; but this muſt be by ſome expreſs Prohibition; as (*d*) by laying on Embargoes, which can be only done in Time of Danger, or by Writ of *Ne exeat Regno*, which from the Words *quam plurima nobis et Coronæ noſtræ Prejudicialia ibidem proſequi intendis*, appears to be a State Writ, but is never granted univerſally, but to reſtrain a particular Perſon, upon Oath made that he intends to go out of the Realm; indeed *Fitzherbert* ſays, that the King may reſtrain his Subjects by Proclamation; and aſſigns as a Reaſon for it, that the King may not know where to find his Subject, ſo as to direct a Writ to him.

(*c*) Noy 182. 12 Co. 33. 11 Co. 92. Fitz. N. B. 89. 2 Inſt. 54.--- One Reaſon, ſays Sir *John Davis*, why the King is intitled to Cuſtoms, is his permitting his Subjects to go beyond Sea when he might reſtrain them. Dav. 9.

(*d*) *Vide* Title *Merchant.* 4 Mod. 179.

Dyer 179. Moor 109. 3 Inſt. 179. Comb. 53. Skin. 166. It is agreed, that the Matter alledged in the Writ of *Ne exeat Regno*, is not traverſable, and that the King may avoid it without ſhewing any Cauſe; and tho' it may be objected, that if the King may, without aſſigning any Reaſon, grant it in one Caſe, he may in five hundred, &c. The Anſwer is, that this is a Royal Truſt repoſed in the King, which the Law does not preſume that he will abuſe or make Uſe of to the Prejudice of the Subject.

F. N. B. 85. Lane 29. 2 Co. 17. b. 76. 11 Co. 92. This Writ may be awarded under the Privy Seal or Signet, as well as the Great Seal.

The

The Writ of *Ne exeat Regno*, though a Prerogative or State Writ, hath been introduced into the Court of Chancery, but was at firſt but tenderly made Uſe of; it is now become the common Proceſs of that Court. The Plaintiff, by a ſtanding Order made in my Lord *Cowper*'s Time, is to make Oath of his Debt; and the Writ is always marked for the Sum ſworn in the Affidavit, in Words at length and not in Figures; and the Plaintiff ſwears the Defendant is going out of the * Kingdom, which if he ſhould do, the Debt may be loſt; the Order is 'till Anſwer or further Order; and it was formerly thought, that upon the Party's putting in a full Anſwer the Writ ſhould be diſcharged, but of late the Party hath been obliged to give Security to abide the Order on Hearing, before the Court will diſcharge the Writ; which Security is taken by Recognizance before a Maſter, as all other Security is; and it is in the Penalty of what is ſworn due, and the Sheriff takes Bail accordingly when he arreſts the Party thereon, the Sum ſworn due being conſtantly indorſed on the *Ne exeat Regno*, as a Guide for the Sheriff to take Bail by.

* Page 169
Skin. 136. Chan. Ca. 115. 2 Chan. Ca. 245. 7 Mod. 9. Ld. Raym. 696. Caſes in *B. R.* 562. Stil. 441, 442.

A Writ of *Ne exeat Regno* may be granted in any Caſe where there is Danger of Subterfuge from the Juſtice of the Nation, though of a private Concern.

2 Chan. Ca. 245.

Giving out that he intends to go beyond Sea, aſſigned as a Reaſon for awarding a Writ of *Ne exeat Regno*, and it was granted.

2 Chan. Rep. 20.

A Solicitor's Bill being taxed and reported overpaid 60*l*. On Motion and Affidavit of his going beyond Sea, a *Ne exeat Regno* was granted, though no Bill was in Court whereon to ground this Writ.

Preced. Chan. 171. *Lloyd* v. *Cardy*.

A Motion was made for a *Ne exeat Regno* againſt Sir *Jerom Smithſon*, for that his Wife had ſued him in the Eccleſiaſtical Court for Alimony, and it was ſuſpected that he would go beyond Sea to avoid the Sentence; and the Writ was granted; and the Lord Chancellor ſaid that it had been ſo done before, for this Court was to aid the Eccleſiaſtical Court in ſuch Caſes.

2 Vent. 345. Sir *Jerom Smithſon*'s Caſe.

It hath been held, that a *Ne exeat Regno* lies to prevent one's going into *Scotland*, it being out of the Juriſdiction of Chancery; and the Proceſs thereof not reaching thither, is equally miſchievous to the Suitor here as if he actually went out of the Kingdom; and in this Caſe it is ſaid, that the Condition muſt be not to go out of the Realm, or to *Scotland*; but in (*a*) a latter Caſe it is held, that there is no Occaſion that the Order ſhould be particular as to *Scotland*; and that even ſince the *Union*, the Writ in the general Form will reſtain the Party from going into *Scotland* as well as any of the King's other Dominions that are out of the Proceſs of this Court.

Will. Rep. 263. pl. 60. *Done*'s Caſe.

(*a*) *Hunter* v. *Maccray*. Caſes in Ld. *Talbot*'s Time 196.

A *Ne exeat Regno* having been awarded againſt the Defendant, *J. S.* (who was the now Petitioner) became his Surety to the Sheriff; after Anſwer put in *J. S.* petitions to be diſcharged, but was denied; then the Cauſe was heard, and 19,000*l*. decreed againſt the Defendant, and he committed for Non-payment; and then *J. S.* petitions again to be diſcharged, becauſe being a *Manucaptor*, and the Party in Priſon, there can be no Danger of his going beyond Sea. *Lord Keeper:* If ſo, then his Surety is in no Danger, and would not diſcharge him.

Preced. Chan. 230. *Le Clea* v. *Trot*.

4. That he may command his Subjects to return Home; and therein of awarding a Privy Seal.

As the King may reſtrain any of his Subjects from going abroad, in like Manner it is clearly agreed, that he may command them to return home; and that the diſobeying a Privy Seal to this Purpoſe is the higheſt

Dyer 128. b. Lane 44. Moor 109. 3 Inſt. 179.

higheſt Contempt. 1*ſt*, It is a Diſobedience to the Command of the King himſelf directed to the Party. 2*dly*, The Command is, that he ſhall return upon his Faith and Allegiance, which is the ſtrongeſt Compulſion that can be uſed. 3*dly*, The Thing required by the King is the principal Duty of a Subject, *viz.* to be at the Service of his King and Country.

*Page 170 (*a*) And when he does return he ſhall be fined. Hawk. P. C. 59, 60.

* The Puniſhment for this Offence is, the ſeizing the Party's Eſtate (*a*) till he return; and of this there are divers Inſtances in our Books.

Dyer 128. b. Vouched in a Caſe there. Lan. 44. S. C. cited and ſaid to be proved by other Precedents.

As that of *William de Brittain* in the 19th Year of *Ed.* 2. who refuſing to return upon the King's Writ, his Goods and Chattels, Lands and Tenements, were ſeized in the King's Hands; and the like was done in the Caſe of (*b*) *Edward of Woodſtock* Earl of *Kent*, in the ſame Reign.

(*b*) Leon. 10. cited.

Dyer 176. Jenk. Cent. 220. *Bartue*'s Caſe.

So in the Caſe of one *Bartue* who married the Ducheſs of *Suffolk*, they obtained a Licence from Q. *Mar.* to go out of the Realm, under Pretence of recovering ſome Debts they were intitled unto as Executors to the Duke; when in Reality it was on Account of the Religion eſtabliſhed by Q. *Mar.* and living with other Fugitives under the Protection of the *Palſgrave* of the *Rhine* in *Germany*, who was an eminent *Calviniſt*, were ſent to by Privy Seal; but the Meſſenger in endeavouring to ſerve them with his Letters, being obſtructed, beat and abuſed by their Servants and Attendants, a Certificate was made of this, and their Lands and Tenements ſeiſed.

Leon. 9. Moor 109. Dyer 375. And. 95. S. C. Sir *Francis Englefield*'s Caſe. *Vide* alſo 7 Co. 18. Poph. 18. 4 Leon. 135.

So in the Caſe of Sir *Francis Englefield*, who departed the Kingdom on a Licence obtained for three Years; but not returning at the Expiration of the three Years, a Privy Seal was ſent to him by Q. *Eliz.* which he not obeying, and this Matter certified into Chancery by the Queen under her Sign Manual, in the fifth Year of her Reign by virtue of a Commiſſion under the Great Seal directed to Sir *Henry Nevil* and others, his Lands and Tenements were ſeiſed.

Lane 42, &c. *The King* v. *Earl of Nottingham.* Paſch. 7 Jac. 1. *in ſcac.*

So in the Caſe of Sir *Robert Dudley*, who, intending to travel, obtained a Licence from K. *Jam.* 1. to go to *Venice*; but before his Departure he by Indenture inrolled for valuable Conſideration, as was expreſſed in the Deed (but none paid) conveyed the Manor of *Killingworth* with other Lands, to the Earl of *Nottingham* and others in Fee, with a Proviſo, that upon Tender of an Angel of Gold all ſhould be void; and with a Covenant on the Part of the Bargainees, that they ſhould make all ſuch Eſtates as the ſaid Sir *Robert* ſhould appoint; the Bargainees were not Parties to the Deed, nor had they Notice of it 'till ſome Time after; but afterwards they made a Leaſe to Sir *Robert Lee*, to the Intent that Lady *Dudley* ſhould take the Profits of Part of the Premiſſes for ten Years, if their Eſtate continued ſo long unrevoked. The King, hearing that Sir *Robert* had been guilty of ſome bad Practices beyond Seas, in the fifth Year of his Reign ſent his Privy Seal to him, which he not obeying, the great Queſtion in this Caſe was, whether thoſe Lands thus conveyed were forfeited? And adjudged that they were, the Conveyance being fraudulent as to the King.

(*c*) Lane 48. *per Tanfield* Ch. Baron.

In theſe Caſes it hath been held, that the King hath only an Intereſt in the Offender's Lands 'till he return; and (*c*) that his reſtoring of them to him is not a Matter of Grace but of Right.

But

But though the Lands are to be reſtored to the Offender, yet it is held, that till his Return the King hath a greater Intereſt than the Perception of the Profits; and that he may aſſign or grant them, *quamdiu in manibus ſuis fore contigerint*; and that he or his Patentee are intitled to Woodfals, may make Leaſes, and grant Copyholds, being *Domini pro tempore*. Sav. 7, 8. Leon. 9. Dyer 176. *in Marg.* Moor 112.

* And on this Foundation it was holden, in Sir *Francis Engleſield*'s Caſe, that where Q. *Eliz.* in the eighth Year of her Reign, and after the Forfeiture of Sir *Francis*, granted a Manor, Part of Sir *Francis*'s Eſtate, with all the Profits, *quamdiu in manibus noſtris fore contigerit*; and afterwards the Acts 13 *Eliz. c.* 3. & 14 *Eliz. c.* 6. were made for veſting the Eſtates of Fugitives in the Crown; after which the Queen made a ſecond Seiſure of thoſe Lands, and by her Letters Patent appointed a Steward, who held a Court, took Surrenders and granted Admittances in Right of the Queen; yet it was reſolved, that this ſecond Seiſure, by virtue of theſe Acts, gave the Queen no greater Eſtate or Intereſt than ſhe had before by the Common Law; conſequently that the firſt Grant was good, and the Courts holden, Surrenders and Admittances by her Steward, were void. * Page 171 Moor 109. Dyer 375.

The regular Courſe in thoſe Caſes is for the Meſſenger to certify his Proceedings into Chancery, of which, by *Mittimus*, a Certificate is ſent into the Exchequer, out of which Court a Commiſſion iſſues to inquire, &c. and ſeize the Lands of the Delinquent; and it is ſaid, that this Certificate admits of no Traverſe, becauſe no Venue can be laid here for its Trial, the Matter being tranſacted beyond Sea; but it is ſaid, that the *(a)* Meſſenger ought to make Oath of the Service of the Writ of Privy Seal. Dyer 176. And. 95.

(a) The Writ ought to be ſerved by ſome Meſſenger, who upon his Oath is to make a Certificate of it in Chancery. 3 Inſt. 180.

And it is ſaid, that there is no Need of a Date to the Privy Seal; for that the Matter therein contained is not traverſable, nor is it returned as other Writs are, but the King who iſſues it is to receive the Meſſage or Anſwer of the Party, and he is the Judge of the Contempt. Leon. 9.

The Contempt incurs from the very Time Notice is given the Party; for the Words of the Writ are *quod indilate*, &c. Lane 46.

It is held, that tho' the Party hath a Licence at the Time of his going abroad, that yet he is obliged to obey the Privy Seal; for that ſuch Licence is countermandable, being only an Authority or Diſpenſation, and not like an Intereſt moving from the King. Lane 46. & *vide* Dyer 176.

It is ſaid that the King cannot recal the Party, but by the Great Seal or Privy Signet. 3 Inſt. 180.

(D) Of the King as the Fountain of Juſtice, and intruſted with the Execution of the Laws: And herein,

1. That all Civil Juriſdiction flows from the King.

ALL Juriſdiction exerciſed in theſe Kingdoms that are in Obedience to our King, is derived from the Crown; and the Laws, whether of a Temporal, Eccleſiaſtical, or Military Nature, are called his Laws; and *Fleta*, c. 17. Co. Lit. 99. a. 114. *vide* Title *Courts*.

and it is his Peerogative to take Care of the due Execution of them. Hence all Judges muſt derive their Authority from the Crown, by ſome Commiſſion warranted by Law; and muſt exerciſe it in a lawful Manner, and without any the leaſt Deviation from the known and ſtated Forms.

*Page 172 4 Inſt. 164. 2 Inſt. 54, 478. 2 Hal. Hiſt. P. C. 131, 282. Vaugh. 418. 2 Salk. 510.

* So although the King is the Fountain of Juſtice, and intruſted with the whole executive Power of the Law, yet he hath no Power to change or alter the Laws which have been received and eſtabliſhed in theſe Kingdoms, and are the Birthright of every Subject; for it is by thoſe very Laws that he is to govern; and as they preſcribe the Extent and Bounds of his Prerogative, in like Manner do they declare and aſcertain the Rights and Liberties of the People, and therefore admit of no Innovation or Change but by Act of Parliament.

Will. Rep. 329. pl. 87. *Chriſtian* v. *Corren.*

From the inherent Right inſeparable from the King to diſtribute Juſtice among his Subjects, it hath been held, that an Appeal from the Iſle of *Man*, lies to the King in Council without any Reſervation in the Grant of the Iſle of *Man* of any ſuch Right; and it was ſaid, that though there had been excluſive Words, that yet the Grant muſt have been conſtrued to be void upon the King's being deceived, rather than the Subject ſhould be deprived of a Right inſeparable to him as a Subject, of applying to the Crown for Juſtice.

2. Of the King's Prerogative in Eccleſiaſtical Matters.

Hal. Hiſt. P. C. 75.

The Supremacy of the Crown of *England*, in Matters Eccleſiaſtical, is a moſt unqueſtionable Right, which, as my L. *Hale* ſays, may be proved by Records of undoubted Truth and Authority; and though as he ſays (*a*) the Pope made great Uſurpations and Incroachments on this Right, yet theſe were always complained of as illegal; and thoſe Incroachments are now pared off by the Statutes 25 *H.* 8. *cap.* 19, 20, 21. and 26 *H.* 8. *cap.* 1.

(*a*) The Pope by Degrees, and whilſt the People were blinded with Superſtition, uſurped the Royal Authority in all Matters Eccleſiaſtical, as is manifeſt by the Statute of *Proviſors*, which was made as a Remedy for this Grievance, &c. Ld. Raym. 25. & *vide* 5 Co. *Cawdry's* Caſe. Cro. Eliz 542. and the Statutes 26 H. 8. c. 1. and 1 Eliz. c. 1. whereby ſuch Authority as the Pope had, claiming as Supreme Ordinary, is annexed to the Crown, and is declared to belong thereto of Right; for which *vide* 4 Inſt. 341. Lit. Rep. 232. Moor 463. Dyer 273. Selden *Janus Anglo.* 27. Co. Lit. 134. Dav. 88. 2 Inſt. 580, 584,

(*b*) The Laws of *England* have no Dependance on the Civil Law, nor are governed by it, but are binding by their own Authority.

(*b*) So that the King of *England* doth not recognize any foreign Authority ſuperior or equal to him in this Kingdom, neither do the Laws of the Emperor or Pope of *Rome*, as ſuch, bind in the Kingdom of *England*; but all the Strength and Obligation that either the Papal or Imperial Laws have obtained in this Kingdom, is only becauſe they are and have been received and admitted in this Kingdom, either by Conſent of Parliament or by immemorial Uſage and Acceptation in ſome particular Courts and Matters, and not otherwiſe.

Hal. Hiſt. P. C. 16.

Show. Rep. 218. Rol. Abr. 530. 4 Co. 29. 7 Co. 42. 5 Co. 7. 2 Vent. 43.

The King therefore is ſaid to have two Juriſdictions, one Temporal the other Eccleſiaſtical; the latter of which is derived from the Common Law, though the Form of the Proceedings and the coercive Power exerciſed in the Eccleſiaſtical Courts, is after the Form of the Canon and Civil Law; and this being indulged to them, the Judges of the Common Law will give Credit to their Proceedings and Sentences in Matters in which they have a Juriſdiction, and believe them conſonant

ſonant to the Law of Holy Church, although againſt the Reaſon of the Common Law; and if there be a *Gravamen* it muſt be redreſſed by Appeal.

But if theſe Courts exceed their Juriſdiction, and the Bounds and Limits preſcribed them by the Laws and Statutes of the Realm, they are ſubject to the Controul of, and may be prohibited by, the King's * Temporal Courts; for the Canon and Civil Law did not bind originally in *England*, nor have they been received univerſally; and therefore are called *Leges ſub graviore Lege*, the Common Law ſtill maintaining its Superintendancy over them. *Vide* Title *Courts.* *Page 173

The King being delivered from Papal Uſurpation, might by Common Law grant a Commiſſion to hear and determine Eccleſiaſtical Cauſes. Hence the Juriſdiction of the High Commiſſion Court was acknowledged as deriving its Authority immediately from the Crown; but it was held, that that Court, without the (*a*) Help of an Act of Parliament, could not in Matters of Eccleſiaſtical Conuzance uſe any Temporal Cenſure or Puniſhment, as Fine or Impriſonment.

(*a*) *Vide* 1 Eliz c. 1. a Statute intitled an Act for reſtoring to the Crown the ancient Juriſdiction Eccleſiaſtical; and the 16 Car. 1. c. 11. by which this Court is aboliſhed——and for the Juriſdiction it exerciſed, *vide* 12 Co. 45, *&c.* 13 Co. 2 Rol. Abr. 224. 4 Inſt. 332. Noy 149. Moor 917. March 80. Gibſ. Cod. 50.

Alſo the Common Law hath annexed unto certain Offices Eccleſiaſtical Juriſdiction, as incident to the Offices; thus every Biſhop by his Election and Confirmation, even before Conſecration, hath Eccleſiaſtical Juriſdiction annexed to his Office, as *Judex ordinarius* within his Dioceſe; and divers Abbots anciently, and moſt Archdeacons at this Day, by Uſage have the like Juriſdiction within certain Limits and Precincts; all which they derive from the Crown, although the Proceſs in the Eccleſiaſtical Court runs in the Name and under the Seal of the Biſhop or Eccleſiaſtical Judge. *Vide* Title *Eccleſiaſtical Courts.*

The Matters of Eccleſiaſtical Conuzance are of two Kinds, Criminal and Civil; their Criminal Proceedings extend to ſuch Crimes as by the Laws of the Land are of Eccleſiaſtical Conuzance, (*a*) as Hereſy, Fornication, Adultery, and ſome others, wherein their Proceedings are *pro reformatione Morum* and *pro ſalute Animæ*; and the Reaſon why they have the Conuzance of theſe and the like Offences, and not of others, as Murder, Theft, *&c.* is not from the Nature of the Offence, for the one is as much a Sin as the other; and therefore if the Conuzance were of Offences *quatenus Peccata contra Deum*, it ſhould extend to all Sins againſt God's Law; but the true Reaſon is, becauſe the Law of the Land hath indulged them with the Conuzance of ſome Crimes, and not of others. 2 Inſt. 488. Vaugh. 212. (*a*) They cannot hold Plea of a Legal Perjury or Perjury in Contracts, but for Perjury in their Courts they may puniſh. —So where one forged Letters of Ordination it was held, that the Spiritual Court may proceed to deprive him. Sid. 217. Lev. 138. Keb. 721. Keilw. 39.——So where a Pariſh Clerk was guilty of ſcandalous Crimes, and being proceeded againſt in the Spiritual Court, it was held on a Motion for a Prohibition, that they may proceed to deprive him for theſe Crimes, though they were in their Nature only puniſhable in the Temporal Courts. 2 Ld. Raym. 1507. *&* *vide* Dyer 293. Comp. Incumb. 53. Hob. *Searle's* Caſe L. P.——Cannot puniſh for writing a Libel, being an Offence indictable at Law. Comb. 71.——For Sacrilege the Party may be proceeded againſt in the Spiritual Court, although the Robbery is likewiſe puniſhable in the Temporal Courts. 37 H. 6. 39. Bro. *Appeal* 31. 45. 2 Inſt. 492. 2 Keb. 23. Sid. 281.——So an Action at Law lies for an Aſſault and Battery on a Spiritual Perſon, as alſo a Suit in the Spiritual Court for Irreverence to his Perſon. 6 Mod. 136. Cro. Eliz. 655.—— But for calling a Woman Whore and Thief, the Party cannot be proceeded againſt in the Spiritual Court and by Action at Law, being one continued Act. 2 Rol. Abr. 259. So for Solicitation of Chaſtity which is attended with Force and Violence. *Vide* 4 Co. 20. 2 Salk. 552. pl. 15. 7 Mod. 78. 2 Ld. Raym. 809, 1101.

The Civil Cauſes committed to their Conuzance, wherein the Proceedings are *ad inſtantiam Partis*, ordinarily are the Buſineſs of Tithes, *Vide* Title *Eccleſiaſtical Courts*, Let. (D)

Rights

Rights of Inſtitution and Induction to Eccleſiaſtical Benefices, Matters of Matrimony and Divorce, and Teſtamentary Cauſes and the Incidents thereunto, as the Inſinuation of Teſtaments, Legacies of Goods and Money, &c. wherein they proceed according to the Canon Law, and the Civil Law, which is taken as a Director in Points of Expoſition and Determination.

*Page 174

* 3. Of his Prerogative in creating Officers.

Dyer 176. 2 Rol. Abr. 152. 4 Co. 32. 2 Inſt. 425, 540. 12 Co. 116. Rol. Rep. 206. Show. Par. Ca. 111. Lev. 219. Co. Lit. 3, 114. 2 Vent. 270. 4 Inſt. 125. 6 Co. 11, 12. 2 Inſt. 540. 2 Sid. 141. Moor 808. 4 Inſt. 200.

The King as the Fountain of Juſtice hath an undoubted Prerogative in creating Officers, and all Officers are ſaid to derive their Authority mediately or immediately from him; thoſe who derive their Authority from him are called the Officers of the Crown, and are created by Letters Patent; ſuch as the great Officers of State, Judges, &c. and there needs no greater or ſtronger Evidence of a Right in the Crown herein, than that the King hath created all ſuch Officers Time immemorial.

But though all ſuch Officers derive their Authority from the Crown, and from whence the King is termed the univerſal Officer and Diſpoſer of Juſtice, yet it hath been held, that he hath not the Office in him to execute it himſelf, but is only to grant or nominate; nor can the King grant any new Powers or Privileges to any ſuch Officers, but they muſt execute their Offices according to the Rules eſtabliſhed and preſcribed them by the Law.

Neither can the King create any new Office inconſiſtent with our Conſtitution or prejudicial to the Subject.

Jon. 231. *Mounſon* v. *Leiſter*.

And on this Foundation it was held, that an Office created by Letters Patent for the ſole making of all Bills, Informations and Letters Miſſive in the Council of *York* was unreaſonable and void.

Hob. 63.

So it hath been held, that the King could not grant to any Perſon to hold a Court of Equity, it being a ſpecial Truſt committed to the King, and not by him to be intruſted to any other except his Chancellor.

4 Aſſ. 5. Br. *Commiſſion* 3, 15, 16. 2 Inſt. 54.

So a Commiſſion to ſeize the Goods and impriſon the Bodies of all Perſons who ſhall be notoriouſly ſuſpected of Felonies or Treſpaſſes, without any Indictment or legal Proceſs againſt them, was held illegal and void.

4 Inſt. 163. (*a*) 18 E. 3. c. 1, 4.

So Commiſſions to aſſay Weights and Meaſures, being of new Invention, were condemned by (*a*) Parliament.

Co. 116.

So where one *Chute* petitioned the King to erect a new Office for regiſtring all Strangers except Merchant Strangers, and to grant the ſaid Office to the Petitioner with or without Fee; and it was reſolved by all the Judges, that the Erection of ſuch Office for the Benefit of a private Perſon was againſt Law.

2 Inſt. 478.

So it is held by Ld. *Coke*, that the King could not authoriſe Perſons to take Care of Rivers and the Fiſhery therein, according to the Method preſcribed by the Statute of *Weſtm.* 2. (13 *Ed.* 1. *ſt.* 1.) *cap.* 47. before the making of that Statute.

Vide Head of *OFFICE and OFFICERS*.

4. Of his Prerogative in making War and Peace.

The Power of making War or Peace is *inter Jura ſummi Imperii*, and in (*a*) *England* is lodged (*b*) ſingly in the King; tho', as my Lord *Hale* ſays, it ever ſucceeds beſt when done by Parliamentary Advice. Hal. Hiſt. P. C. 159. 7 Co. 25.

(*a*) The *Jus Gladii*, both Military and Civil, is one of the *Jura Majeſtatis*; and therefore no Man can levy War in this Kingdom without the King's Commiſſion. 3 Inſt. 9. (*b*) The Diſputes touching the Diſpoſition of the *Militia* are now ſettled, and declared to be the Right of the Crown, by the Statutes of 13 Car. 2. c. 6. and 13 & 14 Car. 2. c. 3. Hal. Hiſt. P. C. 130.

* A general War, according to my Lord *Hale*, is of two Kinds; *Page 175 Hal. Hiſt. P. C. 163.

1. *Bellum ſolemniter denunciatum.* 2. *Bellum non ſolemniter denunciatum.* The firſt is, when War is ſolemnly declared or proclaimed by our King againſt another Prince or State, which is the moſt formal Solemnity of a War now in Uſe. 2*dly*, When a Nation ſlips ſuddenly into a War without any Solemnity, which happens by granting of Letters of *Marque*, by a foreign Prince invading our Coaſts, or ſetting upon the King's Navy at Sea; and hereupon a real though not a ſolemn War may and hath formerly ariſen; and therefore to (*c*) prove a Nation to be at Enmity with *England*, or to prove a Perſon to be an *Alien Enemy*, there is no Neceſſity of ſhewing any War proclaimed; but it may be averred, and ſo put upon the Trial of the (*d*) Country whether there was a War or not.

(*c*) When the Courts of Juſtice are open, and the Judges and Miniſters of the ſame may by Law protect Men from Oppreſſion and Violence, and diſtribute Juſtice to all, it is ſaid to be Time of Peace; ſo when by Invaſion, Inſurrection and Rebellions, &c. the peaceable Courſe of Juſtice is diſturbed, then it is ſaid to be Time of War; and the Trial hereof is by the Records and Judges of the Courts of Juſtice. Co. Lit. 249. (*d*) Owen 45.

Peace is of two Kinds; 1*ſt*, Poſitive or Contracted. 2*dly*, Such a Peace as is only a Negation or Abſence of War. A Poſitive Peace is ſuch as ariſeth by Contracts, Capitulations, Leagues or Truces between Princes or States that have *Jura ſummi Imperii*, and is of two Kinds. Hal. Hiſt. P. C. 159.

1. Temporary, which is properly (*e*) a Truce, which is a Ceſſation from War already begun; and then, the Term being elapſed, the Princes or States are *ipſo facto* in the former State of War, unleſs it be protracted by new Capitulations, or be otherwiſe provided in the Inſtrument or Contract of the Truce. 2. Perpetual *ſine termino* or indefinite, which regularly continues according to the Tenor or Conditions of the Agreement, until ſome new War be raiſed between the Princes or States upon ſome emergent Injury ſuppoſed to be done by the one Party or the other; and this is properly called a (*f*) League *Fœdus*, and makes the Princes and States *Confœderati*; and though this may be variouſly diverſified, according to the Capitulations, Conditions and Qualifications of ſuch Leagues, yet they are ordinarily of theſe Kinds. 1*ſt*, Leagues offenſive and defenſive, which oblige the Princes not only to a mutual Defence, but alſo to be aſſiſting to each other in their military Aggreſſes upon others, and makes the Enemies of one in Effect the common Enemies of both. 2*dly*, Defenſive but not offenſive, obliging each to ſuccour and defend the other in Caſes of Invaſion or War by other Princes. 3*dly*, Leagues of ſimple Amity, whereby the one contracts not to invade, injure, or offend the other, which regularly includes alſo Liberty of mutual Commerce and Trade, and Safeguard of Merchants and Traders in either's Dominions.

(*e*) The Difference between a League and Truce is, that a Truce is a Ceſſation from War for a certain Time, but a League is an abſolute Striking of Peace. 4 Inſt. 156. *vide* Molloy, c. 7, 8.

(*f*) In all Leagues the Municipal Laws of each Country are excepted. 2 Show. 369.

Hal. Hiſt. P. C. 160.

2. A Peace which is only a Negation or Abſence of War is where no League or Articles of Peace intervene, nor yet any Denunciation of War; as among divers Princes in the World who never capitulated one with another, and yet there is no State of War between them; and the general Rule is, *ubi Bellum non eſt Pax eſt.*

The King, in conſequence of his Power in making War and Peace, hath a Prerogative in the Coin and Royal Mines, in Salt-Petre and Gunpowder; may (*a*) enter into a Man's Lands to make Fortifications; may lay on Embargoes, grant (*b*) Letters of *Marque* and Repriſal, * preſs (*c*) Soldiers, Sailors, *&c.* and though in many Inſtances relating to theſe Matters, the ſtrict Letter of the Law may be exceeded, yet from the Neceſſity of Order, Government and Diſcipline, are they countenanced and allowed; *quod Neceſſitas cogit defendit.*

(*a*) 1 Rol. Rep. 152.

*Page 176

(*b*) Molloy 30. 2 Rol. Abr. 175.——No Perſon can take the Ship or Goods of the adverſe Party unleſs he hath a Commiſſion from the King, the Admiral, or thoſe that are ſpecially appointed thereunto. Hal. Hiſt. P. C. 162. Vern. 54.——By the Law of the Admiralty, the Property of a Ship taken upon the High Sea without Letters of *Marque*, veſts in the King upon the taking. Carth. 399.——Clauſe in a Charter which impowers the Seizing the Goods of every Perſon is illegal and void. Show. 137. (*c*) 6 Co. 27. Hutt. 134. §

---

§ As to the preſſing of Sailors, ſee Foſter Rep. The Caſe of *Alexander Broadfoot*, fo. 154. and Black. Com. 1 V. 418. and ſee alſo Comb. 245.

Ld. Raym. 283. *per Treby* Ch. J.

The King may declare War againſt one Part of the Subjects of a Prince, and may except the latter Part; as was done by K. *Will.* in his Declaration of War with *France*, where he excepted the *French* Proteſtants; and of ſuch Proclamations all ought to take Notice, becauſe the War begins only by the King's Proclamation.

5. Of his Prerogative as *Parens Patriæ* in taking Care of Infants, Ideots, Lunatics, and Charitable Uſes.

Vide Head of *Infants.*

The King, as *Parens Patriæ*, hath the Protection of all his Subjects; and in a particular Manner is to take Care of all thoſe who by Reaſon of their Want of Underſtanding are incapable of taking Care of themſelves and their Affairs. By virtue of this high Truſt, Infants, who by Reaſon of their Nonage are under Incapacities, are under the Protection of the Crown; and hence ariſes Allegiance, as a Debt of Gratitude, which can never be cancelled, though the Subject owing it goes out of the Kingdom, or ſwears Allegiance to another Prince.

Will. Rep. 103.

This Truſt lodged in the King, and the Juriſdiction exerciſed herein, originally belonged to the Court of Chancery, and now, upon the Diſſolution of the Court of Wards, is again devolved on that Court. Hence it is every Day's Practice in that Court to determine as to the Right of Guardianſhip, to puniſh Abuſes in relation to their Perſons, *&c.*

Will. Rep. 706. in the Caſe of the Duke of *Ormond*, who was appointed Guardian to the Duke of *Beaufort.*

If a Perſon appointed Guardian is attainted, or otherwiſe becomes incapable, the Truſt devolves on the Great Seal as the General Guardian of all Infants.

Vide Head of *Ideots and Lunatics.*

In the like Manner and for the ſame Reaſon it is, that Ideots and Lunaticks, who are incapable of taking Care of themſelves, are provided for by the King as *Pater Patriæ.*

Vide Head of *Charitable Uſes and Mortmain.*

In like Manner in the Caſe of Charities, the King *pro bono publico* has an original Right to ſuperintend the Care thereof; ſo that abſtracted

Will. Rep. 119.

from

from the Statute 43 *Eliz. cap.* 4. relating to Charitable Uſes, and antecedent to it as well as ſince, it has been every Day's Practice to file Informations in Chancery in the Attorney-General's Name, for the Eſtabliſhment of Charities, *&c.*

6. Of his Prerogative in Pardoning.

This high Prerogative is (*a*) inſeparably incident to the Crown, and the King is intruſted herewith upon a ſpecial Confidence, that he will ſpare thoſe only whoſe Caſe, could it have been foreſeen, the Law * itſelf may be preſumed willing to have excepted out of its general Rules, which the Wiſdom of Man cannot poſſibly make ſo perfect as to ſuit every particular Caſe.

* Page 177

Co. Lit. 114. b. H.P. C. 104. 3 Inſt. 233.

Show. 284. (*a*) It is a perſonal Truſt and Prerogative in him for a Fountain of Bounty and Grace to his Subjects, as he obſerves them deſerving or uſeful to the Public; which he can neither grant or otherwiſe extinguiſh; *per Holt* Ch. J. Ld. Raym. 214. *& per Rokeby* J. As he cannot but have the Adminiſtration of public Revenge, ſo he cannot but have a Power to remit it by his Pardons when he judges it proper. *Idem.*

Vide Title PARDON.

7. Of Diſpenſations and *Non Obſtantes.*

The Power and Prerogative of diſpenſing with Laws and granting *Non Obſtantes*, hath been always looked upon with a jealous Eye, and are ſaid to have been firſt invented in *Rome* and brought into this Kingdom by the Pope and Clergy.

2 Rol. Abr. 179. Dav. 69. 2 Mod. 261.

But though they have not been favoured in the Courts of Juſtice, yet it hath been always held, that the King had a Prerogative in certain Caſes † to grant Diſpenſations and *Non Obſtantes*, which is founded *in Plenitudine Poteſtatis*; and upon this Reaſon, that it is impoſſible for Law-Makers by human Prudence to foreſee ſeveral particular Caſes that may happen, wherein a Law that is good in general might be miſchievous in ſome particular Caſes; and therefore and for the publick Good the Law intruſts the King (who is intruſted with the Execution of the Law) to judge of ſuch Circumſtances; and when ſuch particular Caſe happens, to exempt it out of the Penalty of the General Law. §

11 Co. 88. Finch 234. Dyer 54. pl. 17.

† Whether it did or did not exiſt (and from the Nature of our Conſtitution it perhaps never did) there is now an End to the Claim. *Vide* the Statute *infra* 178.

§ In the ſecond Paragraph, fo. 178. a Caſe is put, that before the Statute of W. 3 (*infra* 178) might perhaps have admitted of ſome Doubt.

The prevailing Diſtinction herein hath been, that the King cannot by any previous Licence or Diſpenſation make an Offence diſpuniſhable which is *Malum in ſe*; but that in certain Matters, which are only *Mala Prohibita*, he may to certain Perſons and on ſome ſpecial Occaſions; and this Diſtinction the Ch. J. (*b*) *Vaughan* admits, being well underſtood and rightly applied, is the beſt Guide in theſe Matters.

12 Co. 29. Dav. 75. 5 Co. 35.

(*b*) In the Caſe of *Thomas* and *Sorrel*, Vaugh. 330 to 359. where this Learning is fully diſcuſſed; and in Lev. 217. Sid. 6, 7. S. C.

On this Diſtinction it was always held, that the King could not diſpenſe with the Laws againſt Murder, Adultery, Stealing, Inceſt, Sacrilege, Extortion, Perjury, Treſpaſs, and others of the (*c*) like Kind; and that

Vaugh. 334.

(*c*) Hence the Reſolution in the *Year-Book* 11 H. 7. 11, 12. pl. 35. that the King's Grant to the Biſhop of *Saliſbury* and his Succeſſors having the Cuſtody of a Priſon, that they ſhall be quit of all Eſcapes, *&c.* having been allowed

allowed in *Eyre* ſhall be a good Diſcharge

that a Pardon for any ſuch like Offence that was *Malum in ſe* before it happened was void.

from any Fine for a negligent Eſcape out of ſuch Priſon, is doubted of in 2 Hawk. P. C. 389.

2 Hawk. P. C. 390. and ſeveral Authorities there cited.

But where a Thing lawful in its own Nature is made unlawful by Act of Parliament only, as the Carrying Bell-Metal or Beer, *&c.* out of the Realm, Importing certain Merchandizes in foreign Ships, *&c.* Selling Wines beyond a certain Price, Exporting Wool to any other Place than *Calais*, Coining Money of a baſe Alloy, and other Matters of the like Nature; it ſeems formerly to have been taken for granted, that generally the King might diſpenſe with it as to a particular Time or Place, or Perſon, or even Corporation aggregate, ſo far as the Public was concerned in it. §

§ Which was (in ſuch Caſes) making the King Legiſlator, and, as ſuch, full, complete, and ſole Sovereign, inſtead of executive Magiſtrate.

2 Hawk. P. C. 390.

Yet where ſuch Diſpenſation could not but be attended with great Inconvenience, as the Introducing a Monopoly, or Fruſtrating the End for which the Law was made, as the Licenſing a particular Perſon to import foreign Cards or Wines prohibited by Parliament, and * *a fortiori*, if it tended to ſuſpend the whole Statute in general, it was commonly agreed to be void. †

*Page 178

† Theſe kind of Determinations ſhew the Abſurdity of the Claim. As to what the King might legally diſpenſe with, ſee the Paragraph next but one.

Hawk. P. C. 390. Hob. 214. Hard. 110.

Alſo wherever an Act of Parliament gives a particular Intereſt or Right of Action to the Party grieved by the Breach of it, as the Statutes of Mortmain, which give an Entry to the next immediate Lord for an Alienation to a Corporation, the Statutes againſt Maintenance, Forcible Entries, Carrying Diſtreſſes out of the Hundred, ſuffering one in Execution to eſcape, *&c.* which give an Action to the Party grieved by the Offence prohibited; it ſeems to have been always agreed, that no Charter by the King can be of any Force to bar the Right of the Party grounded upon ſuch Statute; becauſe it is a ſettled Rule, that the King cannot prejudice the Intereſt of the Party.

2 Hawk. P. C. 390. ‡ See *poſt.* 187. (*a*) 12 Co. 18.

Alſo where a Statute is expreſs, that the King's Charter againſt the ‡ Purport of it, whether with or without a Clauſe of *Non Obſtante*, ſhall be void; it is ſaid by *(a)* Sir *Ed. Coke*, that no Clauſe of *Non Obſtante* can diſpenſe with it, unleſs it tend to reſtrain ſome Prerogative ſolely and inſeparably incident to the Perſon of the King; as the Right of Pardoning, or of Commanding the Service of the Subject for the Public Weal; which being, as he ſeems to argue, founded on the Law of Nature, are ſo far inſeparable from the King, that by a Clauſe of *Non Obſtante* he may diſpenſe with any Statute whatſoever which tends to deprive him of them. ‖

‖ This may admit of Doubt: But it ſeems ſtrange to ſay, that when the *whole* Legiſlative Body hath enacted any Thing, that one of the three Eſtates of the Realm, being only a *Part* of the Legiſlative Body, ſhould have a Power to diſpenſe with what hath been ſo enacted. However, there is now an End of the Queſtion. *Vide* the Statute of W. 3. *infra.*

2 H. 7. 6. b. *vide* 2 Hawk. P. C. 390.

On this Foundation the Reſolution of the Judges in the *Year-Book* *H.* 7. is ſaid to be maintainable; in which it is adjudged, that where the Statute of 23 *H.* 6. *cap.* 8. expreſsly enacts, that Patents to Sheriffs to continue longer than a Year ſhall be void, and the Party diſabled to bear the Office of Sheriff notwithſtanding any Clauſe of *Non Obſtante*; yet the King

King by the Clauſe of *Non Obſtante* might make a good Patent of ſuch Office for Life.

In the Reign of K. *Jam.* 2. when the King's diſpenſing Power was endeavoured to be extended, a Difference was taken and attempted to be eſtabliſhed in thoſe Caſes, which was, That as to a General Law made for public Government, and in which all the King's Subjects were equally intereſted, the King might diſpenſe with it, but not where any Right or Intereſt veſted in a particular Perſon; and it was ſaid to be no Objection to ſuch diſpenſing Power, that the Law was made *pro bono publico*; for that though it was *pro bono Subditorum*, yet not being *Singulorum* but *Populi Complicati*, the King might diſpenſe with it.

Alſo the following Points were determined in Sir *Ed. Hale*'s Caſe in the ſame Reign. 1. That the King is Sovereign or abſolute Prince. 2. That the Laws of the Land are the King's Laws. 3. That to diſpenſe with Penal Laws, where the Subject hath no particular Damage, for neceſſary and urgent Occaſions, is an inſeparable Prerogative of the King. 4. That the King is ſole Judge of ſuch Neceſſity. 5. That this Truſt reſiding in him came not from the People, but was a Sovereign Right of the King *ab Antiquo*. 6. That the Diſpenſation in this Caſe, becauſe it came within three Months before any Diſability incurred, was a good Bar to the Plaintiff's Action. Comb. 21. 2 Show. 475. pl. 440. Clift. 133.

Theſe Reſolutions being thought of dangerous Conſequence, as tending in Effect to make the Execution of the moſt neceſſary Laws precarious, and merely dependant on the Pleaſure of the King;

By the 1 *W. & M. ſeſſ.* 2. *cap.* 2. it is declared and enacted, "That "no Diſpenſation by *Non Obſtante* of or to any Statute or any Part there-"of be allowed, but that the ſame ſhall be held void and of none Effect, "except a Diſpenſation be allowed in ſuch a Statute."

As the abovementioned Caſe of Sir *Ed. Hale* is the moſt remarkable Caſe on this Subject, it may not be improper to inſert it at large *as taken from a MS. Report, together with the Argument of Sir *Ed. Northey*. *Page 179

Anthony Godden v. Sir *Ed. Hale*, Trin. 2 Jac. 2. in *B. R.*

This is an Action of Debt for 500*l.* founded on a Conviction of the Defendant for exerciſing the Office of a Colonel of a Foot Regiment, after Neglect to take the Oath of Allegiance and Supremacy injoined to be taken by the Statute 25 *Car.* 2. *cap.* 2 by which Statute the Defendant hath forfeited the Sum of 500*l.* to him that ſues for the ſame.

The Declaration ſets forth, that the Defendant Sir *Ed. Hale*, the 20th of *Nov. Ann.* 1 *Regni* of this King, at *Hackington* in the County of *Kent* was advanced to be a Colonel of a Foot Regiment in the ſaid County (which the Plaintiff avers to be a Military Office and Place of Truſt under his ſaid Majeſty and by Authority from him derived); and that the Defendant held and exerciſed the ſaid Office for three Months then next following, and to the Time of exhibiting the Bill of the Plaintiff, and did and doth inhabit in the ſaid Pariſh, and County, and did not either in the Court of Chancery or in this Court, in the next Term or in the next Quarter-Seſſions of the Peace holden for the ſaid County of *Kent* or Place where he did reſide, or within three Months after his Admiſſion to the ſame, take the ſeveral Oaths of Supremacy and Allegiance; but did wholly neglect to do the ſame, and did continue after his Neglect to execute the ſaid Office, and yet doth execute the ſame, contrary to the Form of the Statute in that Caſe made and provided.

The Declaration further ſets forth, that the ſaid Sir *Ed. Hale* the Defendant 29 *March* laſt, at the Aſſiſes held at *Rocheſter* in the County of *Kent* before the late Ld. Ch. J. *Jones* and Mr. *Jo. Withens* Juſtices of *Oyer* and *Terminer* for the ſaid County, was indicted for the ſaid Neglect, and

and for executing the ſaid Office after the ſaid Neglect contrary to the Form of the ſaid Statute; and thereon was in due Form of Law convicted, as by the Record thereof may appear; and the Plaintiff intitles himſelf to the ſaid 500*l.* forfeited by the Defendant by the ſaid Act on his ſaid Conviction, and ſaith the Defendant hath not paid him the ſame.

To this Declaration the Defendant pleads in Bar, that the King's Majeſty that now is, after the Defendant's Admiſſion to the ſaid Office, and within the three Months next enſuing, and before the next Term or Quarter Seſſions of the Peace after the ſame, and before the exhibiting the Bill of the Plaintiff in this Court, *viz.* the 9th Day of *January* in the firſt Year of the Reign of his preſent Majeſty, his ſaid Majeſty by his Letters Patent under the Great Seal of *England*, did diſpenſe, pardon, remiſe, and diſcharge, to and with the ſaid Defendant, of and from taking the ſaid Oaths of Allegiance and Supremacy, and from receiving the Sacrament according to the Uſe of the Church of *England*, and from ſubſcribing the Teſt mentioned in the Act of 25 *Car.* 2. (*cap.* 2.) or mentioned and contained in any other Acts of Parliament, and of and from all Crimes, Convictions, Penalties, Forfeitures, Damages, and Diſabilities incurred or to incur at any Time then after for executing the ſaid Office, after he ſhould omit, neglect, or refuſe to do and perform any of the ſaid Matters injoined to be done by the ſaid Act; and further, that his ſaid Majeſty by his ſaid Letters Patent did grant unto the Defendant, that he ſhould be enabled to hold the ſaid Office without taking the ſaid Oaths or ſubſcribing the ſaid Teſt, as if the ſaid Act had never been made.

To this Plea the Plaintiff demurred, and the Defendant joined in Demurrer.

Mr. *Northey.* I am of Counſel with the Plaintiff in this Caſe, and am humbly to ſhew your Lordſhip and the Court the Cauſes of this Demurrer.

*Page 180 * This Action is grounded on the Statute made 25 *Car.* 2. *cap.* 2. which requires, that all and every Perſon or Perſons, that ſhould be admitted, entred, placed, or taken into any Office or Offices Civil or Military, or ſhould receive any Pay, Salary, Fee, or Wages by reaſon of any Patent or Grant of his then Majeſty, or ſhould have Command or Place of Truſt from or under his ſaid late Majeſty, his Heirs or Succeſſors, or by his or their Authority, or by Authority derived from him or them within this Realm of *England*, &c. after the firſt Day of *Eaſter Term* 1673, and ſhall inhabit, be, or reſide, when he or they is or are ſo admitted or placed, within the Cities of *London* or *Weſtminſter*, or within thirty Miles of the ſame, ſhall take the ſeveral Oaths of Supremacy and Allegiance in his Majeſty's High Court of Chancery or in the Court of King's Bench in the next Term after ſuch his or their Admittance or Admittances into the Office or Offices, Imployment or Imployments aforeſaid; and that all and every ſuch Perſon or Perſons to be admitted as aforeſaid, not having taken the ſaid Oaths, ſhall, at the Quarter-Seſſions of that County or Place where he or they ſhall reſide, next after ſuch his Admittance or Admittances into any of the ſaid reſpective Offices or Imployments aforeſaid, take the ſaid ſeveral reſpective Oaths as aforeſaid, and ſhall receive the Sacrament of the Lord's Supper, according to the Uſage of the Church of *England*, within three Months after his or their Admittance into or receiving the ſaid Authority and Imployment, in ſome publick Church on ſome Sunday immediately after divine Service and Sermon, and ſhall ſubſcribe the Teſt in the ſaid Act mentioned at the Time when he ſhall take the ſaid Oaths.

And by the ſaid Act it is further enacted, that all and every the Perſon and Perſons aforeſaid, that do or ſhall neglect or refuſe to take the ſaid Oaths

Oaths and Sacrament in the ſaid Courts and Places, and at the reſpective Times as aforeſaid, ſhall be *ipſo facto* adjudged incapable and diſabled in and to all Intents and Purpoſes whatſoever to have, occupy and enjoy the ſaid Office or Offices, Imployment or Imployments, *&c.* and every ſuch Office and Place, Imployment and Imployments ſhall be void, and is by the ſaid Act adjudged void.

Then comes the Clauſe of Forfeiture, by which the Plaintiff is intitled to this Action, which is, That all and every ſuch Perſon or Perſons that ſhall neglect or refuſe to take the ſaid Oaths, or the Sacrament as aforeſaid, within the Times and in the Places aforeſaid, and yet after ſuch Neglect and Refuſal ſhall exerciſe any of the ſaid Offices or Imployments after the ſaid Terms expired wherein he or they ought to have done the ſame, and being thereupon lawfully convicted in or upon any Information, Preſentment or Indictment in any of the King's Courts at *Weſtminſter* or at the Aſſiſes, every ſuch Perſon and Perſons ſhall be diſabled from thenceforth to ſue or uſe any Action, Bill, Plaint or Information in Courſe of Law, or to proſecute any Suit in any Court of Equity, or to be Guardian of any Child, or Executor or Adminiſtrator of any Perſon, or capable of any Legacy or Deed of Gift, or to bear any Office within the Realm of *England*, *&c.* and ſhall forfeit the Sum of 500*l.* to be recovered by him or them that ſhall ſue for the ſame, to be proſecuted by an Action of Debt, Suit, Bill, Plaint or Information in any of his Majeſty's Courts at *Weſtminſter*, wherein no Eſſoin, Protection or Wager of Law ſhall lie.

In this Caſe, my Lord, I ſhall lay down and endeavour to maintain theſe two Things:

Firſt, That the Plaintiff hath well intitled himſelf by his Declaration to recover the 500*l.* demanded by him againſt the Defendant, according to the ſaid Act 25 *Car.* 2. *c.* 2. of the late King.

* Secondly, That the Defendant hath not by his Plea alledged any Mat- *Page 181
ter that can bar the Plaintiff from the Recovery of the ſame.

As to the firſt, I conceive, that by the ſaid Act four Things are neceſſarily required before the Informer can be intitled to bring an Action for the 500*l.*

Firſt, That ſuch Perſon hath been admitted into ſome Office, Place, or Imployment within the Deſcription and Intention of the ſaid Act.

Secondly, That ſuch Perſon after his Admiſſion into ſuch Office hath neglected or refuſed to take the ſaid Oaths at the Times and Places by the ſaid Act directed.

Thirdly, That ſuch Perſon after ſuch Neglect or Refuſal hath continued to execute ſuch Office.

Fourthly, That ſuch Perſon be convicted thereupon in one of his Majeſty's Courts at *Weſtminſter* or at the Aſſiſes, at the Suit of the King, by Information, Preſentment, or Indictment.

The Plaintiff hath ſhewn all theſe Things in his Declaration.

1. It is ſet forth, that the Defendant was admitted to be Colonel of a Foot Regiment, which is expreſsly averred to be a Military Office and a Place of Truſt under his preſent Majeſty, and by Authority from him derived, according to the Words of the ſaid Act of Parliament.

2. It is expreſsly ſhewn, that the Defendant did neglect to take the Oaths of Allegiance and Supremacy in the next Term in the Court of Chancery or this Court, or in the next Quarter-Seſſions for the County or Place where he did then inhabit, or within three Months next after his Admiſſion to the ſame, which are Times and Places limited and appointed by the ſaid Act for the taking of the ſaid Oaths.

3. It

3. It is expreſsly averred, that the Defendant did execute the ſaid Office after the Times expired, and his Neglect to take the ſaid Oaths.

4. Laſtly it is ſet forth in the Declaration, that the Defendant was by Indictment at the Aſſiſes in *Kent* before Sir *Tho. Jones* and Mr. Juſtice *Withens*, Juſtices of *Oyer* and *Terminer* for the ſaid County of *Kent*, lawfully convicted for executing the ſaid Office after his Neglect to take the ſaid Oaths, contrary to the Form of the ſaid Statute; which is a Conviction by one of the Means, *viz.* by Indictment, and in one of the Courts, *viz.* at the Aſſiſes, in the ſaid Statute mentioned.

Theſe, my Lord, I conceive are made neceſſary by the Statute, but it is not incumbent on the Informer to make them all appear to be ſo; for as to the three firſt, they muſt be proved on the Information, Preſentment or Indictment at the King's Suit, before ſuch Officer can be convicted; but when there is a Conviction, the Informer need only ſhew the Record thereof.

If then the Plaintiff hath intitled himſelf to his Action, the next Thing to be conſidered is, the Matter alledged by the Defendant in Bar thereof.

In ſpeaking to this I ſhall conſider two Things.

Firſt, Whether the Defendant ſhall be now admitted to plead this Diſpenſation in Bar of this Action, and whether he hath not loſt the Benefit of it, by not pleading of it in Bar to the Indictment whereon he hath been convicted.

Secondly, Admitting he may plead the ſame now, whether the ſame be good in Law to enable the Defendant to execute the ſaid Office without taking the ſaid Oaths, ſo that he ſhall be exempted from the Penalty inflicted by the ſaid Act of Parliament for executing the ſaid Office after his neglecting to take the Oaths.

*Page 182 * As to the firſt Point, I ſhall obſerve to your Lordſhip the Times mentioned in the Record now before you; the Defendant was admitted to the Office of Colonel the 20th of *Nov. Anno* 1. of this King; the Offence in executing the ſaid Office after his Neglect to take the Oaths of Allegiance and Supremacy, is alledged to be the 10th of *March Anno* 2. of this King; and the Conviction for the ſame appears to have been the 29th of *March Anno* 2. of this King; and the Diſpenſation pleaded by the Defendant was granted to him the 9th Day of *January Anno* 1. of this King, which was before the Offence and Conviction; ſo that as to this Point the Caſe will be but this:

An Act of Parliament doth enact, that he who doth neglect to take the Oath of Allegiance within the certain prefixed Time, and ſhall be convict of the ſame by Indictment, ſhall forfeit 500*l.* to him who will ſue on ſuch Conviction for the ſame; the Defendant neglects to take the ſaid Oath, having a Diſpenſation of the ſame granted to him before the Time lapſed for taking the ſaid Oath; and which (to make a Caſe) is admitted to be a good Excuſe, and may be pleaded in Bar of any Indictment for that Neglect.

The Defendant is after indicted for that Neglect, and pleads Not guilty to the ſame; and an Action is brought by the Plaintiff againſt him for the 500*l.* on the ſaid Conviction, and the Defendant pleads the ſaid Diſpenſation in Bar. I conceive with Submiſſion, he comes too late; for the Defendant had his Election to have pleaded the ſaid Diſpenſation in Bar of the Indictment, and to have relied on it; and that was his proper Time to make Uſe of the ſame or to waive it, and inſiſt on his Innocence, and plead Not guilty; and when he pleads Not guilty, and does not make Uſe of the Diſpenſation for his Defence, the Law con-

conſtrues it to be a Waving of it; and he ſhall at all Times after be eſtopped by his Plea and Conviction thereon to ſay, that he did not waive the ſame.

To make this plain, I humbly ſubmit to your Lordſhip's Conſideration, that after the Conviction the Defendant could never have made Uſe of his Diſpenſation to have ſtayed the Judgment on the ſame, which is the expreſs Opinion in the 11 *H.* 4. *Bro.* Tit. *Chartres de Pardon, pl.* 15. the Words of the Book are, "He who pleads Not guilty cannot plead a "Pardon afterwards, unleſs the Pardon be of a later Date than the Time "of his Plea."

In 3. *Cro.* 4 *Margaret* and *Marſhall*'s Caſe, the Difference there taken makes out the Reaſon of it to be what I have before offered. *Marſhall* in the Reign of Q. *Mary* had committed Petit Treaſon; the 10 *Eliz.* there was a general Pardon, notwithſtanding which ſhe was outlawed for the Petit Treaſon after, and ſhe brought a Writ of Error to reverſe the ſame; and it was there reſolved, that ſhe may aſſign the general Pardon for Error, becauſe ſhe had no Day in Court to have pleaded it, but always made Default; but that it had been otherwiſe if ſhe had ever appeared in Court, and had not pleaded the ſame.

In a *Sci. Fa.* upon a Recognizance, if the Defendant appear, and having a Releaſe that he may plead, does not plead it, and Judgment is given againſt him, he hath totally loſt the Benefit of his Releaſe, and ſhall not be relieved in an *Audita Querela* on the ſame againſt the ſaid Judgment, for that he hath waived the Benefit of it himſelf; but if Judgment had been given againſt him by Default on a *Nihil* returned, there he ſhould be relieved by *Audita Querela*; for that he never had any Time before to have pleaded it: This is agreed, my Lord, in the Caſe cited of *Marſhall*, and in *Rol. Abr.* 306. where divers Caſes to this Purpoſe are collected together.

By this I conceive it is very clear, that as to the King, the Defendant by pleading Not guilty to the Indictment did thereby loſe the * Benefit of his Diſpenſation, and could not help himſelf by the ſame againſt the Conviction on the ſaid Indictment, either in Arreſt of Judgment, or by Error. In the next Place, I conceive, that the Defendant ſhall be no more admitted to uſe the ſaid Diſpenſation againſt the Plaintiff than he could againſt the King; for on the Plaintiff's bringing his Action for the 500*l.* forfeited, the Statute veſts the Benefit of the Conviction in him, and creates a Privity between the Plaintiff and Defendant as much as if the Plaintiff had been Party to the Record of the Conviction; by the Words of the Statute this appears very plain, for the Words are, *And being thereof convicted ſhall forfeit the Sum of* 500*l. to be recovered by him who will ſue for the ſame*; this Action I take therefore to be in Nature of an Execution of that Conviction, and therefore the Defendant ſhall not be admitted to plead any Matter precedent to the ſame in Bar of this Action. *Page 183

The Plaintiff in this Action, may, I conceive, be reſembled to an Adminiſtrator *de bonis non*, who by the Statute 18 *Car. cap.* 8 may ſue forth Execution on a Judgment obtained by an Executor or Adminiſtrator before him; and certainly no Man ever thought but that Statute put the Adminiſtrator *de bonis non*, to all Intents and Purpoſes, in the ſame Condition as the Executor or Adminiſtrator who obtained the Judgment was in; and that the Defendant cannot alledge any Matter whatſoever againſt him, which he could not have alledged againſt him who obtained the ſaid Judgment.

My Lord, I conceive there is a great Difference where a Record of a Conviction is the Foundation of an Action, ſuch as without which the Action will not lie; and where it is an Evidence only which the Plaintiff

may

may make Uſe of or may let it alone, and yet maintain his Action; as in Caſe of a Conviction on an Indictment of Battery, which is Evidence the Plaintiff in an Action for the ſame Battery may make Uſe of, or maintain his Declaration by other Proof. In the firſt of theſe Caſes the Record muſt be taken to be true according to the Tenor of it, till it be reverſed by Error; but in the other Caſe the Defendant is not at all concluded by it, for the Plaintiff doth not, nor can rely on the ſame as he doth on the firſt; for there the Conviction is ſo much the Foundation of the Plaintiff's Action, that I conceive he might have declared only on the ſame, and have ſet nothing out in his Declaration, but that the Defendant was indicted and convicted for the Offence contained in the Indictment.

If the Defendant ſhall be admitted to plead this Plea now, he ſhall thereby falſify the Record of the Conviction in the very Point tried; which he ſhall never be admitted to do, as appears by Ld. *Coke*'s *P. C. fol.* 230.

For theſe Reaſons and Authorities, I ſhall conclude as to the firſt Point, that the Defendant, by pleading Not guilty to the Indictment, hath waived the Benefit of his Diſpenſation, and ſhall never have Advantage of the ſame to avoid the Execution of the Judgment in the Conviction on that Indictment, which is to be executed by this Action according to the Direction of the Statute.

The ſecond and grand Point.

But admitting this Point to be againſt the Plaintiff, and that the Defendant hath Liberty to plead the Diſpenſation to this Action, I conceive it is no Bar; but that, notwithſtanding the ſame, the Plaintiff ſhall recover; for that the Diſpenſation was merely void in Law, and could not enable the Defendant to execute the ſaid Office, without taking the ſaid Oaths, nor exempt him from the Penalties inflicted by the ſaid Act on his executing the ſaid Office after his Neglect to take the ſaid Oaths according to the ſaid Act.

*Page 184.

* I ſhall not trouble your Lordſhip with a Diſcourſe on *Non Obſtantes* in general, nor how nor where they were brought into the World; and ſhall not deny but agree, that the King hath, by his Prerogative, a Power of diſpenſing with Penal Laws in many Caſes; and it is a great Uſe and Advantage to the Subject as well as to himſelf, that he hath ſuch a Power; for although Acts of Parliament paſs with the greateſt Deliberation that can be, yet the Judgments of the Law-makers are but finite and fallable, and they cannot poſſibly foreſee all Events that may happen; and that which was well intended and ſpecious in the Theory, may be fatal in the Practice; and to particular Perſons there may be, without the Aid of this Prerogative, the greateſt Injuſtice many Times done by the Help of a Law; but though the King have ſuch a Prerogative, yet that Prerogative is bounded by the Law; and with ſome Acts of Parliament the King cannot diſpenſe at all to any Perſons in any Caſes; with other Acts though he may diſpenſe, yet not to all Perſons nor in all Caſes.

That the King cannot diſpenſe with ſome Acts of Parliament to any Perſon, will appear from 11 *H.* 7. *fol.* 11, 12. the King cannot diſpenſe with a Law that prohibits an Act that is *Malum in ſe*; as the King cannot licenſe a Man to kill another, nor do any Nuſance to the Common Highway; and if ſuch Licences be granted they are void.

The King cannot diſpenſe with an Act of Parliament which is of public Concernment, and in which the People have any Intereſt; for that is ſo veſted in them that the King cannot diveſt. The Statutes of 13 *R.* 2. *cap.* 3. 15 *R.* 2. *cap.* 5. and 2 *H.* 4. *cap.* 11. being Statutes declaring the Juriſdiction of the Court of the Admiral, for that all the Subjects of the Realm have Intereſt in them, cannot be diſpenſed with by any *Non Obſtante*;

Obſtante; this appears by *Coke's Juriſ. of Courts, fol.* 135. Whether the Law now diſpenſed with be not of public Concernment, and the People have not an Intereſt in it, I ſhall leave to the Conſideration of the Court, on Conſideration of the Statute.

This I only offer to your Lordſhip, to ſhew your Lordſhip, that this great Prerogative of the King may be bounded.

I ſhall confine myſelf in my further Diſcourſe touching the Bounding of this great Prerogative of the King, purely to the Statute now before your Lordſhip; and I ſhall lay down this Rule, that wherever an Act of Parliament doth abſolutely and directly injoin and prohibit the Doing of any Action, and doth create a Diſability to any Purpoſe to fall on any Perſon on the Doing or not Doing of ſuch Act (let the Concern of ſuch Statute be what it will) the King, with Submiſſion I conceive, by Reaſon of the Clauſe of Diſability, cannot diſpenſe with ſuch Law by *Non Obſtante*, either before the Doing or not Doing ſuch Action injoined or prohibited, or after; although he might have diſpenſed with the ſame, if ſuch Action had been prohibited only *ſub Modo*, as on a Penalty given to the King. This I ſhall endeavour to make out by Authorities; for that clearing the ſame will, I conceive, determine the Queſtion on this Statute now before your Lordſhip; which I ſhall then come ſhortly to conſider.

By the Statute 31 *Eliz. cap.* 6. it is enacted, that every Admiſſion, Inſtitution and Induction, on any Simoniacal Contract to any Eccleſiaſtical Benefice, ſhall be utterly void; and the Perſon ſo corruptly taking ſuch Benefice, ſhall thereupon and from thenceforth be adjudged a diſabled Perſon in Law to have and enjoy the ſame. If a Perſon be Simoniacally inducted to any Benefice, the ſame by this Act immediately becomes void; and the Incumbent is ſo abſolutely diſabled for ever after to be preſented to that Church, as that the King himſelf (to whom the Law giveth the Title of Preſentation in that Caſe) cannot preſent him again to that Living; for the Act binds the King * in that Caſe, and he cannot diſpenſe with the ſame; and this only by reaſon of the Diſability therein. *Page 185

This, my Lord, appears by *Co. Lit.* 120. 3 *Inſt.* 154. where the Difference between an Act of Parliament's making a Diſability, and prohibiting any Matter *ſub modo*, is taken; and ſo it hath been often reſolved on the Statute; *Cro. Jac.* 385. *The King* againſt *The Biſhop of Norwich* and others, and the ſame Caſe *Hob.* 75. are expreſsly ſo reſolved; ſo is the Caſe of *Smith* v. *Sherborn*, *Moor pl.* 1299.

By the Statute 5 *E.* 6. *cap.* 16. it is enacted that every Perſon that ſhall give or contract to give any Sum of Money for any Office, or ſhall make any Promiſe, Agreement or Aſſurance for any Office mentioned in the ſame Act, ſhall immediately thereon be adjudged a diſabled Perſon in Law to all Intents and Purpoſes to have and enjoy ſuch Office. Sir *Robert Vernon* being Cofferer to K. *Jam.* 1. contracted with Sir *Arthur Ingram* to ſell his Office (the ſame being an Office within the ſaid Act) to the ſaid Sir *Arthur*, and agreed to ſurrender it, to the Intent that Sir *Arthur* might obtain a Grant thereof; which was done, and Sir *Arthur* obtained a Grant from the King of the ſame: The Office was adjudged after to be void; and that Sir *Arthur* was a Perſon diſabled by the Statute to take that Office; and that no *Non Obſtante* could diſpenſe with the ſaid Act to enable him. *Co. Lit.* 234. *Hob.* 75. *Cro. Jac.* 386.

From theſe Caſes it is plain, the King cannot diſpenſe with an Act enacting a Diſability on the Doing or not Doing any Action, after the Action injoined or prohibited to be done is done, or omitted to be done, contrary to the Act; and that if this Diſpenſation to Sir *Ed. Hale* had come

come after his Refuſal to take the Oaths, and his exerciſing the Office contrary to the Act, it had been ineffectual to enable him againſt this Statute.

Now, my Lord, I ſhall conſider whether the King may diſpenſe with ſuch Act enacting ſuch Diſability on the Doing or not Doing any Action, after the Action injoined or prohibited to be done is done, or omitted to be done, contrary to ſuch Statute; and I conceive he cannot; for, with Submiſſion, the Reaſon why the King cannot in the Caſes cited diſpenſe with theſe Perſons, is, not becauſe the Diſability is attached, but becauſe the King cannot controul an Act of Parliament, and make a Perſon capable againſt the expreſs Proviſion of the ſame; which he doth as much do when he grants a Diſpenſation precedent to the Offence, as when it is granted ſubſequent. This, my Lord, I ſhall a little enlarge on when I come to conſider the Statute now in Queſtion.

As for Inſtance, if the King ſhould licence any Perſon who hath an Office within the Statute of 5 & 6 *E.* 6. *c.* 16. to ſell the ſame, and another to buy it *Non Obſtante* the ſaid Statute of *E.* 6. this certainly would be a void *Non Obſtante*, although it were before any Contract made for ſuch Office; and ſuch *Non Obſtante* would not hinder, but that the Statute would avoid the ſaid Office, and the Purchaſer would become and remain diſabled to hold ſuch Office. This was agreed by all the Judges who argued for the King's Prerogative to diſpenſe with Penal Laws in the Caſe of *Thomas* v. *Sorrel*, touching Wine-Licences, which was in the Exchequer Chamber about ten Years ſince; and ſo it doth appear by my Lord *Vaughan*'s Argument in his *Rep. fol.* 354. which cannot, I humbly conceive, be diſtinguiſhed, from this Caſe now before your Lordſhip.

Now, my Lord, I ſhall conſider this Statute whereon this Queſtion ariſes; and with Submiſſion I conceive this Diſpenſation of that Statute, tho' granted before the Offence committed, can no more be maintained to be lawful than can the Diſpenſations in the Caſes before cited on the
Page 186 * Statutes of the 5 & 6 *E.* 6. *cap.* 16. of Offices, and 31 *Eliz. cap.* 6. of Simony; but this ſhall be ineffectual for enabling the Defendant againſt this Act, for the ſame Reaſons that thoſe Diſpenſations were uſeleſs againſt the Diſabilities created by thoſe Laws.

For by this Statute it is directed and poſitively enacted, That every Perſon admitted to any Office, *&c.* ſhall take the Oaths of Allegiance and Supremacy, either in the Court of Chancery or in this Court, in the next Term after his Admittance to the ſame, or at the Quarter-Seſſions for the County or Place where he ſhall reſide, next after ſuch his Admittance; and ſhall receive the Sacrament within three Months after his Admittance to the ſame.

Then comes the diſabling Clauſe, That every Perſon that doth or ſhall neglect or refuſe to take the ſaid Oaths and Sacrament in the ſaid Courts and Places, and at the reſpective Times aforeſaid, ſhall be *ipſo facto* adjudged incapable and diſabled in Law to all Intents and Purpoſes whatſoever, to have, occupy, or enjoy the ſaid Office; and every ſuch Office ſhall be void, and is thereby void.

Every Man by the Common Law had a double Capacity as to Offices.

1. He was capable to take the ſame.

2. He had a Capacity to hold the ſame for any Time whatſoever.

The Statute works not at all upon the firſt Capacity, but every Perſon remains notwithſtanding as capable of taking as ever; but it quite changes his Capacity of holding, and annexes a Condition precedent to the ſame; on performing which Condition only he ſhall be capable; and 'till that be performed, by Judgment of this Act he is incapable.

This,

This, I conceive, may properly be called an Incapacity; for that he, who is incapable to any one Purpoſe, is as properly ſaid to be a Perſon incapable as if he was diſabled to all Purpoſes.

The Intent of the Statute appears to be the ſame as if it had been enacted in theſe Words, That no Man ſhall hold an Office above three Months, unleſs within the three Months he take the Oath of Allegiance, in which Caſe it would be plain, that a Diſability to hold beyond three Months, would attach on every one who ſhould accept of an Office ſo ſoon as he ſhould accept the ſame; which could not be removed but by qualifying himſelf as the Act directs.

If the Diſpenſation pleaded will enable the Defendant to hold the Office without qualifying himſelf by taking the Oaths, then may the King enable a Man in a Point wherein he is diſabled by Act of Parliament; which is expreſsly contrary to the Reaſon of the Caſes I before cited; and here it doth appear the Diſability was attached in the Defendant before the Diſpenſation granted; for he was admitted to the Office the 28 *Nov.* and the Diſpenſation was not granted 'till *January*; and therefore according to what I have offered it comes too late.

By the Statute 7 *Jac. cap.* 6. for taking the Oath of Allegiance, it is enacted, That every Member of the Houſe of Commons, at any Parliament or Seſſion to be aſſembled, before he ſhall be permitted to enter into the ſaid Houſe, ſhall take the ſaid Oath before the Perſons mentioned in the ſaid Statute.

By the Opinion of L. *Vaughan*, the King cannot diſpenſe with that Act; for that every Member, ſo ſoon as choſen, is *Perſona inhabilis*, and not to be permitted to enter the Houſe without the Oath taken,

My Lord, by the very Diſpenſation it appears, that the King's Counſel, who drew it, were willing to make what Proviſion they could againſt the Diſability incurred by the Taking the ſaid Office of a Colonel, which the Defendant had not three Months when the Diſpenſation was granted; yet he is thereby expreſsly diſcharged from all Diſabilities incurred by the ſaid Act; which ſeems to admit there was a * Sort of Incapacity then on the Defendant; to remove which the Diſpenſation cannot be of any Avail for the Authorities I have before cited. *Page 187

I ſhall humbly offer this farther Matter to your Lordſhip's Conſideration, that this Caſe as to this Statute is *Primæ impreſſionis*; and that this Prerogative was never made Uſe of herein ſince the making of the Statute, although many Perſons at the Time of making of this Act ſtood in Need of the Aid of it, and for want of which they loſt their Employments, and the late King the Benefit of their Services.

I ſhall in the next Place conſider the Authorities of Sir *Ed. Coke* in his 12 *Rep.* 18. which I foreſee will be objected to me; and I ſhall ſtate it, and give ſuch Anſwer to it as occurs to me, and ſubmit the whole Matter to your Lordſhip's Conſideration.

There my Lord *Coke* ſaith, that no Act can bind the King from any Prerogative which is ſole and inſeparable to his Perſon, but that he may diſpenſe with by a *Non Obſtante*, as a Sovereign Power to command any of his Subjects to ſerve him for the Weal Public; and that this Royal Power cannot be reſtrained by any Act of Parliament; and for that he relies on a Caſe 2 *H.* 7. *fol.* 6. which is on the Statute 23 *H.* 6. *cap.* 8. which enacts, that all Patents made or to be made of any Office of a Sheriff, *&c.* for a Term of Years, for Life or longer, ſhall be void and of no Effect, any Clauſe or Parole of *Non Obſtante* put or to be put in ſuch Patents to be made notwithſtanding; and further, whoever ſhall take upon him or them to accept or occupy ſuch Office of Sheriff, by virtue of ſuch Grants or Patents, ſhall ſtand perpetually diſabled to be or bear the Office of Sheriff within any County in *England*; yet, ſaith my

Lord

Lord *Coke*, there the King by his Royal Prerogative may command any Perſon to ſerve him for the Weal Public as Sheriff of any County for Years or for Life †; ſo he ſaith it was reſolved by all the Judges of *England* in the Exchequer Chamber in that Caſe.

† Very ſtrange Doctrine! tantamount to ſaying, that the Conſtitution had inveſted the King with a Power to ruin any Subject that was obnoxious to him: But ſee the following Part of the Argument.

This and ſome other Matters of the like Nature, which are put together by my Lord *Coke*, are, with Submiſſion, the only Authorities in the Law that ſeem to give Countenance to this Diſpenſation now before your Lordſhip. I ſhall very briefly conſider, whether that be any Authority or not; and if it be, whether it differs from the Caſe now before your Lordſhip.

To the firſt, I conceive it is the ſingle Opinion of Sir *Ed. Coke*, but he is miſtaken in the Caſe on which he relies; for by the Book 2 *H.* 7. 6. on which he relies, it appears plainly that there never was any ſuch Reſolution as he cites, but a ſudden Opinion given, and at which Time the Judges declared they would not be bound by what they then ſaid, but adviſed the King's Counſel to conſider well the Point; and ſo they ſaid they would; and by *Bro. Abr.* Tit. *Pard.* 45. 109. where he rather repeats than abridges the Caſes, it appears, nothing more was ever done in that Matter, but it reſted and was never adjudged. The great Foundation failing, the Superſtructure of Lord *Coke* thereon, and his Opinion, muſt needs fall and be rejected as an Opinion grounded on a palpable Miſtake.

But admit that Caſe and the Reaſon of it to be Law, that the King cannot be deprived of the Power of commanding any of his Subjects to ſerve him, yet I think it differs quite from the Caſe now before your Lordſhip; and the Reaſon of it can be no Rule in this Caſe, for theſe Reaſons.

The Statutes 23 *H.* 6. *cap.* 8. was an Act purely reſtraining that Power the King had of commanding, and was rather a Diſabling the King than the Subject; for it took away the Power the King had of granting the Office for Years, Life and Inheritance, and by Conſequence * was a total Depriving him of the Uſe of ſome of his Subjects at ſome Times; and I may very well allow, that ſuch Act of Parliament did not, nor can ‖ bind the King; but, my Lord, in the Act of Parliament now in Queſtion, the Prerogative nor the Power of the King is not in any Manner touched; for the King may grant an Office to any Perſon or may command any Perſon to ſerve him, as he might have done before this Law; and he is in no Sort deprived of the Uſe of his Subject by any Thing in the Statute; for this Statute is a Direction and Obligation on the Subjects to qualify themſelves according to the Act, to obey the Command the King ſhall lay on them; and there is nothing in this Act that excuſes any Perſon from ſerving the King, when he by his Royal Command requires his Service, but he is at his Peril to qualify himſelf for that Service and to do the ſame; and if he be one incapable, it is by his own voluntary Neglect, and he is puniſhable by Law for the ſame, as every other Man is who without any Reaſon refuſes to ſerve the King in what Station he is pleaſed to require his Service in.

*Page 188

‖ Strange Doctrine! if meant to apply to Acts of Parliament legally made and clearly expreſſed! See *ante* 177, 178. n. & *poſt.* 198, 204.

This, my Lord, will appear plain from the Reſolution of the Caſe of Sir *John Read*, which was in the Exchequer *Hill.* 27 & 28 *Car.* 2. Sir *John Read* was by the late King made Sheriff of *Hertfordſhire*, and Sir *John* was duly ſworn into the ſaid Office; but after neglecting to take the Oaths and receive the Sacrament injoined by the Law now before your Lordſhip, the Office became void; whereupon an Information was exhibited

bited againſt Sir *John Read* in the Exchequer, ſetting forth the Statute of 25 *Car. 2. cap.* 9. and that he was appointed and ſworn Sheriff for that County, and did neglect to qualify himſelf by taking the Oaths according to the ſaid Act, whereby the Office became void by his voluntary Neglect; and the public Juſtice in the Adminiſtration thereof in that County, as to the Office of Sheriff, was obſtructed. On this Information the ſaid Sir *John Read* was convicted and fined in the ſaid Court; for the Court there was of Opinion that the Statute never intended to put it in the Power of any Man by his own Act to diſcharge himſelf of that Duty he owed the King, but hath poſitively enacted, that every Officer ſhall qualify himſelf for his Duty, the not Doing of which is an Offence for which he is puniſhable; ſo that from hence it is plain there is no Reſemblance between the Sheriff's Caſe and any Caſe on this Statute.

There is likewiſe another Difference between the Sheriff's Caſe and this Caſe at Bar. In the Sheriff's Caſe, the Diſpenſation is in the very ſame Patent that the Office is granted, and in the ſame Clauſe, and enables the Grantee before the Diſabilities are in any Sort attached on him; but here the Office was granted in *November* to the Defendant, and by which immediately, for the Reaſons I have before offered, he is diſabled by this Act; and in *January* after is this Diſpenſation granted, which, for Reaſons I have before offered, I conceive comes too late.

For theſe Reaſons and Authorities I conclude therefore, that this Diſpenſation, granted to the Defendant, is void in Law. §

§ I don't perceive that the learned Advocate hath drawn a ſingle Argument from the Nature or Principles of the Conſtitution, which I ſhould have ſuppoſed had been his beſt Foundation. He has not ſhewn that where the Power of Ligiſlation reſides, there reſides the Sovereign Power. That notwithſtanding the King, ſitting in Parliament, conſtitutes a Part of the Legiſlative Power, yet out of Parliament he is, with reſpect to the Laws in being, only the great Magiſtrate of the State, entruſted with the executive Power; and though previous to the Paſſing of a Law he hath a Negative, yet when he hath aſſented, none but the Power which framed can reſcind the Law. But it's reaſonable to preſume, from the Circumſtances of the Times, that it would have been very dangerous to have delivered ſuch Sentiments, or avowed ſuch Opinions in the Court of King's Bench, conſidering the Men who then compoſed it, and of whom we may form a pretty accurate Judgment, from their Reſolutions in this Caſe of Sir *Ed. Hale*, which *vide*, *ante* 178.

8. Of his Proclamations.

It is plain that the King by his Prerogative may in certain Caſes and ſpecial Occaſions make and iſſue out Proclamations for Prevention of Offences, to ratify and confirm an ancient Law, or, as ſome Books expreſs it, *quoad terrorem Populi*, to admoniſh them that they keep the * Laws on Pain of his Diſpleaſure; and ſuch Proclamations being grounded on the Laws of the Realm are of great Force.

* Page 189

Forteſ. *de Laud.* c. 9. 12 Co. 74, 75. 11 Co. 87. Daliſ. 20. pl. 10. 2 Rol. Abr. 209. 3 Inſt. 162.

It is likewiſe clear, that the Subject is obliged on Pain of Fine and Impriſonment to obey every Proclamation legally made; and that tho' the Thing prohibited were an Offence before, that yet the Proclamation is a Circumſtance which highly aggravates it; and upon which alone the Party diſobeyed may be puniſhed.

12 Co. 74. Hob. 251.

It is clearly agreed, that no (*a*) private Perſon can make any Procla-

Bro. *Proclamat.* pl. 1.

12 Co. 75. Cromp. *Jur.* 41. (*a*) Sir *Edmund Knightly* Executor of Sir *William Spencer* made Proclamation in certain Market Towns, that the Creditors ſhould come in by a certain Day and prove their Debts; he was fined and impriſoned for this, becauſe, as the Book ſays, he did it publickly and without any Authority. Bro. *Proclamat.* pl. 10. †

† *Sed qu. de hoc*, and if it amounts to any more than an Advertiſement in the daily Papers for the ſame Purpoſe, and which were not then in Uſe?

mation

mation of a publick Nature except by Cuſtom, as is uſual in ſome Cities and Boroughs; this being a Prerogative Act, with which alone the King is intruſted.

Daliſ. 20. pl. 10. 12 Co. 75. 11 Co. 87. b.

But notwithſtanding the King's Prerogative herein, it ſeems clearly agreed, that the King cannot by his Proclamation change any Part of the Common Law, Statutes, or Cuſtoms of the Realm; nor can he by his Proclamation create any Offence which was not an Offence before; for that theſe Things cannot be done without a *(a)* Legiſlative Power, of which in our Conſtitution the King is but a Part.

(*a*) By the 31 H. 8. c. 8. (now repealed) it was enacted, That Proclamations made by the King and the greater Part of his Council, ſhould have the Force of Acts of Parliament; but there was a Proviſo that ſuch Proclamation ſhould not croſs any Statute or laudable Cuſtom of the Realm. N. Bacon's Hiſt. 2 Part. fol. 215.

2 Inſt. 63.

And on this Foundation it hath been held, that the King's Proclamation prohibiting the Importation of Wines from *France* upon Pain of Forfeiture, was againſt Law and void; there being no War at that Time ſubſiſting between the two Nations.

12 Co. 75.

So where an Act was made by which Foreigners were licenſed to merchandiſe within *London*; and *Hen.* 4. by Proclamation prohibited the Execution of it, and ordered that it ſhould be in Suſpenſe *uſque ad proximum Parliamentum*; and this was held to be againſt Law.

12 Co. 74.

Upon a Conference between ſome Lords of the Privy Council and the two Chief Juſtices (of which the Lord *Coke* was one) and Ch. B. and Baron *Altham*, the Queſtions were, *1ſt*, whether the King by Proclamation might prohibit new Buildings in and about *London*. *2dly*, If the King might prohibit the making of Starch of Wheat. And the Judges were of Opinion, that the Subject could not be reſtrained in theſe Particulars by the King's Proclamation.

Hob. 251. *Armeſted's* Caſe.

But notwithſtanding the abovementioned Opinion, there are Inſtances of Perſons who have been ſentenced in the Star-Chamber upon Proclamations againſt the Increaſe of Buildings; and particularly in *Hob.* where a Perſon was fined in the Star-Chamber for building without Brick, tho' upon an old Foundation; and it is there ſaid, that ſuch Buildings had an ill Effect from the Danger of Fire, Conſumption of Timber, and Difficulty of Feeding, Cleanſing and Governing the City; and it was ſaid in general that Proclamations were ſo far juſt as they were made *pro Bono Publico*, and for publick Utility. †

† Obſerve that this was a Star-Chamber Opinion.

3 Inſt. 162. Hal. Hiſt. P. C. 163. *(b)* Owen 45. Raſt. Ent. 605.

The King by Proclamation may call or diſſolve Parliaments, may declare War or Peace; for theſe are Prerogative Acts with which he is intruſted as the Executive Part of the Law; but *(b)* if there be an actual War between us and a foreign Nation, it is not neceſſary in Pleading to ſhew that ſuch War was proclaimed.

* Page 190. Co. Lit. 207. b. 5 Co. 114. b. Dav. 21. Hal. Hiſt. P. C. 192, 197. Comp. Incumb. 354.

The King by Proclamation may legitimate foreign Coin, and make it Current Money of this Kingdom, according to the Value impoſed * by ſuch Proclamation; he may legitimate Baſe Coin or mixt below the Standard of Sterling; he may inhanſe Coin to a higher Denomination or Value; and may decry Money that is current in Uſe and Payment; and in all theſe Caſes a Proclamation with a Proclamation-Writ under the Great Seal is neceſſary.

The King by Proclamation may appoint Faſts and Days of Thankſgiving and Humiliation; and iſſue Proclamations for preventing and puniſhing Immorality and Profaneneſs; and injoin the Reading of the ſame in Churches and Chapels.

A Pro-

A Proclamation must be under the Great Seal, and if denied is to be tried by the Record thereof; but if a Man pleads that he was prevented doing a Thing by Proclamation, it seems the better Opinion that he need not aver that such Proclamation was under the Great Seal; for alledging that such Proclamation was made, it shall be intended to have been duly made. ‡ Cro. Car. 180. *Keley* v. *Manning*, & *vide* Rol. Rep. 172.

‡ *Sed qu.* if he must not prove it on the Trial, if put in Issue?

(E) How the Rules of Law differ with respect to the King and a private Person: And herein,

1. Of what Things incapable from the Dignity of his Person and Office.

FROM the Dignity of his Office and Person the Law presumes him (*a*) incapable of doing any Wrong; ‖ but if the King command an unlawful Act to be done, the Offence of the Instrument, as my Lord *Hale* says, is not thereby indemnified; for though the King is not under the Coercive Power of the Law, yet in many Cases his Commands are under the Directive Power of the Law; which consequently makes the Act itself invalid, if (*b*) unlawful, and so renders the Instrument of the Execution thereof obnoxious to the Punishment of the Law. (*a*) Cannot do any Wrong. Co. Lit. 19. Co. 45. 11 Co. 72, 85. Bracton, l. 3. c. 9. Stamf. P.C. 102. Hal. Hist. P. C. 43, 44.

(*b*) If two Men combat together at Barriers in Time of Peace for Trial of Skill, and one kill the other, it is Homicide; but if it were by the Command of the King, not Felony. 11 H. 7. 23. a. & *vide* 3 Inst. 56, 160.

‖ In his politic Capacity he is under the happy Inability of doing Wrong, because acting by his Officers, and limited by Law. *Conf. on Law of Forfeiture*, &c. 101.

The King cannot arrest in Person nor imprison, nor can he command another to imprison; but it must be done by some Order, Writ, or Precept, or Process of some of his Courts. 2 Inst. 187. 2 Hal. Hist. P.C. 131.

—cannot sit in Judgment upon any Indictment. 2 Hawk. P. C. 2.——Cannot be a Witness. 2 Hal. Hist. P. C. 282.

The King cannot execute any Office relating to the Administration of Justice, altho' all such Offices derive their Authority from the Crown, and although he hath such Offices in him (*c*) to grant to others. Bro. *Prerog.* 125. Co. Lit. 3. b. 8 Co. 55.

2 Vent. 270. (*c*) If Lands with the Office of Forester be granted to *J. S.* Remainder to the King in Fee, this is a good Remainder, though the King cannot be an Officer to any Man, because he may grant it over. 1 H. 7. 31. Bro. *Done*, pl. 51.

The King cannot be seised to an Use, because there is no Means to compel him to perform it; for the Chancery has only a delegated * Power from the King over the Consciences of his Subjects; and the King, who is the universal Judge of Property, and who is equally concerned for the Good of all his Subjects, ought to be perfectly indifferent, and not to take upon him the particular Defence of any Man's Estate as a Trustee. * Page 191 Bro. *Feof. to Uses* 338. Poph. 72. Dyer 383. pl. 3. Cro. Jac. 50. Hard. 468.

Dyer 48. If one hath the Nomination to a Church, and another the Preſentation, and ſuch Right of Preſentation doth accrue to the King, he that hath the Nomination ſhall have (*a*) all; by Reaſon that it is indecent for the King to do any Thing as Servant to another.

(*a*) But by *Dodderidge* J. the Nominator ſhall in ſuch Caſe nominate to the Lord Chancellor, who in the Name of the King ſhall preſent to the Ordinary. Pop. 158.

Co. Lit. 1. Dev. 2. 4 Leon. 40. Dyer 313. And. 45. *Stroud's* Caſe; & *vide* 1 Co. 47. 8 Co. 114. b. Cro. Car. 82. 2 Rol. Rep. 246. Jon. 234. Lit. Rep. 43. The King cannot be Tenant, nor can he hold by any Services from his Subjects; for his Poſſeſſions are called *Sacra Patrimonia* and *Dominica Coronæ Regis*; and on this Foundation it hath been adjudged, that where Lands, holden of the Subject, came to the Poſſeſſion of the King by the Statute of 1 *E.* 6. *cap.* 14. of *Chantries*, and the King granted thoſe Lands over to another, though there was a Saving in the Statute to the Donor, of the *Ancient Rents*, *Services*, *&c.* that yet the Patentee ſhould hold of the King, according to his Patent, and not of the Ancient Lord; and that the Saving in the Statute, as to the Services, was controuled and made void by the Common Law; ſo that the Patentee was to pay the Rent, by which the ſaid Lands were before holden, as a Rent Seck diſtrainable of Common Right, to the Lord and his Heirs, of whom the Lands were before holden, but diſcharged of the Services.

Cro. Car. 96, 97. Pigot 74—5. The King, in regard to Decency and Order, cannot ſuffer a common Recovery; for in ſuch Recovery he muſt be either Tenant or Vouchee; and in both Caſes the Demandant muſt count againſt him, and there muſt be Judgment againſt him, which the Law does not ſuffer, ſo cannot come in as Tenant by Receipt; but if the Party have any Warranty he muſt pray in Aid.

Ld. Raym. 51. The King cannot be Tenant at Will; ſo that if he takes a Leaſe at Will, though he may determine his Will, yet the Tenant cannot otherwiſe do it but by Surrender.

4 Inſt. 335. Godolp. Repert. 76. The King may be appointed an Executor; but as it cannot be preſumed that he has ſufficient Time and Leiſure to engage in a private Concern, the Law allows him to nominate ſuch Perſons as he ſhall think proper to take upon them the Execution of the Truſt; againſt whom all Perſons may bring their Actions; alſo the King may appoint others to take the Accounts of ſuch Executors.

2. What Things enure to him in his natural, what in his political Capacity.

Plow. 234. in the Caſe of *Wilſon* v. *Ld. Berkley.* The King has two Capacities, the one Natural the other Politic; in which laſt he is conſidered as a ſole Corporation, capable of taking in Succeſſion, as a Biſhop or Dean. In his Natural Capacity it is ſaid, that he may purchaſe Lands to him and his Heirs; and that ſuch Lands, as alſo Lands deſcending to him from an Anceſtor, ſhall go to his Heir, in Caſe he is removed from the Royal Eſtate.

Co. Lit. 15. b. 7 Co. 10, 12. in *Calvin's* Caſe. 9 Co. 123. *Page 192 But my Lord *Coke* ſays, that all the Lands and Poſſeſſions whereof the King is ſeiſed *Jure Coronæ*, ſhall *ſecundum Jus Coronæ* attend upon and follow the Crown; and therefore, to whomſoever the Crown * deſcends, thoſe Lands and Poſſeſſions deſcend alſo; and that the Lands and the Crown are *Concomitantia.*

Co. Lit. 16. a. If the King purchaſe Lands to him and his Heirs, he is ſeiſed thereof *in Jure Coronæ*; *a fortiori* when he purchaſes Lands to him, his Heirs and Succeſſors.

So

So if Lands in Gavelkind descend to the King and his Brother, the King shall take one Moiety and his Brother the other; but if the King dies his Moiety shall descend to his eldest Son, and not according to the Rules of Descent in Gavelkind; for the King was seised of his Moiety *Jure Coronæ*, therefore it shall attend the Crown, and consequently go to the eldest Son. Plow. 205 a. Co. Lit. 15. b.

The King can have Nothing in his Natural Capacity, unless in Right of his Duchy, or an Estate-Tail, by the Statute *De donis*, and Dutchy Lands would now be in the Crown if not kept separate by (*a*) Act of Parliament. 7 Mod. 78. *per Holt*, Ch. J.

(*a*) The Statute of 1 H. 4. provides that when the Dutchy Lands come to the King, they shall not be under such Government and Regulation as the Demesnes and Possessions belonging to the Crown; for the Act says, *quod taliter, & tali modo & per tales officiaros & ministros gubernentur, ac si ad culmen Dignitatis Regiæ assumpti minime fuissent.* Raym. 90.

If the King has a Title to present to a Church which is void, and dies before Presentment, his Successor shall have the Presentment, and not his Executor. 2 Rol. Abr. 211.

So if the King be seised of a Ward, and dies, his Successor shall have it, and not his Executor. 2 Rol. Abr. 211.

The Treasure and other valuable Chattels are so necessary and incident to the Crown, that in case the King dies, they shall go with the Crown to the Successor, and not to the Executors. 11 Co. 92. 2 Rol. Abr. 211.

So a Lease for Years to the King and his Successors is good, and shall go accordingly, and not to his Executors and Administrators. Co. Lit. 90. a. 11 Co. 92. a.

The Ancient Jewels of the Crown are Heir-Looms, and shall descend to the next Successor, and are not devisable by Testament; but (*b*) the King may dispose of them in his Life-time. Co. Lit. 18. b. (*b*) Cro. Car. 344.

If the King be seised in Fee of an Advowson, and he creates the Incumbent Bishop, he shall present as Patron, that being a Title precedent to that of the Prerogative. Ld. Raym. 26.

3. Of the Difference in the Rules of Law as directing the King's Property, otherwise than that of a Subject.

The King may reserve Rent out of Inheritances which are Incorporeal, as Commons, Tithes, Fairs, &c. because the King by his Prerogative may distrain in all (*c*) other the Lands of the Lessee for such Rent; and having such Remedy, the Law adjudges the Reservation good. Co. Lit. 47. Plow. 227. in Ld. *Berkley*'s Case.

(*c*) That this must be understood of all such other Lands as his Tenant has in his actual Possession, and not in the Possession of his Lessee for Life, Years or at Will. 2 Inst. 134. 4 Inst. 119. & *vide* 5 Co. 4. 56. 1 Rol Abr. 670. 2 Rol. Abr. 159. Lane 59. ——Whether he may distrain on other Lands of the Tenant that are under Sequestration out of Chancery, *vide* 2 Vern. 714. Will. Rep. 306—7. ——That this Prerogative shall not extend to the King's Grantee. Bro. Tit. *Prerog.* 68.

So if a Rent-Charge is granted to the King to be issuing out of the Manor of *D.* the King may distrain in any other the Lands of the Grantee; so the King may distrain for a Rent-Seck, which in the Case of a common Person is not distrainable by Common Law. Bro. *Prerog.* 77. 3 Leon. 124-5.

* The King may reserve Rent payable to a Stranger, contrary to the Rule of Law, which makes void such Reservation in the Case of a common Person. *Page 193 Moor 162. Co. Lit. 143. 2 Rol. Abr. 447.

But where the King made a Lease of his House belonging to his House-keeper of *Whitehall*, reserving a Rent to the House-keeper for the Ld. Raym. 36.

Time being, it was held an ill Reſervation; for though the King may reſerve Rent to a Stranger, yet ſuch a Reſervation as this is ill, becauſe he cannot reſerve Rent to ſuch an Officer who is removeable at the Will of the King.

Co.Lit.15.b. The Rule of *Poſſeſſio Fratris* does not hold in the Deſcent of the Crown or its Poſſeſſions, neither is Half Blood any Impediment in ſuch Caſe; for the Brother of the Half Blood ſhall be preferred to the Siſter in the Enjoyment of the Crown, as the moſt capable Perſon of the two, by the Advantages and Prerogative of his Sex, to diſcharge the important and weighty Buſineſs of the Crown.

Co.Lit.15.b. So if the King hath Iſſue a Son and a Daughter by one *Venter*, and a Son by another *Venter*, and purchaſes Lands and dies, and the eldeſt Son enters and dies without Iſſue, the Daughter ſhall not inherit theſe Lands nor any other Fee-ſimple Lands of the Crown, but the younger Brother ſhall have them together with the Crown.

Co. Lit. 9. Plow. 250. S. P. and that the adding of Succeſſors in Grants to the King, was but of late Time, and a new Device; *per* Dyer Ch. J. Jenk. 209, 271. S. P.

If Lands are given to the King by Deed inrolled, without the Words (*a*) *Succeſſors* or *Heirs*, a Fee-ſimple paſſeth; for he is conſidered as a Corporation that never dies.

(*a*) So a Grant by the King, without mentioning Succeſſors, ſhall bind the Succeſſors. Plow. 176. Yelv. 13.

Co.Lit.21.b. If the King gives Lands to a Man and a Woman and the Heirs of their Bodies, and the Woman dies without Iſſue, the Man ſhall be Tenant in Tail *apres* Poſſibility, *&c.* but if the King gives Lands to a Man with a Relation of his in Frank-marriage, and the Woman dies without Iſſue, the Man ſhall not be Tenant *apres* Poſſibility, *&c.* but his Intereſt in the Land ceaſes upon the Death of his Wife without Iſſue; this is a Privilege of the King's which is not extended to a common Perſon; and the Reaſon of it may be this; the Wealth and Demeſne Lands of the Crown are not only neceſſary for the Honour and Credit, but alſo for the Safety and Protection of the Nation; and therefore in this particular Caſe it is but reaſonable, that if Land applied to ſuch particular Uſes and Purpoſes be granted away, ſuch Grant ſhould bind the King no longer than the Conſideration and Cauſe of the Grant continues; and therefore, in the firſt Caſe, the Man may be Tenant in Tail *apres* Poſſibility; *&c.* becauſe the Services, which were the Cauſe of the Gift, are ſtill owing, and to be performed by the Tenant to the King; but in the laſt Caſe, where the Woman, which was the Cauſe of the Gift, dies without Iſſue, the Cauſe of the Gift, which was the Proviſion for the Deſcendants of that Marriage, ceaſes; and conſequently, if the Grant continued, the Tenant would hold the Land free from all Services.

Dyer 1. pl.7. Cro. Jac. 179, 180. The King may grant a *Choſe in Action*, as an Obligation forfeited to him upon an Outlawry, *&c.* and the Grantee may ſue by Action in his own Name, or by Extent in the King's Name, although there are not the uſual Words in the Grant to ſue in the King's Name.

31 H. 7. 19. Bro. *Prerog.* 40. So a *Choſe in Action*, as an Obligation, may be granted or aſſigned to the King, and he may bring an Action in his own Name, tho' the Deed of Gift be not inrolled.

*Page 194 Bro. *Prerog.* pl. 23. Jenk. 65. *If a Man enters into an Obligation to two, and one of the Obligees aſſigns to the King, or is outlawed, the King may bring an Action in his own Name, and ſhall recover the (*b*) whole Debt to his own Uſe.

S.P. though one of the Obligees might have releaſed the Obligation. Lucas Rep. 245. S. P. *per Parker* Ch. J. (*b*) If Lands deſcend to the King and a common Perſon, the King ſhall have but a Moiety; for to take the Whole would be a Wrong, which the King cannot do by his Prerogative. Plow. 247. a.

Before the Statute *De donis*, when the King created a Conditional Fee, there was no Reverſion but a Poſſibility; and if the Donee had Iſſue and aliened, the King's Poſſibility was barred as well as that of a common Perſon; but after the Statute *De donis* had turned that Poſſibility into a Reverſion, and after Common Recoveries were allowed to be common Conveyances, and to bar Remainders and Reverſions, it became a Queſtion, how far a Recovery could bar a Remainder or Reverſion veſted in the King; and herein the Judges determined, that tho' a Recovery ſuffered by Tenant in Tail barred the Eſtate-Tail, that yet it did not (*a*) diveſt any Intereſt the King had in the Remainder or Reverſion, it being unreaſonable to ſtrip the King of any Part of his Revenue upon the Conſideration of an imaginary Recompence; but they allowed that the Eſtate-Tail as to the Iſſue, was barred; for that otherwiſe the Eſtate-Tail, in the Subject muſt be perpetuated, which is againſt the Policy of the Law.

Bro. *Aſſur.* pl. 6. Bro. Tit. *Recovery* 31. Tit. *Tail* 41. Co Lit. 372. Plow. 483, 553. Dyer 344. Moor 344. Piggot of *Recoveries* 85.

(*a*) The Act of the Party, as a Fine or Common Recovery, ſhall never diveſt any Eſtate, Remainder or Reverſion out of the King; but by Act in Law a Remainder or Reverſion may be diveſted out of the King. ——As if there be Tenant in Tail, Remainder to *A.* in Fee, Tenant in Tail diſcontinues in Fee, and takes back an Eſtate to himſelf for Life, Remainder to the King in Fee; Tenant in Tail dies; the Iſſue is remitted, and the Remainder pulled out of the King, and veſts in *A.*——So if a Recovery be on a good Title againſt Tenant in Tail, and the King has the Remainder by a defeaſible Title, there it ſhall diveſt the Remainder out of the King, and reſtore and remit the right Owners.—But if a Gift be made to *A.* in Tail, Remainder to *B.* in Tail, Remainder to the King in Fee; if in this Caſe *A* ſuffers a Common Recovery, this bars *A* and his Iſſue, and the Remainder to *B.* but not the King's Reverſion; for that cannot be diſcontinued or put to a Right, or plucked out of him by the Act of a third Perſon. Piggot of *Recoveries* 86, 87.

But in the Reign of *Hen.* 8. an Act of Parliament was made to invalidate Recoveries even againſt the Iſſue in Tail, where the Reverſion or Remainder was in the Crown; the Intention of which Act was, to perpetuate thoſe Eſtates in Families which the King himſelf had given, or for Money or other Conſideration had procured to be given to any Subject, as a Reward for his Services to the Crown; that the Deſcendants of that Stock might never forſake the Intereſt of the Crown which had ſo liberally rewarded their Anceſtor's Loyalty. 2 Jon. 252.

And therefore by the 34 & 35 *H.* 8. *cap.* 20. it is enacted, that if the King give any of his own Manors, Lands, &c. or cauſe or procure another, in Conſideration of Money or other Lands, to give any Manors, &c. to any of his Subjects or Servants in Tail, in Recompence of their Service, Remainder to the King in Fee-Simple or Fee-Tail, ſuch Eſtates-Tail are not to be barred; nor ſhall any feigned Recovery to be had by Aſſent of Parties againſt any Tenant or Tenants in Tail of any Lands, &c. whereof the Reverſion or Remainder at the Time of ſuch Recovery had ſhall be in the King, bind or conclude the Heirs in Tail; but that after the Death of every ſuch Tenant in Tail, againſt whom ſuch Recovery ſhall be had, the Heirs in Tail may enter, hold and enjoy the Lands, &c. recovered, according to the Form of the Gift in Tail, the ſaid Recovery notwithſtanding.

In the Conſtruction of this Statute, the following Opinions have been holden:

That if a Reverſioner or Remainder Man upon an Eſtate-Tail grant the Reverſion or Remainder to the King, this is no Security to the Iſ-
* ſue in Tail, becauſe the Eſtate-Tail was neither of the Gift or other Proviſion of the King, and conſequently not within the Act. *Page 195

Moor 195.
Yelv. 149.
2 Co. 15. *Wiſeman's* Caſe.

So if a Man make a Gift in Tail, and the Crown deſcend on him, or if the King's Anceſtor not being King make a Gift in Tail, and the Reverſion deſcends on him, the Eſtate-Tail may be barred. 2 Co. 15. Co. Lit. 372.

If

2 Co. 52. Noy 132. Yelv. 149. Leon. 8.

If a Man makes a Gift in Tail, Remainder in Fee, he in Remainder grants his Eſtate to another for Life, Remainder to the King in Fee, on Condition to be void on Payment of Money; a Recovery by Tenant in Tail bars the King's Remainder and Condition; for the Grant was void.

Piggot of *Recoveries* 88, 89.

If a Subject by the King's Proviſion or Procurement makes a Gift in Tail, and then grants the Reverſion to the King for Life or Years only, in this Caſe the Eſtate-Tail, Remainders, and Reverſions may be all barred; for the Reverſion or Remainder in the King, muſt be in Fee or in Tail.

Piggot 88.

If the King grant an Eſtate-Tail, reſerving the Reverſion to himſelf, and after grants the Reverſion to another, Tenant in Tail may ſuffer a Recovery, and thereby bar the Reverſion.

Raym. 288, 358. 2 Jon. 251. *Gardner* v. *Bambridge*.

Therefore where *Hen.* 8. gave Lands to *Michael Stanhope* and his Wife and the Heirs of their Body, in Conſideration of Services, *&c. Michael* died, and his Son and Heir petitioned the Queen, to grant the Reverſion to ſome Perſons in Fee, to the Intent that he might make a Leaſe for ninety-nine Years by Way of Mortgage; and entered into a Recognizance to the Queen, conditioned that nothing ſhould be done whilſt the Reverſion was out of the Crown, prejudicial to the Crown; and accordingly the Queen conveyed the Reverſion to the Lord *Burleigh* and Sir *Walter Mildmay*, in Fee; then the Son made a Leaſe for ninety-nine Years, and ſuffered Recovery; and then the Truſtees re-convey to the Queen; and it was reſolved, *1ſt*, That the Grant of the Queen was good. *2dly*, That during the Time the Reverſion was out of the Crown, the Son was not reſtrained from aliening within the Statute, and ſo the Recovery good to bind the Iſſues; but a Fine or Recovery, after the Regrant to the Queen, would not have been good to bind the Iſſue, as it ſeems; becauſe that Act doth not require that the Reverſion ſhould continue (*a*) always in the King, but it ſufficeth if it be in him at the Time of the Fine levied or Recovery ſuffered.

(*a*) Q. & *vide* Hard. 409.

2 Jon. 250-1. Earl of *Ormond*'s Caſe cited to have been adjudged by eleven Judges, 13 Car. 1.

If Tenant in Tail of the Gift of the King, makes a Gift in Tail, the ſecond Donee is not within the Statute; for his Eſtate, as far as it could, diſaffirms the Reverſion of the King, though it could not take it out of him; and his Poſſeſſion was injurious to the Eſtate given by the King.

Raym. 260, 286, 319, 350. 2 Jon. 249. Earl of *Derby*'s Caſe.

King *R.* 3. by Letters Patent gave ſeveral Lands to the Earl of *Derby* and the Heirs Male of his Body, in Conſideration of great Services to the Crown, *&c.* afterwards by a private Act made 4 *Jac.* 1. ſeveral Alterations were made in this Eſtate; as that *Charles* then Earl of *Derby*, ſhould hold and enjoy them for his Life; and after his Death, to *James* his Son and Heir apparent, and the Heirs Male of his Body; and ſo to the ſecond, third, *&c.* and ſeventh Son of Earl *Charles*; and then to ſeveral others in Tail Male, who by the Limitation of the Letters Patent would have ſucceeded to the Eſtate upon Failure of Iſſue Male of Earl *Charles*; with Power for Earl *Charles* and the Sons ſucceſſively to make Leaſes for Lives or Years, and Jointures for Wives. After Earl *Charles*'s Death, his Son Earl *James* levied a Fine of theſe Lands, and ſold them to a Stranger; yet upon ſpecial Verdict in Ejectment, brought after his Death by his Son, it was reſolved by all the

Page 196

Judges in the Exchequer-Chamber, except three, that the Fine was no Bar; for that the Reverſion continued in the Crown, and that theſe Eſtates given by 4 *Jac.* 1. were no new Eſtates, but all within the Compaſs of the firſt Tail created by the Letters Patent, and only a Diſtribution of the Enjoyment of them, and all to the ſame Perſons who would be intitled under the Letters Patent; and the Power to make

Leaſes

Leaſes was with Conformity to the Power of Tenant in Tail; and that to make Jointures was in Lieu of Dower; beſides, there was a Saving to the King, and all other Perſons, all ſuch Rights, &c. ſo as the Prerogative of the King, by his Reverſion to reſtrain the Tenant in Tail from barring his Iſſue, was ſaved; and the eighth, ninth and all other Sons inheritable by virtue of the Entail let in, though the firſt, &c. and ſeventh only were named; and the Alterations were only in Accidents, not in the ſubſtantial Parts of the Limitations; and ſo within 34 & 35 *H.* 8. *cap.* 20.

If the King in Conſideration of Money, or other Conſideration by way of Proviſion, procure a Subject to ſettle his Lands on one of his Servants in Tail, for Recompence of Service, by Deed of Bargain and Sale inrolled, with Remainder to the King in Fee; and all this appears on Record; the Tenant in Tail cannot bar his Iſſue, being protected by the expreſs Words of the Statute. Co. Lit. 372. Piggot 91.

It hath been held, that the latter Words of this Act, *viz. had done or ſuffered by or againſt any ſuch Tenant in Tail*, muſt be intended where Tenant in Tail is Party or Privy to the Act, be it by doing or ſuffering that which ſhould work the Bar, and not by mere Permiſſion. As if Tenant in Tail of the Gift of the King, Reverſion to the King, is diſſeiſed, and Diſſeiſor levy a Fine, and five Years paſs, this bars the Eſtate-Tail; and ſo if a Collateral Warranty be made by the Anceſtors of the Donee, and the Donee ſuffer the Warranty to deſcend, without any Entry made in the Life of the Anceſtor, this binds; becauſe he is not Party or Privy to any Act either done or ſuffered by or againſt him. 11 Co. 78. And. 46. Co. Lit. 373. Moor 467. Cro. Car. 13. Cro. Eliz. 595. Yelv. 72. 8 Co. 77. Sid. 166.

If the King make a Leaſe reſerving Rent, with a Clauſe of Re-entry, for Non-payment, the King (*a*) is not obliged to make any Demand previous to his Re-entry, but the Tenant is obliged to pay the Rent for the Preſervation of his Eſtate; becauſe it is beneath the Royal Dignity of the Crown to attend a Subject, to demand the Rent; but the Law for the Support of that Dignity obliges every private Perſon to attend the King with the Services due to him. 2 H. 7. 8. Bro. *Prerog.* pl. 101.

(*a*) But this Prerogative is not to be extended to the Dutchy Lands.

Moor 149, 154, 161.

But if the King, in Caſes where he need not make a Demand, aſſigns over the Reverſion, the Patentee cannot enter for Non-payment without a previous Demand; becauſe the Privilege is inſeparably annexed to the Perſon of the King for the Support of his Royal Dignity; and therefore ſhall not be extended to Caſes where the King is no way concerned. 4 Co. 73. Moor 404. Cro. Eliz. 462. Dyer 87. And. 304.

So if a Prebend make a Leaſe rendering Rent, and if the Rent be Arrear and be demanded, that it ſhould be lawful for the Prebend to reenter; if the Reverſion in this Caſe comes to the King, the King muſt in this Caſe demand the Rent, though he ſhall be by his Prerogative excuſed from an Implied Demand; for the Implied Demand is the Act of the Law, the other the expreſs Agreement of the Parties, which the King's Prerogative ſhall not defeat; therefore in the Caſe of the King, if he make a Leaſe reſerving Rent, with a Proviſo that if the Rent be in Arrear for ſuch Time (being lawfully demanded, or demanded in due Form) that then the Leaſe ſhall be void; it ſeems that not only the Patentee of the Reverſion in this Caſe, but alſo the King himſelf, whilſt he continues the Reverſion in his own Hands, is * obliged to make an actual Demand by reaſon of the expreſs Agreement for that Purpoſe. Moor 210. Dyer 87.

* Page 197

There can be no Occupant of any of the King's Poſſeſſions; and therefore if the King grants Lands to *A.* during the Life of *B.* and *A.* dies, living *Ceſtui que vie*, the Law allows no Man to gain the Poſſeſſion which is now vacant by the Death of *A.* but preſerves it for the King; Co. Lit. 41. 2 Rol. Abr. 150.

King; for this Reaſon, that he is preſumed to be taken up in the publick Affairs of the Kingdom, and therefore not at Leiſure to attend his own private Concerns; alſo the King's Grants proceeding from his own Bounty and Liberality, none ought to have any Benefit from them but thoſe for whom he firſt deſigned them; and therefore when he made the Grant to *A.* during the Life of *B.* tho' he intended *A.* ſhould have the Benefit of it during the Life of *B.* yet if *A.* dies before *B.* none can make himſelf a Title under the Grant, becauſe it was made only to *A.* nor ought any one by Way of Occupancy to take Advantage of a Grant made to *A.* for his particular Services; becauſe that were to extend the King's Bounty further than he deſigned it, whereas ſuch a Grant in the Caſe of a common Perſon ought to be taken moſt ſtrongly againſt the Grantor, becauſe he parted with his Land for the Life of *B.* upon a valuable Conſideration, and therefore is no Sufferer if he does not enjoy it during the Time for which he granted it away. Alſo no Man can make himſelf a Title to any of the King's Poſſeſſions, without Matter of Record; and therefore none can claim any of them an Occupant, becauſe that is an Act in *Pais*, and no Matter of Record.

Co.Lit. 201. b. Cro. Eliz. 462. Moor 404. 4 Co. 73. Dyer 87.

If the King makes a Leaſe reſerving Rent, the Tenant muſt pay it without Demand, either to his Receiver for that Purpoſe, or at the Receipt of the Exchequer, as well as if by Words of the Leaſe the Rent had been made payable at the Exchequer, or into the Hands of his Receiver; but if the King grants the Reverſion, the Patentee muſt demand the Rent upon the Land, that being the Place appointed by Law for a common Perſon to demand it on.

Rol. Rep. 169.

If the King make a Feoffment on Condition, that upon Payment by the King of 100*l.* ſuch a Day, the Feoffment ſhall be void; the Feoffee muſt apply to the King at the Day; for the King is not obliged to make a Tender, as in the Caſe of a common Perſon.

Plow. 491.

The Deed of a private Perſon hath a Relation only to the Time of the Delivery, and not to the Time of the Date; but the King's Charter hath Relation to the Time of the Date; for being of Record, it cannot be averred to have been executed on any Time than that on which it bears Date.

Vide Comp. Incumb. 223, 224. and ſeveral Authorities there cited. (*a*) Latch 254. 2 Rol. Abr. 354. Dyer 392. Gouldſ. 163.

If the King preſents to a Church, and his Clerk is admitted and inſtituted, yet before Induction the King by his Prerogative may revoke ſuch Preſentation; nay the Preſentment of another is in Law a Repeal and Revocation of ſuch Preſentment, and that without any Notice to the Ordinary; but in the Caſe of a common Perſon, by Preſentation and Inſtitution he hath given up his Power to the Ordinary, and cannot afterwards vary, alter, or revoke his Preſentation; but ſome (*a*) Books hold, that after a Preſentment only he may vary; and this ſeems to be the right Diſtinction and better Opinion at this Day.

Page 198 4. That his Rights ſhall be preferred to the Subjects where they happen to meet.

Co.Lit.30.b. 4 Co. 55. 9 Co. 129. Hard. 24.—

It is an eſtabliſhed Principle in Law, that where the King's Right and that of the Subjects meet at one and the ſame Time, the King's ſhall be preferred.

In Caſe of concurrent Titles between the King and Subject, the Rule is *Detur Digniori.* 2 Vent. 268.

3 Leon. 251.

Hence it is ſaid, that if there be Lord Meſne and Tenant, and the Tenant pays his Rent at the Day to the Meſne, before Noon; and after

on

on the ſame Day, the Meſne dies, his Heir within Age, the Tenant ſhall pay it over again to the King.

If a Woman marries and hath Iſſue, and Lands deſcend to the Wife, and the Huſband enters, and after the Wife is found an Ideot by Office, the Lands ſhall be ſeized for the King, according to this Maxim, That when the Title of the King and a common Perſon begin at one Inſtant, the Title of the King ſhall be preferred. Co. Lit. 30. b.

So if the Woman had been the King's Nief, and one had married her without the King's Licence, *&c.* and Lands had deſcended before or after Iſſue, yet the King, upon Office found, ſhould have them. Co. Lit. 30. b. 4 Co. 55.

Baron and Feme Joint Purchaſers of a Term for Years, the Huſband drowns himſelf, the Leaſe is forfeited, and Wife ſurviving ſhall not hold it againſt the King or his Almoner; becauſe the Title of the King and a common Perſon coming together, the King's ſhall be preferred. Dyer 108. Plow. 260. Dame *Hale's* Caſe.

5. Of Acts of Parliament which extend to or bind not the King.

Herein a general Rule hath been laid down and eſtabliſhed, *viz.* that where an Act of Parliament is made for the Public Good, the Advancement of Religion and Juſtice, and to prevent Injury and Wrong, the King ſhall be bound by ſuch Act, though not particularly named therein. Plow. 136, 137. in Ld. *Berkley's* Caſe. 11 Co. 68. b. 5 Co. 14. 7 Co. 32. 11 Co. 68.

But where a Statute is general, and thereby (*a*) any Prerogative, Right, Title or Intereſt is deveſted or taken from the King, in ſuch Caſe the King ſhall not be (*b*) bound; unleſs the Statute is made by expreſs Words to extend to him.

(*a*) And it ſeems that the uſual Saving of the King's Right, *&c.* is only *ex abundanti Cautela*, and not of abſolute Neceſſity. Show. P. C. 179.

(*b*) But may take Advantage of an Act of Parliament, though not particularly named. 11 Co. 68. b. Leon. 150.

On this Foundation and theſe Diſtinctions it hath been held,

That the Statute of *Weſtm.* 2. (13 *Ed.* 1. *ſtat.* 1.) *De donis* extends to and binds the King; as where Lands were given to the King and the Heirs of his Body, it was adjudged, that the King's Prerogative had not given him a greater Eſtate than in the Caſe of a common Perſon; and that an Alienation by him would be a Tort and an Injury to the Donor, which the King cannot do. Plow. 238, *&c.* Ld. *Berkley's* Caſe, cited in 11 Co. 72. 5 Co. 14. Co. 44.

So it hath been adjudged, and alſo held in Parliament, that the King is bound, though not named, by the (*c*) 13 *Eliz. cap.* 10. which re-
*ſtrains Eccleſiaſtical Perſons from making Leaſes, *&c.* this being a General Law, and for the Public Good. *Page 199

11 Co. 75. Caſe of *Magdalen College.* 5 Co. 15. b. Rol. Rep. 151.

(*c*) The Statute 1 Eliz. c. 19. which reſtrains Biſhops from making Eſtates, *&c.* hath a Proviſo that it ſhall not extend to the King; which my Lord *Coke* ſays, was of abſolute Neceſſity; for that otherwiſe the King would be bound by it. 5 Co. 14. b.—It ſeems the Law was held otherwiſe on the Stat. 13 Eliz. c. 10. and therefore where a Leaſe was made to the King by a Dean and Chapter, and the King had aſſigned it over, after that the Law came to be held, that the King was bound, the Aſſignee had his Leaſe made good to him in Chancery againſt the Statute, becauſe he could not know the Law in a Matter ſo dubious. Rol. Abr. 378.

So the King is bound, tho' not named, by the Statute 32 *H.* 8. *cap.* 28. againſt Diſcontinuances by Huſbands of their Wives Eſtates, *&c.* for this being an Injury to the Wife, it ſhall extend to the King, whoſe moſt immediate Concern it is to relieve his Subjects from any Injury or Wrong. 2 Inſt. 681. Show. Rep. 209.

So

35 H. 6. 61. Plow. 236. b. 2 Inſt. 89. So the King, though not named, is bound by the Statute of *Merton*, 20 *H.* 3. *cap.* 5. made againſt Uſury in doubling the Rent, in the Caſe of an Infant Heir who has made Default in Payment.

Plow. 236. b. 2 Inſt. 99. So the King, though not named, is bound by the 10 *cap.* of the Stat. *Merton*, 20 *H.* 3. which ordains, that Suit to the Lord may be done by Attorney, *&c.*

Co. Lit. 120. The King is bound by the 31 *Eliz. cap.* 6. againſt Simony; being a Law made for the Advancement of Religion.

11 Co. 74. b. So the King, though not named, is bound by the 27 *Eliz. cap.* 4. againſt Voluntary Conveyances to defraud Purchaſers; ſo that a Voluntary Conveyance to the King is as much void againſt a ſubſequent Purchaſer for a valuable Conſideration, as in the Caſe of a common Perſon.

2 Inſt. 169. 4 Mod. 207. Bound by the Stat. *Weſt.* 1. (3 *Ed.* 1.) *cap.* 5. that none ſhall diſturb Elections upon Pain of great Forfeitures.

2 Inſt. 142. Show. Rep. 209. Bound by the Statute of *Marlbridge*, (52 *H.* 3.) *cap.* 22. that none may diſtrain his Freeholders without the King's Writ.

4 Mod. 207. Show. Rep. 208. *Croke's* Caſe—at the End of the Caſe it is ſaid, that there were two Inſtances in *London* where under Colour of this Prerogative the King's Preſentee was preferred; but this is ſaid to have been done by *Jefferies*, and never conteſted.

By an Act of Parliament 22 *Car.* 2. *cap.* 11. the Pariſhes of St. *Michael Woodſtreet* and St. *Mary Staining* in *London*, were united and eſtabliſhed as one Pariſh Church; and it was provided, that the firſt Preſentation ſhould be made by the Patron of ſuch of the ſaid Churches, the Endowments whereof were of the greateſt Value; the King was Patron of St. *Mary Staining* (of far leſs Value), and a common Perſon Patron of St. *Michael Woodſtreet*, who preſented Mr. *Crooke*; on a *Caveat* entered againſt the Inſtitution, it was determined by Civilians, by the Advice of Lawyers at Doctors-Commons, that this Statute though in the Affirmative, and without any Negative Words, extended to, and ſo far bound the King, as to deprive him of any Preference he might have by his Prerogative, as in Caſes where his Intereſt is intermixed with others; and that the Act of Parliament giving a new Eſtate to the King, and preſcribing the Manner of Enjoyment, the Method limited muſt take Place of the King's Prerogative.

Plow. 240. Hob. 146. 7 Co. 32. Moor 540. But as Acts of Parliament are to be conſtrued according to the Subject Matter, and not to be extended further than the Intention of the Legiſlature; hence in Variety of Caſes we find it determined, that General Words in an Act ſhall not ouſt the King of his Prerogative.

Lit. Sect. 140. Co. Lit. 98. Plow. 240. 11 Co. 68. b. As on the Statute *Quia Emptores Terrarum*, which enacts, *That none ſhall alien Lands in Fee to hold of himſelf*; yet it is held, that the King may give Lands in Fee to hold in Frankalmoigne or other Services.

So the 12 *cap. Mag. Cha.* which provides, *quod communia Placita non ſequantur curiam noſtram ſed teneantur in aliquo certo loco*, does not bind
*Page 200 Plow. 240. b. 244. a. 11 Co. 68. b. * the King; but that he may bring an Action of Debt or *Quare Impedit* in *B. R.*

Plow. 240. a. So of the Statute *Weſt.* 2. (13 *Ed.* 1. *ſtat.* 1.) *cap.* 17. which provides, that where divers Inheritances by Knight's Service deſcend, *quod ille dominus de cætero habeat Maritagium de quo Anteceſſor ſuus prius fuerit Feoffat'*.

Plow. 240. b. Not bound by the Statute of *Marlbridge*, (52 *H.* 3.) *cap.* 9. but all Coparceners in Reſpect of the Lands deſcended on them, muſt each of them do Service, as before the making of the Statute.

Not

Not bound by the Statutes of *(a)* Limitation, nor by the Statute of *Weſtm.* 2. (13 *Ed.* 1. *ſtat.* 1.) *cap.* 5. which makes a Plenarty for ſix Months a good Plea. 11 Co. 68. Plow. 244. Comp. Inc. 108.

(a) Vide 3 Inſt. 188.

Nor by the Statute 27 *E.* 1. (*ſtat.* 1. *cap.* 4.) which gives the Trial by *Niſi Prius* in the Country. 11 Co. 68.

Neither the Statute Merchant, thoſe concerning the Staple, the Statute of Frauds, nor thoſe relating to Bankrupts, extend to, nor bind the King. Jon. 203. CroCar. 148. Salk. 162. pl. 1.

There are alſo Statutes, which, as my Lord *Hobart* ſays, were made to put Things in an orderly Form, and to eaſe a Sovereign of Labour, but not to deprive him of Power, which cannot be ſaid to bind the King. Hob. 126.

As the 27 *H.* 8. *cap.* 27. which enacts that all Grants concerning the Court of Augmentations ſhould be under the Seal of that Court; yet Grants under the Great Seal have been held good. Dyer 56. a.

So the Statute 25 *H.* 8. *cap.* 21. which directs the Manner of granting Diſpenſations, though it ſays that Diſpenſations ſhall not otherwiſe be granted; yet the King's Power is not thereby reſtrained, but that by virtue of his Prerogative he may grant them as before. Hob. 146.

So on the Statute 28 *H.* 8. *cap.* 15. for the Trial of Piracy by Commiſſion, it hath been held, that the Trial may be, though the Chancellor does not nominate the Commiſſioners, as that Act appoints. Dyer 225. Hob. 146.

So on the Statute 9 *E.* 2. *ſtat.* 2. that the Queen may make Sheriffs without the Judges. Dyer 303.

So on the 31 *H.* 6. *cap.* 5. the Office of Alnage was granted by the Queen, without the Bill of the Treaſurer; and held good. Hob. 146.

By a private Act of Parliament 1 *Jam.* 2. the Pariſh of St. *James* was taken out of the Pariſh of St. *Martin*, and made an independent Pariſh; and it was provided by the Statute, that Dr. *Teniſon*, the then Vicar of St. *Martin*'s ſhould be the firſt Rector of St. *James*'s Pariſh; and that the Patronage of the Advowſon ſhould belong to the Biſhop of *London* and the Lord *Fermin*, *alternis Vicibus*; the firſt Rector, after Vacation by Dr. *Teniſon*, to be preſented by the Biſhop of *London*, and the next by the Lord *Fermin* and his Heirs, and ſo on. Dr. *Teniſon* was promoted to the Biſhoprick of *Lincoln*, by which the Church of St. *James* became void; and it was adjudged, that although it was by the Statute expreſsly appointed, that the Biſhop of *London* ſhould preſent to the Avoidance, yet the Statute deſigned only to direct the Methods and Turns between the Patrons, and not to exclude the King of his Prerogative; and although this was a Church newly erected, yet the King having the Prerogative to preſent to all Churches where the Incumbent is promoted, ſhall have it in this Church when it is erected. Show. P. C. 164. 4 Mod. 200. 2 Salk. 540. pl. 2. Show. Rep. 413, 441, 493. 3 Lev. 377, 382. Ld. Raym. 23. S. C. Lev. Ent. 344. Comb. 235, 300, 301. Carth. 313. 2 Salk. 559. pl. 2.

Holt 585. pl. 1. between *The Queen* and *Biſhop of London* and *Dr. Birch.*

6. That no Laches can be imputed to him; and therein of the Maxim, *Nullum Tempus occurrit Regi.*

From the Preſumption that the King is daily employed in the weighty and public Affairs of Government, it hath become an * eſtabliſhed Rule at Common Law, that no Laches ſhall be imputed to him, nor he any way to ſuffer in his Intereſts, which are certain and permanent; and this

*Page 201 Stamf. *Prerog.* 32, 33. Plow. 143. 7 Co. 28. Jon. 79. Hard. 24.

this his Privilege (*a*) *quod Nullum tempus occurrit Regi*, has been confirmed by the Statute *de Prærogativa Regis*. †

(*a*) *Vigilantibus & non dormientibus Jura ſub veniunt*, is a Rule for the Subject; but *Nullum tempus occurrit Regi*, is the King's Plea; for there is no Reaſon that he ſhould ſuffer by the Negligence of his Officers, or by their Compacts or Combinations with the adverſe Party. Hob. 347.

† 17 Ed. 2. ſtat. 1.

Lit. Sect. 178. Co. Lit. 118. a. Hence it was held, that if the King's Villein had purchaſed Land, and aliened before Entry by the King, yet upon Office found the King might have entered, *quia Nullum tempus occurrit Regi*; tho' it was otherwiſe in the Caſe of a common Perſon.

Co. Lit. 294. So in a Writ of Right of Advowſon brought by the King, the Tenant ſhall not tender the *Di Mark*, becauſe *Nullum tempus occurrit Regi*; and therefore the King ſhall alledge, that he or his Progenitor was ſeiſed without ſhewing any Time.

Co. Lit. 90. b. So an Action of Account lay at Common Law againſt the Executors or Adminiſtrators of the King's Debtor or Receiver; for being ſuppoſed buſied and employed in the weighty Affairs of the Kingdom, it was not thought reaſonable that he ſhould ſuffer in his Treaſure by an Omiſſion occaſioned perhaps by ſuch his Attendance.

Co. Lit. 41. b. For this Reaſon it is that there can be no Occupant againſt the King; ſo that if the King grants Lands to *A.* for the Life of *B.* and *B.* dies, no Man by his Entry can gain himſelf a Title againſt the King; tho' it was otherwiſe in the Caſe of a common Perſon.

Co. Lit. 57. So there can be no Tenant at Sufferance againſt the King; but he who holdeth over is an Intruder, becauſe no Laches can be imputed to the King for not entering.

Bro. Title *Diſſeiſin* (4.) Hob. 322. Rol. Abr. 659. Therefore if the King be ſeiſed in Fee of the Manor of *B.* and a Stranger erects a Shop in a vacant Plot of it, and takes the Profit of it without paying any Rent to the King; and after the King grants over the Manor in Fee, and the Stranger continues in the Shop and occupies it as before, this is no Diſſeiſin; for the firſt Entry of the Stranger was no Diſſeiſin, but an Intruſion on the King's Poſſeſſion; for that the King's Title appearing on Record, the Entry in *Pais*, which is not an Act of equal Notoriety, will not diveſt it out of him; if then the King is not diſſeiſed, his Conveyance of the Freehold is good, and the Grantee is ſeiſed by virtue of it; and conſequently cannot be ſaid to be diſſeiſed by the Stranger who has made no Entry on him after the King's Convey an e, but only continued the old Intereſt which he had before the Grant; and ſo remains an Intruder ſtill, and liable to an Action of Treſpaſs or Ejectment for it.

Co. 69. 10 Co. 112. Dalt. Juſt. 303. A Perſon cannot be indicted on the Statutes againſt Forcible Entries for entering into the King's Poſſeſſions, becauſe he cannot be diſſeiſed.

Plow. 243. a. 2 Leon. 31. A Deſcent caſt is no Plea againſt the King, nor does it take away his Right of Entry.

2 Inſt. 168. Plow. 243. If the King's Goods become Wreck, the Lord of the Manor cannot take them, but the King may claim them after the Year and the Day; for this Reaſon, that he is ſuppoſed employed in the publick Affairs, and therefore no Lapſe of Time ſhall injure him.

49 E. 3. 4. Kitchen 81. For this Reaſon the Lord of the Manor cannot take the King's Beaſts, as Strays; as alſo that this Privilege of Waifs and Strays is derived from the Crown, and cannot be ſuppoſed to extend farther than a Liberty to take the Goods and Cattle of a common Perſon.

Plow. 243. a. If a Grant be made to the King of the next Avoidance of a Living, and a Stranger upon the Death of the then Incumbent preſents, and his

his Preſentee continues in ſix Months, and dies, yet the King may pre-
* ſent another, *quia Nullum tempus occurrit Regi*; ſo if a Grant had been *Page 202
made to the King of all ſuch Preſentments as ſhould happen within twenty Years, and in the twenty Years there happen ten Preſentments which are all filled up by a Stranger, yet the King ſhall preſent to them over again.

If the King be Patron of a Church, and he omits to preſent within ſix Months, the Ordinary cannot preſent for the Lapſe, but is only to ſequeſter the Profits, and ſerve the Cure till the King thinks proper to preſent; but if in this Caſe the Ordinary collates his Clerk, and afterwards the King preſents, the Clerk ſo collated cannot be turned out without a *Quare Impedit*. Bro. Tit. *Preſentment* (24). Comp. Incumb. 118.

If the King preſents to a Church, and his Clerk is admitted and inſtituted, yet the King may before Induction repeal and revoke his Preſentation; and it is held in this Caſe, that the Preſenting another is a Repeal in Law, without any other Notice to the Ordinary. † 7 E. 4. 32. Dyer 290, 327, 360.

† But *vide ante* 197. the laſt Paragraph.

So where a Title by Lapſe comes to the King, if the King doth preſent, and his Preſentee is inſtituted, yet the King may revoke his Preſentation, and ſo null the Inſtitution at any Time before his Clerk is inducted; or if his Clerk be inſtituted upon ſuch Title, and die before his Induction, the King may preſent another, his Turn not being ſerved by the Inſtitution only of his Clerk. Leon. 156. *Wright* v. *Biſhop of Norwich*.

But tho' the King may remove the Patron's or Stranger's Clerk that comes in upon his Lapſe, yet if ſuch Clerk happens to (*a*) die Incumbent of the Church before the King doth preſent, the King hath loſt the Advantage of the Lapſe, and ſhall not preſent afterwards, or remove the Patron's ſecond Preſentee, becauſe the King, is to have but one Turn, and that the next; and if the Law ſhould be otherwiſe, the King, by ſuffering divers Uſurpations upon his Lapſe, might even diſinherit the very Patron; and the Rule *Nullum tempus occurrit Regi*, is not to take Place where the King is limited to a Time certain. 7 Co. 28. Owen 2. And. 148. Cro. Eliz. 44. Cro. Jac. 53, 216. Hetley 125. Bulſ. 28. Moor 269. Fitzg. 30.

(*a*) Or if the Church becomes void by Reſignation or Deprivation, unleſs ſuch Reſignation were by Fraud or Covin. Cro. Jac. 216. Owen 89. 4 Leon. Caſe 351. ‡

---

‡ By ſtat. 9 Geo. 3. c. 16. The King ſhall not ſue, &c. any Perſon, &c. for any Lands, &c. (except Liberties and Franchiſes) or any Title which has not firſt accrued within ſixty Years before the Commencement of ſuch Suit, unleſs he has been anſwered the Rents within that Time, or they have been in Charge, or ſtood *inſuper* of Record, and the Subject ſhall quietly enjoy againſt the King, and all claiming under him, by Patent, &c.——This extends not to Eſtates in Reverſion, or Remainder, or limited Eſtates.——Theſe Lands ſhall be held on the uſual Tenures, &c.——Uſual Fee-Farm Rents confirmed.——Putting in Charge, ſtanding *inſuper*, &c. good only when on Verdict, Demurrer, or Hearing, the Lands, &c. have been given, adjudged or decreed to the King.

7. Of his Prerogative in his Suits and Proceedings in Courts of Juſtice.

As the King is the Fountain of Juſtice, and all Courts of Juſtice derive their Authority from him, hence he is ſuppoſed to be always preſent in Court; and therefore it hath become an eſtabliſhed Principle of Law, that the King cannot be Nonſuit in any Action or Information in which he is ſole Plaintiff. Co. Lit. 139. Bro. *Nonjuit* (68). Sav. 56.

But

Co. Lit. 139. 2 Rol. Rep. 33, 136. But it ſeems that any Informer *qui tam*, or Plaintiff in a popular Action, may be Nonſuit, and thereby wholly determine the Suit, as well in Reſpect of the King as of himſelf. ‡

‡ But the King may afterwards proceed for his Share of the Penalty, in the uſual Way, as if no ſuch Suit had been inſtituted, provided the Proſecution is commenced in due Time.

Co. Lit. 139. Sid. 420. Salk. 21. pl. 11. Alſo the King's Attorney General may enter a *Nolle Proſequi*, which has the Effect of a Nonſuit to any Information or Action brought by the King only.

like Point, where it is ſaid by the Ch. J. that the Crown, notwithſtanding a *Nolle Proſequi*, may award new Proceſs upon the ſame Indictment.

Vent. 33. *The King* v. *Benſon.* In an Information for Extortion, Iſſue was joined, and the Day the Jury were returned, the King ſent a Writing under his Sign Manual to Sir *Thomas Fanſhaw* Clerk of the Crown, to enter a Ceſſer of Proſecution; and *Palmer* Attorney General affirmed, that the King *Page 203 * may ſtay Proceedings; yet notwithſtanding the Court proceeded to ſwear the Jury, and ſaid they were not to delay for the Great or Little Seal; whereupon the Attorney entered a *Nolle Proſequi*.

Ld. Raym. 721. No Proſecutor upon an (*a*) Indictment can enter a *Nolle Proſequi*, without Leave of the Attorney General.

(*a*) That entering *Nolle Proſequi's* upon Indictments, began in *Charles* 2d's Time. 6 Mod. 262. *per Holt* Ch. J.

4 Inſt. 17. Plow. 243. Rol. Rep. 290. It is a Rule of the Common Law, that the King by his Prerogative may ſue in what Court he pleaſes; and therefore may bring a Writ of Right or a *Quare Impedit* in the Court of King's Bench.

Vent. 17. *The King* v. *Webb.* In an Action for embezzling the King's Goods, which was laid in the Declaration to be in *London*, it was moved for the King, that the County might be changed; and the Court held, the King might chuſe his County, and might wave that which he had ſeemed to have elected before, as he may waive his Demurrer and join Iſſue.

Hill. 6 G. 2. in *B. R. Rex* v. *Hallam*, &c. If a Perſon be guilty of two capital Offences, the King may elect which of them to try him on firſt; and accordingly, where two Perſons murdered the Poſt-Boy in *Lincolnſhire*, and afterwards committed a Robbery in *Wilts*, for which they were taken and in Cuſtody in *Wilts*; the Attorney General moved for a *Habeas Corpus* to the Sheriff of *Wilts*, to deliver them to the Sheriff of *Lincoln*, and another to the Sheriff of *Lincoln* to receive them; which was granted; the Court allowing the Crown had ſuch Election.

(F) Of the King's Grants and Letters Patent: And herein,

1. What Things the King may grant; and therein,

1. Of Grants ariſing from his Prerogative of Power, and which are inſeparably annexed to the Crown.

Bro. *Pat.* 16. 2 Rol. Abr. 187. FROM the great Truſt and Confidence repoſed in the King, and the high Authority with which he is inveſted, the Law hath in-

9 Co. 25, 87. Co. Lit. 199. Godb. 254. Jenk. 79, 307.

ſeparably

ſeparably annexed to the Crown a Power of granting and diſpoſing of divers Rights and Privileges, which cannot be granted or eſtabliſhed by any leſs Authority; of theſe there are ſome that have no Exiſtence 'till created, ſuch as Franchiſes, Liberties, Fairs, Markets, Hundreds, Leets, Parks, Warrens, which the King (*a*) only by his Prerogative can (*b*) eſtabliſh.

(*a*) And therefore a Subject cannot build a Caſtle or other Place of Defence without the King's Licence. Co. Lit. 5. (*b*) May be created by Ordinance, as my Lord *Hobart* expreſſes. Hob. 15.

So the King may grant *Pontage* or *Murage* to be taken by thoſe who erect new Bridges or Walls; but the Payment thereof ſhall continue no longer than the Bridge remains uſeful, or the Wall neceſſary for the Defence of the Subject. Bro. *Patent* 12. Noy 176. *Darcy* v. *Allen*.

So a Grant of a Ferry, and that every Perſon going over ſhall pay a Halfpenny, is good, being for the publick Utility; and the Payment is in Conſideration of the particular Benefit. 13 H. 4. 14. Bro. *Patent* 12.

* But the King cannot grant Toll to be taken in the Highways, which are to be free to all People; and therefore a Toll-Traverſe or Toll-thorough cannot commence by Grant at this Day, but muſt be claimed by Preſcription. *Page 204 Bro. *Patent* 100. Noy 176.

And indeed in all Grants of this Kind, the Good of the Publick ſeems to be principally regarded, as appears by the Writ of (*c*) *Ad quod damnum*; and in this, that if the King creates or grants a Fair or a Market to a Perſon, and afterwards grants another to another Perſon to the Prejudice of the firſt, the ſecond Grant is void. Moor 476. *vide* Title *Fairs and Markets*. (*c*) F. N. B. 220.

All Extraparochial Tithes belong to the King by his Prerogative, and may be granted by him. Bro. *Patent* 33.

So the King may grant a Swan-Mark or the Game of Wild Swans in ſuch a River, and ſuch Grant is good; but none can have a Swan-Mark unleſs he hath an Eſtate of Freehold of five Marks *per Ann.* 7 Co. 17, 18.

So all Royal Mines belong to the King, and he may grant them, but it muſt be by expreſs Words. Plow. 339.

None but the King can erect a *Beacon* or Sea-Mark, unleſs he hath a Licence or a Grant for that Purpoſe. Carter 90.

Where the King hath a Suit to a Mill *ratione Prærogativæ*, he may grant it. Carter 92.

All Judicial Offices which have been uſually granted by the Crown, are of the *Inſignia Majeſtatis*, and ſo inſeparably annexed to the Crown, that they cannot be granted by any leſs Authority, nor in any other Manner, nor with other Powers than as warranted by the known and approved Forms in ſuch Caſes. 4 Inſt. 87. Sid. 338. Co. Lit. 114. Lev. 219.

Hence Commiſſions of a new Invention, though under Pretence of publick Good, have been condemned; as Commiſſions to aſſay Weights and Meaſures. 4 Inſt. 163, 245.

So Commiſſions to ſeize the Goods and impriſon the Bodies of all Perſons who ſhall be notoriouſly ſuſpected of Felonies or Treſpaſſes, without any Indictment or other legal Proceſs againſt them, have been held illegal and void. 2 Inſt. 54.

So it has been held, that the King could not authoriſe Perſons to take Care of Rivers and the Fiſhery therein, according to the Method preſcribed by the Statute *Weſt.* 2. (13 *Ed.* 1. *ſtat.* 1.) *cap.* 47. before the making of that Statute. 4 Inſt. 161.

So a Grant by *Hen.* 6. to the Corporation of Dyers in *London*, of a Power to ſearch, *&c.* and if they found any Cloth dyed with Logwood, that it ſhould be forfeit, was adjudged void; it being againſt Law that any (*d*) Forfeiture ſhould incur by Letters Patent. 2 Inſt. 47. (*d*) Sid. 441. Vent. 47.

The

Lit. Rep. 304. Hob. 48. Lucas 125. The Crown may grant Cognizance of Pleas to proceed *ſecundum Legem Terræ*, but not to proceed by other Laws; for that would be to make new Laws, which the Crown, being but one Branch of the Legiſlative Power, cannot do.

Hob. 63. Noy 147. 2 Rol. Abr. 192. The King cannot grant to any to hold a Court of Equity, becauſe this is in Derogation of the Common Law; and the Chancery in *Cheſter* and *Durham* are Incidents to a County Palatine which had *Jura Regalia*.

Vent. 407. A Grant to the Town of *Berwick* that they ſhould be a County, but no Grant of having a Sheriff, was adjudged to be void, becauſe there would be no Officer to execute and do Juſtice.

Dyer 300. Bro. *Patent* 111. Skin. 606. There are likewiſe perſonal Prerogatives which the King only can grant, and which are of ſo high a Nature, as that they cannot be delegated to any other; ſuch as the Power of making an Alien a Deniſon, the Power of pardoning Felonies, *&c.*

*Page 205

* 2. Of Grants ariſing from his Intereſt.

Plow. 236. in Ld. *Berkley*'s Caſe. Vaugh. 62. Co. Lit. 19. 7 Co. 12. It ſeems to be clearly agreed, that the King may alien, grant, or charge any Branch of his Revenue, in which he hath an Eſtate of Inheritance, as alſo his Lands in Fee-Simple, though he is ſeiſed of them *Juræ Coronæ*; and this Power is ſaid to be founded on Reaſons of State, and ariſes from the Nature of our Conſtitution, by which the King is diſabled to levy Money on the Subject without an Act of Parliament; ſo that if this Power were not inherent in the Crown, the Kingdom might ſuffer by a ſudden Invaſion, *&c.* Alſo as Rewards and Puniſhments are the Supporters of all Governments, it is but highly reaſonable that the Crown ſhould have the Power of rewarding thoſe who deſerve well; and this hath been the conſtant Uſage of the Kings of *England*, by granting out of the Crown-Revenue Penſions and Eſtates to thoſe whoſe Services have been meritorious, as alſo to ſuch of the Nobility whoſe Fortunes have come to decay. †

† And ſuch Grants may, in this free Country, be conſiſtent with ſound Policy, if the Crown is not thereby too much impoveriſhed: The Reaſon, I conceive, is obvious.

5 Mod. 55. *per* Holt Ch. J. *vide* Title *Ancient Demeſne*. Lands in ancient Demeſne, tho' they ſeemed moſt appropriate to the King's Uſe of any of his Revenues, for they had ſeveral Privileges all relating to the King, as not to be impleaded out of the Manor, to be free of Toll for all Things concerning their Suſtenance and Huſbandry, not to be impanelled on any Inqueſt; and yet notwithſtanding all this, thoſe Lands were always alienable.

9 Co. 25. *The Abbot of Strata Marcella*'s Caſe. Moor 474. Palm. 78. And. 87. Mod. 232. The Goods of Felons, Fugitives, Perſons outlawed, *&c.* Waifs, Strays, Deodands, Wreck, *&c.* are deemed the Flowers of the Crown, and diſtinguiſhed by that Name; and theſe the King clearly may grant; and between theſe and Liberties and Franchiſes, which have no Exiſtence 'till created, a Diſtinction hath been eſtabliſhed, *viz.* That if the firſt of theſe, and the Poſſeſſions to which they are appendant or annexed, come to the Crown, they ſink in the Crown, and the King is ſeiſed of them again *Juræ Coronæ*; but if the Poſſeſſions, to which Liberties or Franchiſes, ſuch as Fairs, Markets, *&c.* are appendant, come to the Crown, yet theſe laſt are not extinct, but continue to exiſt according to their firſt Eſtabliſhment.

Cro. Eliz. 463. *Heigham* v. *Beſt*. If the King grants to *J. S.* Felons Goods, or Waifs and Strays within his Manor, *J. S.* ſhall have them in the Lands of the Freeholders; for they are Liberties due to the King, which he may grant, and are not

Charges

Charges to the Subject; for the King hath this Right in every Man's Land, and therefore may grant it to another.

The Forfeiture of Goods and Chattels in an Outlawry in a Perſonal Action belongs to the King, which the King may, and uſually does grant to the Perſon who is at the Expence of ſuing out the Outlawry; yet this is but *ex Gratia Regis*, and not *debito Juſtitiæ*. Yelv. 19. Will. Rep. 690.

All Fines for Offences *de Jure* belong to the King, becauſe it is his Correction, and the publick Revenge is in his Hands; but the King may grant them to others. Ld. Raym. 213, 214.

It was agreed in the Banker's Caſe, that King *Car.* 2. having the Revenue of Exciſe veſted in him, his Heirs and Succeſſors, by Act of Parliament, might grant or charge the ſame or any Part thereof; and that, accordingly, the Letters Patent and Grant of 25,000 *l. per Ann.* out of the Hereditary Revenue of Exciſe, for the Payment of Intereſt to Sir *Robert Vinor* and others, of whom the King had borrowed large Sums of Money, 'till ſuch Time as the principal Debt ſhould be diſcharged, were good and valid in Law, and bound the King's Succeſſors; although it was objected, that this Revenue was granted by Act of Parliament; that it aroſe out of the Purſes of the People, * and that it was given in Lieu of Wards, Liveries, Purveyances, &c. which were Inheritances unalienable. But to theſe it was anſwered and reſolved, that being given in Fee, though by Act of Parliament it muſt have the ſame Incidents as other Inheritances in Fee have, one of which is to be alienable at Pleaſure; and as to its being granted in Lieu of Inheritances which were unalienable, that was held not to be material, as thoſe Inheritances were extinct, and ſo could not affect Inheritances of another Nature newly given; beſides thoſe Inheritances of Wards, Liveries, &c. were in Effect alienable, for they might have been releaſed or diſcharged. 5 Mod. 46. Comb. 270. Skin. 601. pl. 11. *The Banker's* Caſe. *Page 206

3. How far the King muſt have an Intereſt, in order to enable him to grant.

There are three Kinds of Inheritances which the King may grant, though different as to the Manner; which Differences ariſe from the Nature of his Intereſt. *1ſt*, All his Lands, Tenements, Rents, Commons, &c. he may grant in Poſſeſſion, Reverſion or Remainder. *2dly*, A Corody in a Religious Houſe, or Preſentation to a Church, which he can only grant in Poſſeſſion, or when the Corody or the Church become vacant; for of theſe he hath only the Preſentation or Recommendation, and therefore cannot grant them in Reverſion. *3dly*, Offices which he may grant, but cannot himſelf occupy. 8 Co. 55. b. 56. a.

If the King grants for three Lives, *habendum a die confectionis Literarum Patentium*, this is void; becauſe an Eſtate of Freehold cannot commence *in futuro*, and Letters Patent under the Great Seal amount to a Livery; and if the Freehold ſhould paſs immediately from a Day to come, then the King would have a particular Intereſt in the mean Time without any Donor, which is againſt the Rules of Law. 5 Co. 93. *Berwick's* Caſe. Moor 393. S. C.

Upon a Grant of the Office of a Searcher in the Port of *Plymouth*, it was adjudged, that the King may grant an Eſtate in an Office to commence *in futuro*, or upon a Contingency; for he hath no Inheritance in the Office or to the Execution of it, but in Point of Intereſt only to grant; and it was ſaid in this Caſe, that there was a Diverſity between Offices in Fee exiſting, and ſuch as were granted only for Life; which being as a new Thing created might, as a Rent *de Novo*, be granted to commence *in futuro*. 4 Mod. 275. *The King* v. *Kemp.* 2 Salk. 465. pl. 2. Carth. 350. Comb. 334. S. C. Ld. Raym. 49. Skin. 446. pl. 4.

Dyer 108. 2 Rol. Abr. 198. Jenk. 246.

The King may grant that which is not actually in him at the Time of the Grant; as the Marriage of (*a*) a Ward, *quando acciderit*; although he had the Ward in Right of his Prerogative.

(*a*) Wards, Liveries, Purveyances, *&c.* were always in effect alienable, as they might be releaſed or diſcharged. 5 Mod. 56. Skin. 605. *per* Holt Ch. J. in his Argument in the Banker's Caſe.——But the King cannot grant Land when it ſhall eſcheat. Raym. 241.——Whether he can grant Land when it ſhall become derelict. Raym. 241. 2 Lev. 171.

Salk. 58. pl. 1. *per Barones Scaccar'.*

The King cannot grant an Annuity, for his Perſon is not chargeable as the Perſon of a Subject; but if he grant it out of his Exciſe, or any Branch of his Revenue, it is good, for there is ſomewhat therewith chargeable.

4. Grants tending to a Monopoly; and therein of Things of a new Invention.

Vide Title *Monopoly.* *Page 207*

The King's Grant of a Monopoly, as of the ſole Buying, Selling, Working, Making or Uſing of any Commodity, is not only void by the Common Law, but the Perſons procuring ſuch Grants are ſaid to be puniſhable by Fine and Impriſonment.

3 Mod. 128. Noy 182.

And indeed the Freedom of Trade and Labour is of ſuch Conſequence, that as no Perſon can by his own Act totally debar himſelf of this Privilege, much leſs can he be reſtrained by the King's Letters Patent.

But notwithſtanding this, it is agreed, that the King may for a reaſonable Time grant to a Perſon the ſole Uſe of any Art firſt invented by him; and this it ſeems the King might do at Common Law, and is therefore a Matter excepted out of the Statute of Monopolies, 21 *Jac.* 1. *cap.* 3. by which it is provided, "That no Declaration in the Statute ſhall extend to "any Letters Patent and Grants of Privilege for the Term of fourteen Years "or under, of the ſole Working or Making of any Manner of new Ma"nufactures within this Realm, to the true and firſt Inventor and Inven"tors of ſuch Manufactures, which others at the Time of making ſuch "Letters Patent and Grants ſhall not uſe; ſo as alſo they be not contrary "to the Law, nor miſchievous to the State, by raiſing Prices of Com"modities at Home, or Hurt of Trade, or generally inconvenient; the "ſaid fourteen Years to be accounted from the Date of the firſt Letters "Patent or Grants of ſuch Privilege; but that the ſame ſhall be of ſuch "Force as they ſhould be if the ſaid Act had never been made, and of "none other."

In the Conſtruction of this Branch of the abovementioned Statute, the following Points have been held:

3 Inſt. 184.

That no new Invention concerning the working any Manufacture is within the Meaning of this Exception, unleſs it be ſubſtantially new, and not barely an additional Improvement of an old one.

3 Inſt. 184.

That no old Manufacture in uſe before, can be prohibited in any Grant of the ſole Uſe of any ſuch new Invention.

Lucas 131.

That if a Patent be granted in Caſe of a new Invention, the King cannot grant a ſecond Patent; for the Charter is granted as an Encouragement to Invention and Induſtry, and to ſecure the Patentee in the Profits for a reaſonable Time; but when that is expired, the Publick is to have the Benefit of the Diſcovery.

3 Inſt. 184.

It is held by my Lord *Coke*, that a new Invention to do as much Work in a Day by an Engine as formerly uſed to employ many Hands, is not within

within the ſaid Exception; becauſe it is inconvenient in turning ſo many labouring Men to Idleneſs. †

† *Sed qu. de hoc?* For it enables us to ſell our Commodities at foreign Markets cheaper than the Natives of thoſe Places can afford them, and muſt thereby increaſe our Trade and Commerce, of great Moment to a commercial Country like ours, and may be a Means of opening new Channels of Commerce, which muſt ultimately increaſe our maritime Power.

If the Invention be new in *England*, though the Thing was practiſed before beyond Sea, the Patent is good; becauſe the Act intended to encourage new Devices uſeful to the Kingdom; and it is not material whether the Diſcovery be owing to Study or Travel. 2 Salk. 447.

If a Man invent a new Art, and another happens to learn it before the Inventor can obtain a Patent, a Patent afterwards obtained, is void. § 3 Mod. 77. ſaid *arguendo*.

§ *Sed qu.* if learnt of the Inventor?

If a Perſon obtains a Patent for a new Invention, and another makes uſe of the Invention without the Licence or Conſent of the Patentee, an Action lies againſt him. Skin. 204.

5. Grants of the ſole Liberty of Printing.

The King's Prerogative in granting Letters Patent for a Privilege of Printing, hath in many Inſtances been diſputed, and his Power herein greatly doubted, on this Foundation and theſe Reaſons, that Grants of this Kind which exclude all other Perſons, and confine this Liberty or Privilege to the Patentees, tend to a Monopoly in * enhancing the Prices of Books, reſtraining Trade, diſcouraging Induſtry, and in making the Patentees careleſs and remiſs in their Duty. *Page 208

Carter 89. Mod. 256. Skin. 233. pl. 3. 3 Mod. 77. Vern. 275.

But notwithſtanding theſe Reaſons, and the Uncertainty that appears in ſome of the Caſes in the Books on this Subject, it ſeems the better Opinion, that the King hath a peculiar Prerogative in Printing, which hath been countenanced and allowed in all (*a*) Ages, and ſeems eſtabliſhed on the fundamental Maxims of Government, as being a Matter of a (*b*) publick Nature, firſt (*c*) introduced by the Kings of *England*; and in which an (*d*) unreſtrained Liberty might be of dangerous Conſequence to the Publick.

(*a*) Carter 90. it is ſaid, that fifty ſuch Patents have been granted ſince Ed. 6.

Time.—And that before ſuch Grants, this Buſineſs was managed by the King's Servants. (*b*) In 3 Mod. 75. a Difference is made between Things of a publick Nature, and thoſe only of publick Uſe; and on this Diſtinction the Court inclined to think, that the Letters Patent granted for the ſole Printing of Blank Warrants, Bonds and Indentures, were not good, theſe being only of publick Uſe, and not ſo in their Nature. (*c*) The Art of Printing was firſt at *Harlem*, the News of it came to Hen. 6. who at the Deſire of the Archbiſhop brought it over at his own Charge, at the Expence of 1500 Marks; the Perſon aſſigned for this Service was a Merchant. Carter 91.——Said to be introduced by Hen. 6. Skin. 234.——And that the King printed the Bible at his own Charge. Vern. 275. (*d*) Printing is a Conveyance by which Men communicate their Notions in the moſt publick Manner, and with the moſt laſting Impreſſion; and therefore if they are good, this is a Means to ſpread them and to give them a more diffuſive Influence; and if they are bad Notions, this is likewiſe a Method to ſpread the Miſchief wider. Skin. 234.

Accordingly we find this Prerogative admitted in the Caſe of *Darcy* v. *Allen*, the great Caſe of Monopolies, and the Reaſon thereof given by *Dodderidge*, who argued againſt Monopolies, becauſe it is neceſſary for the Peace and Safety of the Realm. Moor 673. Noy 173.

Mod. 256. It seems agreed, that if a Book has no certain Author, the King has the Property of the Copy, and may grant it to whom he pleases; hence (a) Almanacks are deemed Prerogative Copies.

(a) So of the Translation of the Bible, Year-Books, Common Prayer, and Statute-Book. Lucas 105. 2 Chan. Ca. 76.

Carter 89. M. 18 Car. 2. Lucas 106. S. C. cited to have been decreed in Chancery in Favour of the Patentees, and affirmed in the House of Lords.

In the 15 Year *Jac.* 1. a Patent for printing Law Books was granted to one *Moor*, which came to Colonel *Atkins* on his Marriage with *Moor's* Daughter. The Company of Stationers obtained Copies of *Roll's* Abridgment, which they printed; and this being complained of in Chancery by Colonel *Atkins*, an Injunction was awarded, not only against those of the Company (*viz.* *Tyton* and *Roper*), who were principally concerned, but against every Member thereof; and this Matter coming afterwards before a Committee of Parliament, it was there likewise determined in Favour of the Patentee; and in this Case it was said, that the King hath a particular Prerogative over Law Books, and that so he would have had, if the Art of Printing had never been known.

But the Case of the greatest Weight on this Head, is that of *Roper* and *Streater*, which was this; *Roper* bought of the Executors of Justice *Croke*, the third Part of his Reports, which he printed; Colonel *Streater* had a Grant for Years from the Crown for printing all Law Books, and printed upon *Roper*; on which *Roper* brought an Action on the Statute 13 & 14 *Car.* 2. *c.* 33. *Streater* pleaded the King's Grant; and on Demurrer it was adjudged in *B. R.* for the Plaintiff against the Validity of the Patent; on these Reasons, that this Patent tended to a Monopoly; that it was of a large Extent; that Printing was a Handicraft Trade, and no more to be restrained than other Trades; that it was difficult to ascertain what should be called a Law Book; that the Words in the Patent, *touching or concerning the Common or Statute Law*, were * loose and uncertain; that if this were to be considered as an Office, the Grant for Years could not be good, as it would go to Executors and Administrators; and that there was no adequate Remedy in the Way of Redress in Case of Abuses by Unskilfulness, selling dear, printing ill, &c. But this Judgment was reversed on a Writ of Error in Parliament, for the following Reasons; that the Invention of Printing was new; that this Privilege had been always allowed, which was a strong Argument in its Favour, although it could not be said to amount to a Prescription, as Printing was introduced within Time of Memory; that it concerned the State, and was Matter of publick Care; that it was in Nature of a Proclamation, which none but the King could make; that the King had the making of Judges, Serjeants, and Officers of the Law; that as to the Uncertainty, these Words in the Patent were to be taken *secundum subjectam materiam*, and not to be extended to a Book containing a Quotation of Law, but where the principal Design was to treat on that Subject; that as to its being an Office, it was not so properly an Office as an Employment, which may well enough be managed by Executors or Administrators; and that, as to Abuses, these like all others were punishable at Common Law, or the Patent itself might be repealed (b) by *Sci. Fa.*

*Page 209 Skin. 234. S. C. cited and said to have been so determined in *B. R.* M. 22 Car. 2. but reversed in the House of Lords. 2 Show. 260. S. C. cited as adjudged, M. 24 Car. 2. and there the Judgment given in *B. R.* is called a sudden Judgment, and said to be reversed in Parliament. Lucas 106.

(b) Though it cannot properly be called an Office, yet it is a Trust, and a *Sci. Fa.* will lie to repeal the Grant. 3 Mod. 77. S. C. cited, and there said, that the Validity of the Patent is now established by the Judgment in Parliament. Vern. 120. S. C. cited, and said it was not now to be shaken.

Mod. 256. 3 Keb. 792. S. C. 2 Show. 260. 3 Mod. 76. S. C. cited, and a like Judgment said to be given in the Case of the *Stationers Company* v. *Wright*, for printing Psalters and Psalms. Hill. 35 Car. 2. Skin. 234. Lucas 106. like Point, but no Judgment.

In an Action of Debt by the Company of Stationers against *Seymour*,

for

for printing *Gadbury*'s Almanack, it was adjudged that the Letters Patent, granted that Company for the ſole printing of Almanacks, were good; and though the Jury found, that the Almanack ſo printed contained ſome Additions; yet having likewiſe found, that the ſaid Almanack had all the eſſential Parts of the Almanack that is printed before the Book of Common Prayer, the Additions were looked upon as immaterial.

So an Injunction was granted againſt *Lee*, on the Application of the Stationers Company, to reſtrain him from ſelling Primmers, Pſalters, Almanacks and Singing Pſalms imported from *Holland*; the ſole Privilege of printing theſe belonging to that Company; and that (*a*) without any Trial directed as to the Validity of the Patent. 2 Show. 258.

(*a*) An Injunction was refuſed to ſtay the Sale of *Engliſh* Bibles, and to quiet the Right of Patentees, becauſe not a plain Right; and therefore an Iſſue directed. Vern. 120.——So where the Univerſity of *Oxford* claimed by Patent a Right of printing Bibles, though the Lord Keeper was of Opinion, that the Univerſity Patent extended to no more than were for their own Uſe, or to ſome ſmall Number to compenſate their Charge; yet he refuſed to grant an Injunction until the Right was ſettled by a Trial at Law. Vern. 275. & *vide* 2 Chan. Ca. 76, 93. & 2, as to theſe Caſes; for Injunctions ſeem frequently to have been ſince granted in Favour of Patentees and Owners of Books, upon producing the Patent in Court under the Great Seal.

Here it may be proper to take Notice of the Acts of Parliament relative to this Matter, and the rather as they have been urged as Arguments for the King's Prerogative in theſe Concerns. The firſt Statute is that of 25 *H.* 8. *cap.* 15. § which expreſsly provides in Caſes of Books, that the Lord Chancellor, Lord Treaſurer, or any of the Chief Juſtices, may ſet and limit the Prices as well of Books as of Binding. 2 Inſt. 744. § Repealed by 12 Geo. 2. c. 36. ſ. 3.

In the Statute 21 *Jac.* 1. *c.* 3. (*ſ.* 10.) againſt illegal and miſchievous Monopolies, it is particularly declared, that this Statute ſhould not extend to, or any ways impeach Patents for ſole Printing thentofore made or then after to be made.

* The Statute 14 *Car.* 2. (now expired) recites, that Printing is a Matter of publick Care, and every where countenances the ſole Privilege of Printing, and ſeems to be founded on the King's Prerogative; but was a hard Law and injurious to the Liberty of the Subject, in reſtraining the Number of Preſſes, licenſing Books, and impoſing Penalties and Forfeitures. *Page 210 Mod. 257. 2 Show. 260.

By the 8 *Ann. cap.* 19. "The Author of any Book not yet printed, and "his Aſſigns, ſhall have the ſole Liberty of printing it for fourteen Years, "to commence from the Day of publiſhing thereof; and (*b*) if any Per- "ſon within the ſaid Time ſhall print, reprint, or import any ſuch Book "without the Conſent of the Proprietor in Writing ſigned in the Preſence "of two credible Witneſſes, or ſhall knowingly publiſh it without ſuch "Conſent, the Offender ſhall forfeit the Books and Sheets to the Pro- "prietor, who ſhall forthwith damaſk and make them Waſte Paper, and "ſhall forfeit 1 *d.* for every Sheet found in his Cuſtody, either printed or "printing, one Moiety to the Crown, the other to him who will ſue in "any Court at *Weſtminſter*."

(*b*) It ſeems alſo a good Foundation for an Action at Common Law, or for an Application to a Court of Equity; but in order to entitle the Party to the Penalty in the Statute, the Terms of the Act as to regiſtring the Book in the Stationers Company, &c. muſt be complied with. 2 Atk. Rep. 95. This Act ought to receive the moſt liberal Conſtruction. Books colourable, ſhortened only, are within the Meaning of the Act. *Id.* 143. Collection of Letters as well as other Books within the Intention of the Statute. Re-printing a Book in *England*, which originally was pirated and printed in *Ireland*, will not be ſuffered, being a new Evaſion of this Act. *Id.* 342. ‖

2. Of

‖ An Injunction to ſtay Printing may be continued after the Anſwer come in, on Affidavits of the Prejudice would accrue on diſſolving it. *Gibbs* v *Cole*, P. 1734. 3 Peere Williams 255. The ſtat. 8 G. 2. c. 13. for Encouragement of Engraving, &c. is not confined to Works of Invention or Hiſtory, but extends to any new Print; as a Print of a Building, Prints of Plants repreſented in a different Manner

2. Of the Conſtruction of the King's Grants and Letters Patent, as to their being good or void; and herein of the King's being deceived in his Grant.

Plow. 333. Co. 44. 6 Co. 55. 7 Co. 12. 8 Co. 56. (a) 2 Co. 24. 8 Co. 145. Hob. 224. Pollexf. 418.

As the King's Grants proceed chiefly from his own Bounty, and his Letters Patent are Records of a high Nature, they ought to contain the utmoſt Truth and Certainty, and have in all Times been conſtrued moſt favourably for the King (*a*) contrary to the Grants of common Perſons; and accordingly in a great Variety of Caſes we find Incertainty, Miſrecitals, falſe Suggeſtions, and all ſuch Matters as ſhew that the King was deceived in his Grant, held ſuch Reaſons as have been ſufficient to vitiate the Grants.

In a Matter therefore in which ſuch great Exactneſs has been required, it may be neceſſary in the firſt Place to lay down the following general Rules.

(b) 5 Mod. 297. 2 Salk. 560. Carth. 440. Skin. 651. pl. 1. Ld. Raym. 292. S. C.

Firſt, that in the Conſtruction of Letters Patent every falſe Recital in a Part material will not vitiate the Grant, if the King's Intent ſufficiently appears; this was ſo held in the Caſe of *(b) The King* and *Biſhop of Cheſter*, where the Grant was made to a Perſon as a Knight who in Truth was no Knight; and tho' the Grant was held void for this Reaſon in *B. R.* yet the Judgment was reverſed in Parliament.

(c) 4 Mod. 277. Carth. 350. Comb. 334.

Secondly, That if the King is not deceived by the falſe Suggeſtions of the Party, but only miſtaken by his own Surmiſes, this will not vitiate his Grant; and ſo was the Reſolution in the Caſe of (*c*) *The King* v. *Kemp*.

Salk. 465. pl. 2. Skin. 446. pl. 4. Ld. Raym. 50. S. C.

(d) 6 Co. 55. Ld. *Chandos's* Caſe.

Thirdly, That though the King miſtakes either in Matter of Law or Fact, yet if this is not any Part of the Conſideration of the Grant, it will not vitiate it; and ſo is (*d*) Lord *Chandos*'s Caſe, which was thus: *Hen.* 7. granted to Lord *Chandos* a Manor in Tail, and the ſame King by other Letters Patent reciting the former Grant, and that in conſideration thereof to be cancelled that he was and is ſeiſed in Fee, did

* Page 211 *

grant the ſaid Manor to Huſband and Wife, and to the Heirs of the Huſband, *&c.* Now, tho' by the Surrender of the firſt Letters Patent, the Eſtate-Tail was not determined; and ſo the King not ſeiſed of the Manor in Fee as he recited he was in the ſecond Grant; for he had only a Reverſion in Fee expectant upon the Determination of the Eſtate-Tail; yet the Clauſe, *viz. by virtue whereof we are ſeiſed in Fee*, being what the King collected to be the Conſequence of the Surrender, and not at all owing to the Miſinformation of the Party, either as to the Intail or Sur-

---

Manner than hitherto. *Blackwell* v. *Harper*, M. 1740. 2 Atkyns 93.———Books colourably ſhortened, and where Quotations are tranſlated, are within the 8 Ann. c. 19. but fair Abridgments are not; for the Invention, Learning and Judgment of the Author are ſhewn in them. *Gyles* v. *Wilcox*, H. 1740. 2 Atkyns 141.———The Court will grant an Injunction for a Collection of familiar Letters, as well as other Books. There is a Diſtinction between Letters wrote *by* a Perſon, and wrote *to* him. *Pope* v. *Curl*, T. 1741. 2 Atkyns 342.———So though the Book has been pirated and printed in *Ireland*, and pretended to be only reprinted here. *Ibid.*——The Court will not grant Injunction to reſtrain one Tradeſman from uſing another's Mark, (as a Card Maker from uſing the *Mogul* Stamp.) *Blanchard* v. *Hill*, M. 1742. 2 Atkyns 484.

render,

render, the Miſtake which he made being no Part of the (*a*) Conſideration the Grant was held good.

(*a*) It is ſaid the King may grant with any Conſideration. Hob. 230.——So if the Conſideration be not a full one, it is no Objection; for Kings are ſuppoſed to be bountiful. Vern. 279.——If the King be deceived in a Conſideration real executory, it will avoid the Grant; but not in a Conſideration perſonal executed. Freem. 332. For this Difference *vide* 5 Co. 93. Jenk. 304. 10 Co. 67. but in 5 Co. 94. *Berwick*'s Caſe, it is ſaid to be a Maxim, that if the Conſideration which is for the Benefit of the King, be it executory or executed, or be it of Record or not of Record, if it be not true or not truly performed, or if any Prejudice may ariſe to the King, by Reaſon of the Non-performance thereof, the Letters Patent are void, & *vide* Moor 393. Hob. 221. 3 Leon. 248. Plow. 454. Skin. 663. Lane 3. 76. Dyer 252.

Fourthly, That the Words *ex certa Scientia & mero Motu*, in the King's Charters and Letters Patent, do occaſion them to be taken in the moſt benign and liberal Senſe, according to the Intent of the King expreſſed in his Grant,

Bro. *Patents* pl. 80. Plow. 337. 6 Co. 56. 7 Co. 14. 3 Leon. 249.——But where the King in his Grant recites a Thing which is falſe, that ſhall not make the Patent good, although the Words be *ex certa Scientia & mero Motu*. 10 Co. 112. 3 Leon. 249. Plow. 502. 3 Co. 4. Savil 5, 37. Dyer 300. 2 Salk. 561.

Fifthly, That tho', in ſome Caſes general Words of a Grant may be qualified by the Recital, yet if the King's Intent is plainly expreſſed in the Granting Part, it ſhall enure according to that, and is not to be reſtrained by the Recital.

So held in the Caſe of *The King* and *Biſhop of Cheſter*, which is grounded on *Legatt*'s Caſe, 10 Co. 112.

In a *Quare Impedit*, it was found by a ſpecial Verdict, that King *H.* 8. was ſeiſed in Fee of the Manor of *Leyburn* in *Kent*, to which the Advowſon of the Church of *Leyburn* is appendant (which Manor came to the King by the Diſſolution of Monaſteries, having been Part of the Poſſeſſions of the Abbot of *Gray Church*) and that he granted the Manor to the Archbiſhop of *Canterbury* and his Succeſſors, ſaving the Advowſon; afterwards the Archbiſhop regranted the Manor and the Advowſon to the King, his Heirs, and Succeſſors; after which the King grants the Manor with the Appurtenances, and this Advowſon (naming it in particular) which lately did belong to the Archbiſhop of *Canterbury* and to the Abbot of *Gray Church*, together with all Privileges, Profits, Commodities, &c. in as ample Manner as they came to the King's Hands by the Grant of the Archbiſhop, or by Colour or Pretence of any Grant from the Archbiſhop, or by Surrender of the late Abbot of *Gray Church*, or as amply as they are now or at any Time were in our Hands, to Sir *Edward North* and his Heirs; and the Queſtion was, Whether by this Grant the Advowſon did paſs; and adjudged that it did; for tho' here was a Falſity or Miſcrecital, the Advowſon never having been in the Hands of the Archbiſhop, yet that not being material, as the King could not be ſaid to be deceived, having granted the Advowſon expreſsly by Name, it was adjudged *ut ſupra*.

Mod. 195. 2 Mod. 1. 2 Keb. 442. *The King* v. *Sir Francis Clark*.

In the Argument of the above Caſe, the following Points were laid down as ſupported by the Authorities in the Margin.

* 1. Where a particular Certainty precedes, it ſhall not be deſtroyed by an Uncertainty or a Miſtake coming after.

*Page 212

Cro. Eliz. 34, 48. Yelv. 42. 3 Leon. 162. And. 148. 2 Godb. 423. *Markham*'s Caſe. 10 Co. *Legatt*'s Caſe.

2. That there is a Difference when the King miſtakes his Title to the Prejudice of his Tenure or Profit, and when he is miſtaken only in ſome

21 E. 4. 40. 33 H. 7. 6. 36 H. 8. 37. 9 E. 4. 11, 12. Lane 111. 2 Co. 54

Deſcription

Deſcription of his Grant, which is but ſupplemental, and not material nor iſſuable.

Bulſ. 4. Dyer 350. 9 Co. 24. 10 Co. 4. 3. That diſtinct Words of Relation in the King's Grant are good to paſs away any Thing.

Whiſtler's Caſe.

2 Inſt. 446-7. 6 Co. Sir *John Molin*'s Caſe. 4. That when the King's Grants are upon a valuable Conſideration, they ſhall be conſtrued favourably for the Patentee for the Honour of the King.

10 Co. 65. Hob. 220. *Needler* v. *Biſhop of Wincheſter.* One *Southwell* and his Wife being ſeiſed of the Parſonage of *Horſham* to them and the Heirs of the Huſband, by Deed dated 10 *May* granted the ſame to K. *Hen.* 8. in Conſideration whereof the ſame King, by his Letters Patent, dated the 21 *July* following, granted the Vicarage of *Harley* to them and the Heirs of the Huſband; after which, and on the 26 *July* following, the Deed 10 *May* was inrolled; and it was objected, that the King was deceived in the Conſideration, as nothing paſſed by the Deed before Inrollment, and therefore the Grant void; but notwithſtanding this it was held, that here was no Deceit in Effect, that tho' the Deed could not be pleaded as ſuch before inrolled, yet it took its Force and Effect from the Execution; and to that the Inrolment ſhall have relation, ſo as to make it good *ab initio.*

Plow. 455. Sir *Thomas Wroth*'s Caſe. If the King recites the Conſideration to be the Services of the Patentee, tho' none were done by him, or if he recites that a Manor came to him by Eſcheat, when in Truth it was his Inheritance; theſe will not vitiate the Grant; *ſecus* if they are the Surmiſes of the Party.

Leon. 30. Sir *Walter Hungerford*'s Caſe. Queen *Eliz.* being ſeiſed of a great Waſte in the Pariſh of *Chipnam*, granted a Moiety of a Yard-Land in the ſaid Waſte to the Mayor and Burgeſſes of *Chipnam*, without any Certainty, Name or Deſcription; and afterwards granted the ſaid Waſte to *H.* And it was adjudged, that this firſt Grant was void, not only againſt the Queen, but againſt the ſecond Patentee, for Incertainty; and *(a)* that it could not, as in Caſe of a Common Perſon, be made good by any Election of the Patentee.

(a) 12 Co. 86. L. P. & *vide* Title *Election.*

2 Rol. Rep. 118. *Dixon*'s Caſe. *Ed.* 6. granted *totam illam rectoriam de* Dale, *ac omnes decimas, &c. quæ quidem omnia & ſingula Præmiſſa* are of the true yearly Value of 32 *l.* and at the Time of this Grant there was a Farm in the Pariſh of *Dale* in Leaſe under a yearly Rent; and tho' the Words *quæ quidem omnia, &c.* refer only to Tithes of that yearly Value, and it might be the King intended to paſs no more, yet having granted *totam illam rectoriam* generally, it was adjudged, that the Tithes of that Farm ſhould paſs, tho' it made it more than 32 *l. per Ann.*

8 Co. 167. Lane 39. *Camberland*'s Caſe. If the King grants *totum illud manerium ſuum, ſive totam illam rectoriam ſive Advocationem, &c.* if he had a Manor and no Rectory, or an Advowſon and no Rectory, or a Manor or a Rectory impropriate, yet that which he had ſhall paſs, becauſe it was the Effect of the Grant; and in this Caſe a Rule was laid down, *viz.* that *(b)* if the King's Grant may be taken to two Intents, one of which may be good,

(*b*) Dav. 45. 7 Co. 14. 5 Mod. 301. *Page 213 * and the other not, it ſhall be conſtrued to ſuch Intent that the Grant may take Effect.

Cro. Eliz. 512, 513. Ld. *Darcie*'s Caſe. If the King grants a Manor with ſuch Privileges and Franchiſes as the Dean and Chapter of St. *Paul*'s formerly enjoyed therein, it is a good Grant becauſe of the Certainty to which it relates.

10 Co. 63. *Whiſtler*'s Caſe. So a Grant of a Manor, *Habend.* to the Grantee and his Heirs *adeo plene & integre*, as it came to the Hands of the King by the Attainder of *J. S.*

or

or as is contained in ſuch Letters Patent, or the like, is good according to the Rule, *id certum eſt quod certum reddi poteſt.*

King *Ed.* 6. being ſeiſed of the Manor of *Cleobery*, then late Parcel of the Poſſeſſions of the late Earl of *March*, whereof a great Wood was Parcel, grants this Wood to the Lord *Paget* in Fee; from the Lord *Paget* it came to the Lord *Seymour*, and by his Attainder it returned to *Ed.* 6. again, from *Ed.* 6. the Manor and Wood came to Queen *Mary*, and from her to Queen *Elizabeth* who grants to the Earl of *Leiceſter* this Manor, *nuper parcell. Poſſeſſionum nuper comitis Marchiæ, et omnia al' ter, boſc' & hæreditamenta manerio præd' ſpectant', vel ut pars, parcell' ſive membrum inde antehac habita, cognita ſive reputata exiſten'*; and it was adjudged that theſe Woods did paſs. Dyer 362. Co. Ent. 383. *The Queen v. Thornton.*

Sir *Francis Forteſcue* being ſeiſed of a Manor, grants the ſame to the Earl of *Denbigh* except ſuch Lands as were then held for Life by Copy; afterwards the Inheritance of this Copyhold was granted to the Earl of *Denbigh*, and then the Copyholder dies, and the Earl grants by Copy again, and afterwards forfeited all to the King, who granted the Manor and every Part and Parcel thereof, or that is reputed Parcel thereof, to the Earl of *Clarendon*; and the Queſtion was, Whether this Copyhold, having been thus ſevered, paſſed by the Words *reputed Parcel*, or not; and adjudged that it did. Pollexf. 410. Freem. 207. *Lee v Browne.*

If the King grants to *J. S.* Lands and the Mines therein contained, and Royal Mines are found in them, they ſhall not paſs; for the King's Grant ſhall not be taken to (*a*) a double Intent; and the moſt obvious Intent is, that they ſhould only paſs the common Mines that are granta-ble to a common Perſon. Plow. 336.

(*a*) Mines Royal, Amercements Royal, Eſcheats Royal, ſhall not paſs by general Words, of all Mines, Amercements, and Eſcheats. Dav. 17, 57.

So a Grant of *Bona Felonum*, &c. will not paſs the Goods of one who ſtands mute and will not plead. 8 H. 4. 2. pl. 2. Raym. 242.

cited, & *vide* Rol. Rep. 399. 12 Co. 75. Jenk. 325. 2 Rol. Abr. 194. Owen 155. Sand. 275. Vent. 32. Sid. 142. 2 Mod. 107.

By the Statute 17 *E.* 2. (*ſtat.* 1.) *de Prærogativa Regis*, the King's Gift or Grant of Land, Manors, *cum Pertinentiis*, conveyeth not Knight's Fees, Advowſons, or Dowers, without expreſs Words, though it be otherwiſe in Caſe of a common Perſon. 10 Co. 64.

But if a Manor with an Advowſon appendant be in the Hands of the King by Eſcheat or by Purchaſe, and he at this Day gives it as intirely as *J. S.* held it before it came into our Hands by Way of Eſcheat, or as *J. S.* held who infeoffed us, in ſuch Caſe the Advowſon ſhall paſs without ſaying in the Charter *cum feodis & advocationibus*; becauſe the Law in ſuch Caſe intends, that the King is appriſed of his Right. 10 Co. 64. Plow. 251.

So if the King grants *Eccleſiam*, the Advowſon paſſes, the (*b*) Intent, and not the preciſe Words, being to be regarded in the King's Grants. Latch 248.

(*b*) The King's Grant of the Vicarage of *D.* will not paſs the Advowſon of the Vicarage of which the King was ſeiſed. Cro. Eliz. 163.

A Grant of Stewardſhip of ſeveral Manors by Name, without mentioning in what County, has been held good, tho' uncertain; notwithſtanding it was objected that * the King may have divers Manors of the ſame Name, and no Iſſue can be taken which Manors the King intended to paſs. § 9 Co. 42. 4 Mod. 279. cited.

* Page 214

§ In pleading it ought to be alledged in what Counties the Manors lie, as the Plaintiff did in the Earl of *Shrewſbury*'s Caſe, and if the other Party had pleaded *non conceſſit*, upon Trial of the Iſſue, the Circumſtances (mentioned by the Court) may be given in Evidence, to prove what Manor was granted. *Vide* 9 Co. 47. a.

So

8 Co. 45. 4 Mod. 279. cited. So a Grant to the Earl of *Rutland*; *a tempore plenæ ætatis*, when in Truth he was of Age long before, was adjudged a good Patent, becauſe it was the Intent of the King that it ſhould commence from that Time; and if that could not be, then for the Time to come.

Co. 46. If the King, being Tenant in Tail or for Life, grants *totum ſtatum ſuum*, nothing paſſes.

Dav. 43, 45. Rol. Abr. 845. Co. 43. So if the King, being ſeiſed in Fee, grants the Lands or a Rent, and limits no particular Eſtate in the Gift, the Grant is void, and the Patentee has no Freehold either for his own Life or for the Life of the King, nor even an Eſtate at Will; becauſe moſt Grants proceeding from the Application of the Subject, they ought to know what they aſk; and if that do not appear, nothing ſhall paſs from the King by reaſon of the Incertainty.

Co. Lit. 27. a. Jenk. 199. So if Lands are given by the King's Letters Patent to a Man and his Heirs Male, this is void, for there can be no ſuch Tenure; and therefore the King is deceived in his Grant. †

† *Contra* of Armories or Arms granted by the King to a Man for Reward of Service, as the ſame is deſcendible to the Heirs Male lineal or collateral. Co. Lit. 27. a.

3 Lev. 134. *Travel* v. *Carteret*. So if the King poſſeſſed of a Chattel Intereſt grants it in Fee, this is void.

3. Where the King's Grantee ſhall partake of his Prerogative.

Dyer 1. pl. 7. 8. *in Marg.* Keilw. 169. (*a*) Will. Rep. 252. A *Choſe in Action* may be aſſigned to the King, as alſo granted or aſſigned by him; and in this latter Caſe, the Grantee may either ſue in his own or in the King's Name; but it is (*a*) ſaid to be moſt uſual to ſue in the King's Name, in order to take Advantage of his Prerogative.

Dyer 30. Sav. 2. (*b*) Owen 113. Cro. Jac. 82. like Point. *J. S.* attainted of Treaſon, and being poſſeſſed of certain Obligations which became forfeited, the King granted them to the Wife (*b*) without any Words enabling her to ſue for them in her own Name; and ſhe having ſued in her own Name, it was held, that ſhe well might; for the Law allowing the Grant good, gives by Implication the Grantee the neceſſary Means of attaining the Benefit of it.

Cro. Jac. 179. *The King* v. *Twine*. Sav. 133. So where *J. S.* in an Action on the Caſe recovered 4000 *l.* Damages, and afterwards became outlawed in a perſonal Action; and the King having granted this 4000 *l.* it was held, that the Grantee may levy this Debt by Action in his own Name, or by Extent in the King's Name; though he has no Words in his Grant to ſue it in the King's Name, as is uſual in ſuch Caſe; but in this Caſe an (*c*) Aſſignment by the King's Patentee was held void.

(*c*) 2 Lev. 49, 50. Bro. *Diſſeiſ.* 65. If the King enters without Title, or ſeiſes Lands by a void or inſufficient Office, he is no Diſſeiſor; but (*d*) if the King by Letters Patent grants Lands ſo ſeiſed, and the Patentee enters, he is a Diſſeiſor; becauſe he has Time to enquire into the Legality of his Title, which the King is ſuppoſed to want Leiſure for.

(*d*) That the King's Patentee ſhall not take Advantage of the Maxim *Nullum tempus occurrit regi*. Poph. 26.

Bro. *Prerog.* 68. The King may diſtrain for his Rent-Service in any Lands of his Tenant; ſo if he hath a Rent-Charge iſſuing out of certain Lands, he may diſtrain in any other Lands of the Party; but his Grantee cannot do ſo.

Originally

Originally all Wrecks were in the Crown, and the King has a Right to a Way over any Man's Ground for his Wreck; and the ſame Privilege goes to the Grantee thereof. 6 Mod. 149.

---

*PRIVILEGE. *Page 215

PRIVILEGE is an Exemption from ſome Duty, Burthen or Attendance, to which certain Perſons are entitled, from a Suppoſition of Law, that the Stations they fill, or the Offices they are engaged in, are ſuch as require all their Time and Care; and that therefore without this Indulgence it would be impracticable to execute ſuch Offices to that Advantage which the public Good requires.

Under this Deſcription we ſhall conſider,

(A) **The Duties and Offices from which certain Perſons by reaſon of their Privilege are exempt.** 216.

(B) **The particular Privileges in Suits allowed Officers and Attendants in the Courts of Juſtice.** 218.

And herein,

1. What ſuch Officers are that are intitled to Privilege. 218.
2. Of the Privilege and Protection allowed thoſe whoſe Attendance is neceſſarily required. 221.
3. In what Caſes this Privilege is to be allowed. 222.
4. Of claiming and allowing Privilege; and therein, that it muſt be ſet forth and pleaded. 223.
5. How privileged Perſons are to ſue and be ſued. 226.
6. Whether there can be Privilege againſt Privilege. 227.

(C) **Privilege of Peers and Members of Parliament.** 228.

1. Who ſuch Perſons are that are entitled to this Privilege. 228.
2. How far this Privilege extends to their Servants and Attendants. 229.
3. In what Caſes this Privilege is to be allowed. 231.

4. Of

4. Of the Commencement and Continuance of this Privilege. 233.
5. How Privilege is to be claimed and taken Advantage of. 233.
6. What ſhall be deemed a Breach of Privilege. 235.
7. Of the Proceedings in Courts by and againſt Perſons entitled to Privilege of Parliament. 236.

Page 216 **(A) The Duties and Offices from which certain Perſons by reaſon of their Privilege are exempt.**

2 Inſt. 531, 704. Skin. 21. pl. 21. 2 Chan. Rep. 196. 2 Show. 84. pl. 72.——Privileged from Arreſts. Raym. 152. *vide* 8 Mod. 12. Sir *Hans Sloan*'s Caſe.

THE King's Servants are privileged in ſome Caſes in reſpect to their neceſſary Attendance.

(*a*) 1 Sid. 287. Mod. 10. 2 Keb. 50, 54. S. C. *Swallow*'s Caſe.

(*a*) One *Swallow*, being the King's Minter or Moneyer, was elected an Alderman of *London*, but refuſing to take the Oath of an Alderman was fined, and committed for the Fine by the Judgment of the Court in *London*, which appeared on the Return to a *Habeas Corpus*. He alledged in *B. R.* that he was an Officer of the Mint, and that by an ancient Charter of Privilege granted ſuch Officers, he ought to be exempt; and offered to plead this Matter to the Return of the *Habeas Corpus*, as a Matter conſiſtent with it; but this the Court refuſed to admit, as he might have pleaded it in the Court below; however he was directed to ſet it forth in a Suggeſtion in the Crown-Office, which he did, and obtained a Writ of Privilege, which at another Day he brought into Court. The Recorder objected to its being allowed againſt the ancient Privilege of the City, confirmed by Acts of Parliament; but the Court held it a reaſonable Privilege, the Office being ancient, and the Attendance neceſſary elſewhere; they ſaid, that if there were not Perſons ſufficient beſides to ſerve, this might have been ſhewn, and it would be a good Reaſon to ſuſpend his Privilege; and though Aldermen were not mentioned in the Charter, yet as ſuperior and inferior Officers were mentioned, as Mayor, Sheriff, Eſcheator, Collector of Tenths, *&c.* they ſaid the Middle were included; and accordingly he was diſcharged.

Sid. 272. Keb. 933. *The King* v. *Clark*.

But where ſome Perſons belonging to the Cuſtom-Houſe, *London*, were indicted for not keeping Watch and Ward, though they pleaded a ſpecial Privilege granted them by the King to exempt them from this Duty; yet as they did not aver that there were ſufficient Perſons beſides, the Plea was over-ruled.

Sid. 243. Lev. 159. Raym. 113. Keb. 840.

The King by his Charter may exempt ſome Perſons from ſerving on Juries if there be enough beſides; but ſuch Charter of Exemption does not extend to the Court of King's Bench, unleſs particularly named; nor to any Caſe where the King is concerned, unleſs it has theſe Words, *licet tangat nos*; alſo the Sheriff muſt not return ſuch Privilege, but the Perſons who would have the Benefit of it muſt claim it.

Leon. 207. *Mills* v. *Snowball*,

A Juror ſurmiſed at the Bar, that he was Tenant in Ancient Demeſne, and had his Charter in his Hand, and prayed to be exempted from ſerving

ing on the Jury; but the Court did not regard it, but cauſed him to be ſworn; it was ſaid (*a*) he might have his Remedy againſt the Sheriff, or if he had made Default and loſt Iſſues, he might ſhew his Charter in the Exchequer upon the Amercement eſtreated, and there he ſhould be diſcharged.

vide Title *Antient Demeſne.* (*a*) 2. & *vide* Co. Lit. 130. Sid. 243.

Where a Peer is Party, either Plaintiff or Defendant, two or more Knights ‡ muſt be returned on the Jury; and it was ſaid, that in *Cumberland* there was but one Freeholder who was a Knight, beſides Sir *Richard Stote*, a Serjeant at Law; and the Court were of Opinion, that rather than there ſhould be a Failure of Juſtice, a Serjeant at Law * ought to be returned a Juryman; for that his Privilege would not extend to a Caſe of Neceſſity.

2 Mod. 182. Mod. 226. Dyer 107. pl. 27.

*Page 217

‡ See 24 G: 2. c. 18. ſ. 4. No Challenge to the Array, for want of a Knight

If a ſworn (*b*) Attorney or other Officer of any of the Courts of *Weſtminſter-Hall* be choſen Conſtable, he may have a Writ of Privilege for his Diſcharge; and it is held, that ſuch Officers ſhall have this Privilege, not only where there is no ſpecial Cuſtom concerning the Election of Conſtables, but alſo where they are choſen by a particular Cuſtom in reſpect of their Eſtates or otherwiſe; for that no ſuch Cuſtom ſhall be ſuppoſed to be more ancient than the Uſage of thoſe Courts, and therefore ſhall give way to them.

March 30. Noy 112. Cro. Car. 389. 2 Keb. 477.

(*b*) This Privilege is thought to extend to Barriſters at Law, and the Servants of Members of Parliament. 2 Hawk. P. C. 63.

So an Attorney being choſen Church-warden of a Pariſh, may have a Writ of Privilege; ſo a Writ of Privilege was ſigned by all the Court of *C. B.* for *G.* a Clerk under the *Cuſtos Brevium*, to free him from being a Soldier; and it is therein recited, that it is the Privilege of the Court, that neither the Attornies nor Clerks of it ſhould be elected to any Office without their Conſent, but ought to attend the Service of the Court.

2 Rol. Abr. 272. Palm. 392. Lev. 265. Vent. 16, 29. Raym. 180. Cro. Car. 11, 389, 585. and Co. Ent. 436. the like Writ of Privilege.

Gale an Attorney of *B. R.* was elected one of the twenty-four Burgeſſes in the Town of ——— and becauſe he refuſed to ſerve was fined ten Pounds; then he procured a Writ of Privilege, which he ſhewed; after which Debt was brought for the ten Pounds in *B. R.* and it was prayed after Imparlance to ſtay the Action againſt *Gale*, becauſe that after Imparlance he could not plead his Privilege to the Action; and *Stone*'s Caſe was cited, who was elected Reeve to collect the Rents of the Lord at *Harrow the Hill*, and was diſcharged by his Writ of Privilege. The Court held, that the Privilege of an Attorney was a good Diſcharge in this Caſe; they likewiſe held, that the Writ of Privilege had a Retroſpect to the Whole, and that being diſcharged from the Office, he was diſcharged from the Fine alſo.

Trin. 27 Car. in *B. R. Gale*'s Caſe. 3 Keb. 512. S. C.

It ſeems to be the better Opinion, that if a Captain of the King's Guards, a Gentleman of Quality, or practiſing (*c*) Phyſician, be choſen Conſtable in a Pariſh, where there are Perſons ſufficient to ſerve, and in which there is no ſpecial Cuſtom directing ſuch Election, that every ſuch Perſon may be relieved or diſcharged by the Court of King's Bench, which hath a ſupreme and mandatory Power in Caſes of this Nature; but in Caſe of a ſpecial Cuſtom in reſpect of Eſtate or otherwiſe, it hath been holden, that ſuch Perſons are not to be excuſed; and the rather becauſe they may execute the Office by Deputy.

Sid. 272, 355, 431. Mod. 22. Lev. 233. Keb. 439, 933. 2 Keb. 309, 578.

(*c*) Members of the College of Phyſicians in *London* exempted by the Statute 32 H. 8. c. 40.

By

2 Keb. 578. By the Statute 5 *H.* 8. *cap.* 6. Surgeons are exempt from ſerving Pariſh Offices.

By the 6. *W.* 3. *cap.* 4. "All Perſons uſing the Art of an Apothecary, "and who ſhall be brought up and ſerve in the ſaid Art as Apprentices "ſeven Years, ſhall be exempted from the Offices of Conſtable, Scavenger, "Overſeer of the Poor, and all other Pariſh, Ward, and Leet-Offices, "and from ſerving on Juries.

Cro. Car. 585. Jon. 462. Alderman *Abdy*'s Caſe. If an Alderman of *London* has a Houſe in the Manor of *R.* in the County of *Eſſex* (in which Manor the Lord has by Preſcription a Leet) and he as an Inhabitant is choſen Conſtable there, yet he is not compellable to ſerve; for that as an Alderman he is bound to be preſent in the City for the good Government thereof. ‡—And a Writ awarded to the Lord of the Manor to diſcharge him.

‡ So at the Summer Aſſizes at *Croydon* in *Surry*, 1777, Lord *Mansfield* very properly refuſed to fine Mr. *Plumbe*, returned as a ſpecial Juryman in a Cauſe before his Lordſhip, becauſe at that Time he was one of the Sheriffs of *London*.

*Page 218 2 Jon. 46. *Price*'s Caſe. * One *Price* being High Conſtable for the Hundred of *Wanſtead*, was elected Overſeer of the Poor in the Pariſh of *St. Peter the Poor* in *London*; and upon producing the Certificate of the Juſtices of the Peace of the County, and their certifying that his Service in the Office of Conſtable was of great Uſe and Importance to his Majeſty, he was by the Court of *B. R.* diſcharged from the Office of Overſeer 'till ſuch Time as his Office of Conſtable expired.

Vent. 344. 2 Show. 75. pl. 59. *The King* v. *Betteſworth*. But where *A.* was indicted for not taking on him the Office of High Conſtable, and the Queſtion on a ſpecial Verdict was, Whether a Tenant in Ancient Demeſne may be made Conſtable of an Hundred which reaches further than the Demeſnes; and it was adjudged that he might.

Vent. 105. Lev. 303. Dr. *Lee*'s Caſe, and Mod. 282. S. C. where it is ſaid, the Reaſon was, becauſe the Land was in Leaſe, and the Tenant, if any, ought to do the Office. Doctor *Lee*, having Lands within the Level, was made an Expenditor by the Commiſſioners of *Sewers*; whereupon he prayed his Writ of Privilege, which was granted; for the Regiſter is, *Vir militans Deo non implicetur ſecularibus negotiis*; and the Ancient Law is, *quod Clerici non ponantur in Officia*—Clergymen are not to ſerve in the Wars.

6 Mod. 140. A Writ of Privilege was moved for to have a Clergyman, who appeared to have no Cure of Souls, privileged from the Office of Overſeer of the Poor, which three Judges thought reaſonable; but *Holt* Ch. J. ſeemed againſt it, who thought that their Privilege of Exemption was only extendible to their ſpiritual Revenues; and if in any Caſe they were perſonal, it was only from Common Law Offices, eſpecially if they were without Cure, as in the preſent Caſe; and in Deference to his Opinion it was directed to be moved for again.

M. 9 Geo. 2. in *B. R. Evedon*'s Caſe. 2 Stra. 1143. ſee 2 Barnes 33. In the Caſe of *Evedon* an Attorney of *B. R.* it was determined, that he was not obliged to ſerve in the Train-Bands, or to find a Deputy for that Purpoſe, although the Array and Muſter of theſe is directed by ſeveral Acts of Parliament which contain general Words; for his Privilege ſhall exempt him from Offices, as well created by Statute as thoſe at Common Law, if there be not an expreſs Clauſe for taking away his Privilege.

(B) The particular Privileges in Suits allowed Officers and Attendants in the Courts of Justice: And herein,

1. Who ſuch Officers are who are thus intitled to Privilege.

THE Officers, Miniſters, and Clerks of the Courts in *Weſtminſter-Hall* are allowed particular Privileges in reſpect of their neceſſary Attendance on thoſe Courts; they are regularly to ſue and be ſued in the Courts they reſpectively belong to, and cannot, except in certain Caſes, be impleaded elſewhere; which Privilege ariſes from a Suppoſition of Law, that the Buſineſs of the Court or their Clients Cauſes would ſuffer by their being drawn into any other than that in which their perſonal Attendance is required. 2 Inſt. 551. 4 Inſt. 71. Vaugh. 154. Dyer 377. a. pl. 30.

* *Anderſon* Ch. J. of the *C. B.* brought Treſpaſs by Bill for breaking his Houſe in the City of *Worceſter*, againſt a Citizen of the ſaid City; the Mayor and Commonalty came and ſhewed a Charter granted by *E.* 6. and demanded Conuzance of Pleas; but it was refuſed, becauſe the Privilege of that Court, of which the Plaintiff was a chief Member, is more ancient than the Patent; for the Juſtices, Clerks, and Attornies of this Court ought to be here attending to do their Buſineſs, and ſhall not be impleaded or compelled to implead others elſewhere; and this Privilege was given this Court upon the original Erection of it. *Page 219 3 Leon. 149. Ld. *Anderſon*'s Caſe.

An Attorney, ſo long as he remains on Record, ſhall have his Privilege; and therefore where it was moved, that *J. S.* ſhould put in ſpecial Bail, being an Attorney at large, and having (*a*) diſcontinued his Practice, the Court ſaid, that Attornies at large have the ſame Privilege with the Clerks of the Court, and are to appear *de die in diem*; and they were not ſatisfied that he had diſcontinued his Practice. Bro. Title *Attorney* 67. Title *Bill* 24. Vent. 1. Sir *John How* v. *Walley*.

(*a*) That if an Attorney abſents himſelf for a Year, by the new Rules he loſes his Privilege. 2 Lill. Reg. 371. *per* Glin Ch. J.

But where *J. S.* was arreſted in *B. R.* and after the Arreſt he procured himſelf to be made an Attorney of *C. B.* and prayed his Privilege; it was diſallowed, becauſe it accrued *pendente lite*. 2 Rol. Rep. 115.

In Debt againſt the Warden of the *Fleet*, by Bill of Privilege, he refuſed to appear; the Court doubted how they could compel him, as they could not forejudge him the Court, he having an Inheritance in his Office; but it being ſurmiſed that he made a Leaſe of his Office, it was held, that he ſhould not have his Privilege, for that the Leſſee, and not he, was the Officer during the Leaſe. 2 Leon. 173. *Gittonſon* v. *Tyrrel*.

So if the Marſhal of *B. R.* grants his Place for Life, the Grantor has no Privilege during that Time. † Vent. 65.

† *Qu.* if he can now grant it? *Vide* the Stat. 27 Geo. 2. c. 17. whereby the Power of appointing the Marſhal is reveſted in the Crown.

A Clerk of *B. R.* was ſued in an inferior Court for a Debt under five Pounds, and had a Writ of Privilege allowed; for the *Stat.* 21 *Jac.* 1. *cap.* 23. never intended to take away the Privilege of Attornies. Palm. 403.

In

Hard. 365. In the Court of (*a*) Exchequer there are three Sorts of Privilege: 1*ſt* As Debtor. 2*dly*, As Accomptant. 3*dly*, As Officer.

(*a*) Where an Officer or Miniſter of the Exchequer is one of the Parties in a perſonal Action, he ſhall be ſued in that Court, becauſe his Abſence might hinder the King's Affairs; ſo a Priſoner of this Court, or any Accountant that is entered into his Account, ſhall have the like Privilege; and a Farmer or one indebted to the King, for the King's more ſpeedy Satisfaction of his Debt or Duty, may ſue his Debtor by a *Quo minus* in the Exchequer. 2 Inſt. 531.

Noy 40. *Walrend* v. *Winroll.* *J. S.* was ſued in an Action of Battery in *London*, which he removed into *B. R.* and afterwards prayed his Privilege in the Court of Exchequer; and upon the Puiſne Baron's coming into Court, and bringing the Red-Book of the Exchequer, which ſhewed that he was an Eſcheator, and ſo an Accountant to the King, the Privilege was allowed.

2 Leon. 21. *Lightfoot* v. *Butler.* If one holds of the Queen as of her Manor, he ſhall not have the Privilege of the Exchequer for that Cauſe; but (*b*) if the King grants Tithes, and thereupon reſerves a Rent *Nomine Decimæ*, and a Tenure of him, there he ſhall have Privilege.

(*b*) In 2 Leon. 146. it is ſaid, that the Tenant of the King in Chief, or he who pays Firſt Fruits, or he who holds of the Queen in Fee-Farm, ſhall not have Privilege. *Q. & vide* 3 Leon. 258.—That commencing a Suit in the Exchequer on a *Quo minus* as Debtor to the King, are not ſuch Privileges as will ouſt an inferior Juriſdiction; for they are now grown the common Methods of ſuing in thoſe Courts. Hard. 316. 2 Vent. 362.

*Page 220 2 Show. 299. pl 301. *Lampen* v. Sir *Edward Deering* & *al'.* * On a *Latitat*'s being ſued out againſt the Commiſſioners of the Treaſury, the Puiſne Baron of the Exchequer came into the Court of *B. R.* and brought into Court the Red-Book of the Exchequer, which is deemed a Record in that Court; and thereby it appeared, that the Treaſurer had Privilege of being ſued only in that Court; and the Patent being produced in Court which conſtituted the Defendants, *&c.* and granted them the Office of Treaſurer of *England*, their Privilege was allowed them without putting them to bring a Writ of Privilege, the Court grounding themſelves on the (*c*) Record before them.

(*c*) Difference between Officers that are of Record and not. Hard. 164.

Hard. 316. *vide* Moor 753. 2 Inſt. 23, 551. Bro. *Privilege* 16. It hath been held, that the Treaſurer of the Navy is *eo ipſo* an Accountant; and that an Accountant's Privilege will hold againſt a ſpecial Privilege in another Court, as Officer of the Court or otherwiſe; though it be not alledged that ſuch an Accountant is (*d*) entered upon his Account; for that every Accountant may be attached by the Court to make up his Accounts, and muſt attend for that Purpoſe *de die in diem.*

(*d*) But if an Accountant has finiſhed his Account and reduces it to a Debt, he ſhall have no Privilege but as a general Debtor. Hard. 365.

Raym. 34. Keb. 137. *Barrington* v. *Venables.* In Debt in *B. R.* againſt *J. S.* he pleaded to the Juriſdiction, that none of the Privy-Chamber ought to be ſued in any other Court, without the ſpecial Licence of the Lord Chamberlain of the Houſehold, and that he was one of the Privy-Chamber; on Demurrer to this Plea, the Court over-ruled it with great Reſentment, and awarded a *Reſpondeas Ouſter.*

(*e*) 2 Lev. 129. 3 Keb. 424. 2 Mod. 296. S. C.—So of the Servant of a Serjeant at Law. Cro. Car. 84. It was agreed in Serjeant (*e*) *Scrogg*'s Caſe, that the Privilege of the Court of *C. B.* which Serjeants claimed, extended only to inferor Courts, not to the Courts in *Weſtminſter-Hall*; and that he may be ſued in any of theſe, becauſe he is not confined to that Court alone, but may practiſe in any other Court; but it is otherwiſe as to Attornies or Philazers, who cannot practiſe in their own Name in any other Court but ſuch as they reſpectively belong to; and that therefore a

Serjeant

Serjeant at Law is to be ſued by Original, and not by Bill of Privilege.

So in an Action by Bill brought in *C. B.* againſt a Serjeant at Law, for Work done, he pleaded that he ought to have been ſued by Original, and not by Bill; and on Demurrer, the Court held, that the Caſe of a Serjeant and Prothonotary's Clerk were upon the ſame Foot, neither of them being bound to perſonal Attendance, as Prothonotaries and Attornies were; and that therefore he ought to have been ſued by Original, and accordingly gave Judgment for the Defendant. Trin. 7 G. 2. Serjeant *Girdler's* Caſe. Barnes 266. Rep. & Caſ. of Pract. C. P. 104, 105. S. C.

J. S. being arreſted by a Writ out of *C. B.* brought his Writ of Privilege as Clerk of the Crown-Office; but it appearing that he was only a Clerk to Mr. *Ward* (Clerk of that Office) and not an immediate Clerk of the Office, a *Superſedeas* to the Writ of Privilege was granted on Motion; the Court having agreed, that he had no more Privilege than an (*a*) Attorney's Clerk. 2 Show. 287. pl. 284. *Ward* v. *Lawrence.*

(*a*) That an Attorney's Clerk has no Privilege. Comb. 12. adjudged.—But the Clerk to the Clerk of the Pells in the Exchequer is entitled to the Privilege of that Court. Comb. 482.

A Serjeant at Law, (*b*) Barriſter, Attorney or (*c*) other privileged Perſon, whoſe Attendance is neceſſary in *Weſtminſter-Hall*, may (*d*) lay his Action in *Middleſex*, though the Cauſe of Action accrued in another * County; and the Court on the uſual Affidavit will not change the *Venue*. Stil. 460. Mod. 64. 2 Show. 242. pl. 239. *Page 221

(*b*) Though he hath diſcontinued his Practice for ſome Time. 2 Show. 176. pl. 172. ‡ (*c*) This Privilege extends to Judges Clerks, and alſo to the Clerk of Aſſize. Salk. 670. pl. 9. 671. 2 Ld. Raym. 1253. (*d*) It is the common Right of any Gentleman at the Bar to have a Trial at Bar; and it has never been denied in the Caſe of an Officer of the Court. 6 Mod. 123. *per cur.*

---

‡ *Sed qu. Vide ante* 219. n.

But it hath been held, that if a privileged Perſon be ſued, and the Action brought againſt him in the right County, his Privilege will not intitle him to have it tried in *Middleſex*. Carth. 126. Ld. Raym. 338. Show. 148.

Biſſe v. *Harcourt.*—But in Salk. 668. in *Wilcock's* Caſe, Trin. 2 Ann. the Venue is ſaid to have been changed where an Attorney was Defendant.

If an Attorney lays his Action in *London*, the Court will change the *Venue* on the uſual Affidavit; for by not laying it in *Middleſex*, he ſeems regardleſs of his Privilege, and is to be conſidered as a Perſon at large. 2 Vent. 77. 2 Salk. 668. pl. 1.

On a Motion to diſcharge a Rule which had been obtained for changing the *Venue*, it appeared, that the Plaintiff was a Barriſter and Maſter in Chancery; and the Court held, that he had a Privilege by reaſon of his Attendance, to lay his Action in *Middleſex*, and therefore diſcharged the Rule. 2 Ld. Raym. 1556. Fitzg. 40. S. C. *Burroughs* v. *Willis.* 2 Stra. 822. Barnard. K. B. 14.

2. Of the Privilege and Protection allowed thoſe whoſe Attendance is neceſſarily required.

The Law not only allows Privileges to the Officers of the Court, but alſo protects all thoſe whoſe Attendance is neceſſary in Courts; ſo that if a Suitor is arreſted either in the Face of the Court, or out of the Court, as he is going and coming to attend and follow his Suit, and it appears upon Complaint made thereof, that the Fact was ſo, the Court will not only Brownl. 15. Raym. 101. 2 Mod. 181. 2 Rol. Abr. 272. Godf. 33.

only discharge the Party from the Arrest, but will punish the Officers or Bailiffs, as also the (*a*) Plaintiff who procured the Arrest, as for a Contempt to the Court.

(*a*) If he knew that the Party was prosecuting or defending any Suit; because an Affront to the Court as well as an Injury to the Party arrested. 2 Lil. Reg. 369.

M. 26 Car. 2. in *C. B.* Serjeant *Scroggs* entering his Coach at the Door of *Westminster-Hall*, was arrested upon a *Latitat* out of *B. R.* and Complaint being made thereof in *C. B.* it was agreed, that not only Serjeants at Law, but all other Persons whatsoever, are freed from Arrests so long as they are in View of any of the Courts at *Westminster*, or if near the Courts, though out of the View, lest any Disturbance may be occasioned to the Courts or any Violence used, which in such Cases is very penal. In this Case the Serjeant was discharged of the Arrest by Rule of Court, and the Judges said, that if the Plaintiff should bring an Action against the Sheriff for an Escape, they would commit him; the Bailiffs who made the Arrest were committed to the *Fleet*; but the next Day upon their Submission and Acknowledgment were discharged, paying their Fees.

2 Mod. 181. *Long*'s Case. So where one *Long* an Attorney of *C. B.* was arrested in *Palace-Yard*, not far from the Hall-Gate, sitting the Court, he together with the Officer was brought into Court, and the Officer committed to the *Fleet*; and because the Plaintiff was an Attorney of *B. R.* who informed the Court of *C. B.* that his Cause of Action was 200*l.* the Court ordered that another of the Sheriff's Bailiffs should take Charge of the Prisoner, and that the Prothonotary should go with him to the Court of *B. R.* and that Court being informed how the Case was, discharged the Defendant on common Bail. The Writ upon which he was arrested was an Attachment of Privilege, which the Court supposed to be designed to oust him of his Privilege; for there was another Writ against him at the Sheriff's Office, at the Suit of another Person.

*Page 222 * If Process hath issued against a Husband, and in coming to defend it, he and his Wife are both arrested, the Wife shall have Privilege as well as the Husband; for they are considered as one Person in Law, and the Wife cannot answer without her Husband.

Dyer 377. a. pl. 30. Bro. *Priv.* 17. & *vide* Noy 68.

2 Rol. Abr. 272. If the Court gives either Plaintiff or Defendant Leave to enquire after Evidence in any Cause depending in that Court, and he be arrested, he shall have Privilege; but it is otherwise if he goes without the Permission of the Court. So if one on the Day he has been attending his Cause be arrested at ten o'Clock at Night, by one no way engaged in the Cause, he shall not have Privilege.

§ But *qu.* if this does not mean where the Party has loitered much longer Time than necessary for returning Home, or gone much out of the usual Way, or on other Business, or perhaps an Arrest, some Time after the Party had returned Home? §

Jenk. 173. *A.* has a Suit against *B.* in *C. B.* and afterwards *B.* is arrested in an inferior Court, when he was not coming to or returning from the Defence of his Suit, he shall not have Privilege.

Comb. 29. *The King* v. *Fielding.* A Person coming to give Security of the Peace, it was held he was privileged; if he had come to have sworn the Peace, the Arrest would have been allowed.

2 Salk. 544. pl. 6. So where one came to confess an Indictment, the Court held he had no Privilege *eundo & redeundo*, because there was no Process against him.

Vent. 11. Mod. 66. The Courts not only protect the Parties themselves, but all Witnesses are protected *eundo & redeundo*; for since they are obliged to appear by the

the Proceſs of the Court, they will not ſuffer any one to be moleſted whilſt he is paying Obedience to their Writ.

Alſo the Courts not only protect the Perſons of their Attendants, but likewiſe all thoſe Things that are neceſſary for their Journey or the Defence of their Suit; but not Merchandiſes or Goods for Sale or Traffick. 20 H. 6. 4. Bro. *Priv.* 55. 2 Rol. Abr. 273.

3. In what Caſes this Privilege is to be allowed.

The Privilege allowed Officers of the Court, is to be underſtood as extending only to ſuch Caſes where the Party who ſues them has ſufficient Remedy in their own Courts; therefore if a Writ of Entry or other real Action be brought againſt an Attorney of *B. R.* he cannot plead his Privilege; becauſe, if this ſhould be allowed, the Plaintiff would have a Right without Remedy; for the King's Bench hath not Cognizance of real Actions. Sand. 67.

So if an Attorney of *C. B.* be ſued in an Appeal, he ſhall not have his Privilege; for his own Court hath not Cognizance of this Action. Sand. 67.

So if Money be attached in an Attorney's Hands by foreign Attachment in the Sheriff's Court in *London*, he ſhall not have his Privilege; becauſe in this Caſe the Plaintiff would be remedileſs; for the foreign Attachment is by the particular Cuſtom of *London*, and does not lie at Common Law. Sid. 362. Sand. 67. 2 Keb. 346. *Turbill's* Caſe, *& vide* 2 Leon. 156.

In Indictments, Informations or Suits in which the King alone is concerned, the Officer ſhall not have Privilege; for it would be unreaſonable that the Court ſhould allow Protection to thoſe who offend againſt the publick Peace of the Community and the King's Intereſt. 4 Leon. 81. 2 Rol. Abr. 274. Lit. Rep. 97.

But it ſeems the better Opinion, that in an Action *qui tam*, as on the *Stat.* 23 *H.* 6. *cap.* 7. againſt an Attorney, for continuing Sheriff longer than a Year, the Defendant ought to have his Privilege; for though it be brought in the King's Name, and the King is to have Part of the Money, yet it is to be conſidered as the mere Suit of the Party, in which the Party may be Nonſuit; alſo the Party may have a *Tales*, without the Warrant of the Attorney General. 3 Lev. 398. Comb. 319. Lutw. 193. Skin. 549. pl. 10. Salk. 30. Ld. Raym. 27. 2 Salk. 543. pl. 1.

* Alſo the Privilege of the Courts allow their Officers, is reſtrained to thoſe Suits only which they bring in their own Right, or are brought againſt them in their own Right; for if they ſue or are ſued as Executors or Adminiſtrators, they then repreſent common Perſons, and are not intitled to Privilege. * Page 223 Hob. 177. Dyer 24. pl. 150. 2 Sid. 157.

Latch 199. Godb. 10. Brown & Goldſb. 47. Sav. 20.

As where a Clerk of the King's Remembrancer in the Exchequer, married a Woman who was Executrix to *J. S.* and having brought an Action of Debt by Privilege, for a Debt due to the Teſtator, it was held that he was not intitled to Privilege.

So in an Action againſt an Attorney, who was Executor to *J. S.* who pleaded his Privilege, but was over-ruled, though it was urged, that there was a Difference where the Attorney was Plaintiff, and where Defendant; but the Court held it the ſame in both Caſes. Salk. 2. pl. 4. Ld. Raym. 533. *Newton v. Rowland.*

Alſo if a privileged Perſon brings a Joint Action, this deſtroys his Privilege; becauſe thoſe with whom he joins are not Officers of the Court, nor intitled to the Attachment which the Court grants to its own Officers. 2 Rol. Abr. 274.

So if an Action be brought againſt a privileged Perſon and others, he ſhall be ouſted of his Privilege; for if otherwiſe, he would deſtroy 14 H. 4. 21. 20 H. 6. 32. Dyer 377. 2 Rol. Abr.

274, 275. Godb. 10. Noy 68. 2 Sid. 157. Vent. 298. 2 Lev. 129. 2 Mod. 296. Vern. 246.

the Plaintiff's Action, as he would be obliged to ſue the others by original Writ, and him by Petition; but ſome Opinions are, that this muſt be underſtood where the Action is joint in its Nature, and cannot be ſevered; and that if the Action can be ſevered without doing any Injury to the Plaintiff, the Officer ſhall have his Privilege.

Hil. 8 G. 2. in *B. R.* *Pratt* v. *Salt*. But this Matter came fully to be conſidered in a late Caſe where Treſpaſs was brought in *B. R.* againſt an Attorney and another Perſon, the Attorney pleaded his Privilege as an Attorney of *C. B.* and concluded, *quod non intendit quod cur' cognoſcere velit, &c.* and on Demurrer, though it was admitted that the Nature of the Action was ſeveral, yet the Court on Conſideration of the above cited Caſes held, that the Rule was general, and that the Plaintiff was not bound to bring ſeparate Actions; and thereupon awarded a *Reſpondeas Ouſter.*

4. Of claiming and allowing Privilege; and therein, that it muſt be ſet forth and pleaded.

Dalſ. 16. Vaugh. 154. 2 Bulſ. 36. Privileges are to be claimed and allowed of in Courts in ſuch (*a*) Manner as the Law directs, and in moſt Caſes is a Matter to be taken (*b*) ſtrictly.

(*a*) Not to be allowed on Motion. Stil. 373. *vide* 2 Chan. Ca. 69.—An Attorney muſt plead his Privilege, and cannot be diſcharged on Motion. Salk. 544. pl. 3. (*b*) 2 Sid. 164.——but *Q.* for it ſeems diſcretionary in the Court to relieve on Motion, or put the Party to his Writ of Privilege.

8 Co. 141. 2 Brownl. 101. If an inferior Court will proceed after a Writ of Privilege is delivered, it is a Nullity; and the Courts at *Weſtminſter* will diſcharge the Party.

——A Writ of Privilege diſallowed by an inferior Court, held Error. Cro. Eliz. 152.

Hil. 26 C. 2. in *C. B.* *Barns* v. *Fletcher.* One *Fletcher* was ſued in the Marſhal's Court, and he procured a Writ of Privilege as Attorney of *C. B.* upon which the Plaintiff in the Marſhal's Court ſurmiſed, that he was forejudged before, and produced the Record of his Forejudger; upon which the Marſhal's Court
*Page 224 proceeded; and upon Complaint thereof in *C. B.* the Court held, that the Writ of Privilege ought not to have been queſtioned there, but ought to have been allowed; and that if it was not duly obtained, it was a Matter examinable here; therefore all the Proceedings in the Marſhal's Court were ſet aſide, and the Plaintiff ordered to pay all Coſts of the Proceedings ſince the Writ of Privilege, otherwiſe an Attachment to iſſue.

6 Mod. 305. *Phips* v. *Jackſon.* A Clerk to one of the Barons of the Exchequer being ſued in *B. R.* pleaded, that *tempore quo memoria non extat* all the Clerks of the King's Court of Exchequer were privileged from being ſued elſewhere than in that Court; and that the Defendant was Clerk to *R. P. un' Baron' de Scaccario noſtro prædict'*; upon Demurrer the Court ſaid, there were two Ways of pleading Privilege; one was, to go to Iſſue, and at the Trial, if the Party be an Officer of Record, to ſhew it by producing the Record; if he be not an Officer of Record, but is Attendant on one of the Barons, that muſt be tried by a Jury; becauſe the Court of Exchequer, as a Court, cannot take Notice of it any more than the Court of King's Bench; the other Way is, if he be an Officer on Record, to produce a Writ of Privilege at the Time of the Plea pleaded, and then no Iſſue can be joined upon it; and here the Cuſtom is ill pleaded, for *tempore quo non extat memoria* is Nonſenſe, it ſhould be *cujus cont' memoria, &c.* and becauſe

becauſe that he did not aver to one of the Barons of the King's Exchequer, but *de Scaccaria noſtro*, a *Reſpondeas Ouſter* was awarded.

In an Action againſt *A.* he pleaded his Privilege thus: And the ſaid *A.* in his proper Perſon, ſays, that he is, and at the Time of exhibiting the Bill was, one of the Clerks of *T. W.* one of the Prothonotaries of the Court of *C. B.* at *Weſtm.* in the County of *Middleſex*, and attending his Office every Day, and concluded with an Averment generally, without annexing any Writ of Privilege to his Plea; and this on Demurrer was held ill, becauſe the Defendant did not ſay *venit* as well as *dicit*; and for that he did not lay any *Venue*, ſo as the Fact of his being a Prothonotary's Clerk might be tried; for it is a Matter iſſuable, for their Clerks are not (*a*) inrolled. Carth. 362. Skin. 582. pl. 2. *Stephens* v. *Squire*.

(*a*) Hard. 164.

7 Mod. 97.—But the Privilege of an Attorney or Officer on Record is not traverſable, nor triable *per Pais*. Salk. 30. 2 Salk. 543. pl. 1. Ld. Raym. 27. 2 Sid. 164. 2 Lutw. 1466. Vent. 264. 3 Keb. 352. Skin. 582. pl. 2.

To an Action brought in *B. R.* the Defendant pleaded his Privilege of an Attorney of *C. B.* without producing any Writ of Privilege, and without ſaying *prout patet per Recordum*; and two Exceptions taken: *1ſt*, The Want of Averment, *prout*, *&c.* *2dly*, That there was no Place laid where the Defendant was an Attorney; and *per Holt* Ch. J. there are two Ways of pleading this Matter ſo as it cannot be denied, *viz.* with a *Profert* of a Writ of Privilege, or of an Exemplification of the Record of his Admiſſion; or elſe it may be pleaded as it is here; and as to the Averment by the Record, it is never pleaded as a Matter of Record, which is always pleaded with Time, *viz.* of ſuch Term, *&c.* but never any Plea was ſeen that the Defendant of ſuch Term was admitted Attorney, *&c.* As to the ſecond Exception he ſaid, that it was not neceſſary to lay a *Venue*; for that this being a Matter concerning the Perſon of the Defendant, ſhould be tried where the Writ was brought. 2 Salk. 545. pl. 8. 2 Ld. Raym. 1172. *Scawen* v. *Garret*.

An Attorney of *C. B.* being ſued in *B. R.* pleaded his Privilege; to which it is demurred ſpecially, for not concluding his Plea with a *Profert* of a Writ of Privilege teſtifying his being an Attorney, *&c.* and *per Holt* Ch. J. the Difference is, if Privilege of an Attorney be pleaded with a Writ, the Defendant cannot be denied to be an At-
*torney; if without, he may; and then a *Certiorari* ſhall be awarded to *Page 225
certify whether he be or not.

2 Salk. 545. pl. 7. *Dillon* v. *Harper*. 2 Ld. Raym. 898. S. C. *vide* Fareſt. 106. *Clifton* v. *Swezeland*, like Caſe.

An Attorney of *C. B.* pleaded to the Juriſdiction of the Court of *B. R.* *& per Curiam*, he ſhall not be ſo (*b*) ſworn to his Plea, nor need the Writ of Privilege be ſet forth at large; and if Matter of Fact be pleaded in Abatement, and found againſt the Defendant, Judgment (*c*) final ſhall be given. 6 Mod. 114.

(*b*) An Attorney of *C. B.* pleaded his Privilege in *B. R.* and annexed a Writ of Privilege to his Plea, teſted after the Action brought, but made no Affidavit of the Truth of his Plea; and on a Motion of Mr. *Parker*, the Plea was ſet aſide for Want of the Oath; and becauſe it did not appear by the Writ, that the Defendant was an Attorney at the Time of bringing the Action. M. 6 Geo. 2. *Wicks* v. *Dagley*. 2 Barnard. K. B. 216. S. C. The Defendant pleaded his Privilege that he was an acting Clerk to Sir *George Cooke*, and annexed an Affidavit to his Plea, that he ſolicited Cauſes in the Court of *C. B.* but becauſe he did not ſwear that he entered Cauſes in that Office, or that he did Buſineſs as an entering Clerk, the Plea was ſet aſide. Hill. 2 Geo. 2. in *B. R. Edmund* and *Thomas*. Barnard. K. B. 141. S. C. may be pleaded without a Venue. 2 Ld. Raym. 1173, 1243. (*c*) That it is peremptory. Bro. *Perempt.* pl. 48.

In *Aſſumpſit* by *A.* againſt *B.* for 1000 Yards of black Cloth, for which the Defendant promiſes to pay, *&c.* the Defendant pleaded his Privilege 2 Sid. 164. Hard. 164. *Forſter* v. *Barrington*.

Privilege as an Auditor of the Exchequer, in theſe Words, That the Barons of the Exchequer, their Clerks, or other Officers of that Court, have not been impleaded elſewhere; to which Plea there was a Demurrer: 1*ſt*, Becauſe it was pleaded in the (*a*) Negative. 2*dly*, Becauſe it was general, *that the Barons and their Clerks*; which doth not ſhew but that one of their Clerks might be ſued elſewhere. 3*dly*, That the Concluſion was, he hopeth, *&c.* and for theſe Reaſons the Plea was thought ill; it was likewiſe ſaid, that he ought to have concluded *hoc paratus eſt verificare*, unleſs the Puiſne brings into Court the (*b*) Red Book of the Exchequer.

(*a*) *Vide* 2 Ld. Raym. 869. Lutw. 1466.

(*b*) The Privilege of an Officer of the Exchequer may be pleaded, or by ſhewing the Red Book of the Exchequer allowed. 1 Keb. 256. 2 Keb. 103. 2 Lutw. 46.——An Accountant of the King's Exchequer allowed his Privilege in *B. R.* on a Baron's coming into Court and ſhewing his Book of Accounts, and this without any Plea or Prayer of the Party. 2 Bulſ. 36.———Where one entitled to the Privilege of the Court of Exchequer is ſued in *C. B.* the Court ſends a *Superſedeas*? but if it be in *B. R.* no *Superſedeas* is ſent, for that would be to ſuperſede the King; but the Practice is, to ſend up the Red Book by the Puiſne Baron. 2 Salk. 546. *per Walter* Ch. Baron.

Ld. Raym. 336. Salk. 194. pl. 3. *Thomee* v. *Lloyd.* Ld. Raym. 336. Comb. 482. 12 Mod. 195. 6 Mod. 88.

In *Aſſumpſit*, the Defendant *Venit & dicit*, that he is an Officer of the Exchequer, and pleads Privilege; and on Demurrer two Exceptions were taken: 1*ſt*, Becauſe he pleads his Privilege by Writ, but not under the Seal of the Court. 2*dly*, That it is not ſaid, that the Court ought not to have Conuzance in the Beginning of the Plea; *&* *per Holt* Ch. J. If a Man pleads Privilege, and at the Time of pleading he produces a Writ teſtifying that he is an Officer, the Plaintiff cannot deny the Privilege; but if he pleads it without a Writ, the Plaintiff may deny it, but the Plea is good without ſhewing the Writ; as to the ſecond Exception he held, that the Concluſion made the Plea; for if a Man begins in Bar and concludes in Abatement, it is a Plea in Abatement.

Sid. 74.

The Clerks of the Papers and Secondary of the King's Bench, when they claim Privilege, declare themſelves to be Clerks to the Maſter.

Sid. 65.

Privilege in the Common Pleas muſt be certified by the Prothonotaries, and not by the Secondaries.

2 Bulſ. 207. 2 Rol. Abr. 275. Salk. 1. pl. 3. Ld. Raym. 90. 3 Mod. 310. 3 Lev. 343 Carth. 377. Ld. Raym. 93, 136.

It hath been a Matter of great Doubt how far an Attorney of *C. B.* or other privileged Perſon; being *in Cuſtodia Mareſchalli*, ſhall be ouſted of his Privilege; for as on the one Hand being in actual Cuſtody, he is to anſwer to the Plaintiff's Demand lodged againſt him, and not to the Proceſs that brought him in; and on the other Hand, it being thought hard that his being there by Coercion and on a fictitious Treſpaſs ſhould ouſt him of his real Privilege: The Determinations herein have been, 1*ſt*, That though *A.* be in *Cuſtodia Mareſcalli* at the Suit of *B.* yet when *B.* declares againſt him he may plead his Privilege, * becauſe he comes there by Coercion, and had no Opportunity before to take Advantage of it. 2*dly*, If *A.* files Bail at the Suit of *B.* and in the ſame Term a Declaration is delivered againſt *A.* at the Suit of *C. A.* may plead his Privilege againſt *C.* as well as againſt *B.* for it were abſurd that *C.* who tops his Suit upon the Action of *B.* ſhould have more Liberty or Advantage againſt *A.* than *B.* himſelf had. 3*dly*, But if it be in a ſubſequent Term, or if by any Thing *A.* waives his Privilege in the firſt Action, he then becomes obnoxious to the Suits of every one; and as to *C.* he is truly *in Cuſtodiam Mareſcalli*; for being once ouſted of his Privilege, he can no longer attend as an Officer in the other Courts, but is fixed in the King's Bench; and therefore cannot by the Suppoſition of the Neceſſity of his Attendance ouſt the Party of his Action.

*Page 226

Carth. 377.

So if an Attorney of *C. B.* is brought into the Court of *B. R.* at the Suit of an Attorney there, which is an Eſtoppel to the Defendant's Privilege,

Privilege, the Defendant ſhall be ouſted of his Privilege in all other Actions commenced againſt him in *B. R.* in the ſame Term; becauſe the Juriſdiction of this Court was attached upon him by the firſt Action.

As to the Time of pleading Privilege, it has been laid down in a Variety of Caſes as a ſure Rule, that after Imparlance the Defendant cannot plead his Privilege, becauſe by imparling he affirms the Juriſdiction of the Court, which by this Plea he would ouſt; but herein theſe Diſtinctions have been taken, and the Law herein by the modern Authorities ſeems now eſtabliſhed, that after a general Imparlance, the Defendant cannot plead Privilege, becauſe he muſt then plead in Chief; ſo after a ſpecial Imparlance in this Manner, *Salvis omnibus allegationibus & exceptionibus, omnimodis tam ad breve quam ad narrationem*; for by this ſpecial Imparlance he has confined himſelf to take Advantage of Defects in the Writ and Count only; but in Caſe of a general ſpecial Imparlance obtained from the Court, *viz. Salvis ſibi omnibus & omnimodis advantagiis & exceptionibus*, he may after plead his Privilege; for this is not to ouſt the Court of its Juriſdiction, but is a Privilege which each Court allows to the Officers of the other, to be ſued in their own Court only.

22 H. 6. 7. 2 Rol. Abr. 275, 276. Dyer 33. Godb. 286. Stil. 295. Lev. 54. Keb. 195, 221, 256. 2 Show. 145. pl. 124. Hard. 365. Sid. 318. 2 Keb. 103, 121, 163. Show. 49. Lutw. 46. Salk. 1. pl. 3. Comb. 68.

A Witneſs was arreſted in his Return from *Wincheſter* Aſſizes, and in the Term following was diſcharged by Motion on common Bail by the Court from which the Record iſſued, and that without having the Privilege of the Court of *Niſi Prius* certified; had the Arreſt been at the Aſſizes, the Judges there might have diſcharged him; for Privileges given by Law are to be proſecuted in ſuch a Manner as the Party may moſt eaſily get the Benefit of them.

Trin. 13 Ann. in *B. R. Hatch* v. *Bliſs.* Gilb. Caſ. 308. 2 Stra. 986.

5. How privileged Perſons are to ſue and be ſued.

When an Attorney or other Officer intitled to Privilege, is Plaintiff, he regularly ſues (*a*) by Writ of Privilege, and is ſued by Bill; which Proceſſes iſſue out of the Court in which the Action is commenced, and have no Foundation in Chancery.

4 Inſt. 71, 99, 112.

(*a*) In the Exchequer, where the Plaintiff is privileged, the Suit is by *Quo Minus*; where the Defendant is privileged, the Suit is by Bill. 2 Salk. 546.

But an Attorney is not obliged to ſue by Writ of Privilege, but may ſue by Original; but if he elects the former, he muſt name himſelf Attorney, *&c.* for when any particular Character or Relation gives any Perſon Rights and Privileges, it muſt (*b*) be ſet forth.

Vent. 199. 28 E. 3, 4. Cro. Eliz. 731.

(*b*) But the Court of *K. B.* ſaid it was not uſual for to inſert in Proceſs on what Account or in what Right the Party ſues; as in the Caſe of Executors and Adminiſtrators, the Caſe of an Aſſignee of a Bail Bond, and the like, where the Proceſs is only to anſwer *A. B.* 2 Str. 1232.

* And therefore it hath been held, that if an Attorney ſues by Original, he muſt declare as others do; and that if he does otherwiſe, it will be fatal on a ſpecial Demurrer, though aided after Verdict, and alſo good on a general Demurrer.

*Page 227 2 Lev. 40. Vent. 198. 2 Keb. 860, 879. 3 Keb. 15.

Attornies are intitled to Proceſs of Attachment, are not to be arreſted or held to ſpecial Bail, let the Cauſe of Action be what it will; for being Officers of the Court they are obliged to a conſtant Attendance, and are preſumed to be always amenable.

Mod. 10.

A Phi-

2 Salk. 544. pl. 4. *Brown's* Caſe. A Philazer of *B. R.* was arreſted by Writ, but diſcharged on common Bail; for he ought to be ſued by Bill, as being preſent in Court.

Salk. 544. A Bill cannot be filed againſt a Perſon privileged, in Vacation; for then he is not preſent in Court, and as to the Vacation, it begins the laſt Day of the Term, as ſoon as the Court riſes.

2 Salk. 544. pl. 5. The Bill muſt be filed though the Attorney agrees to appear and diſpenſe with it; but it may in ſuch Caſe be filed afterwards.

6 Mod. 16. In an Attachment of Privilege by the Marſhal, he ſhall have no Attorney, becauſe preſent in Court.

Sid. 134. *The King* v. *Paget*. An Information was exhibited againſt the *Cuſtos Brevium* of *B. R.* for Abuſes and Miſdemeanors in his Office, who refuſed to appear in *(a)* Perſon, but would have appeared by Attorney; and the Opinion of the Court was, that he could not appear by Attorney, being an Officer of the Court, and preſumed to be always preſent; and therefore it was agreed, that no Proceſs ſhould be iſſued againſt him; but that upon reading the Information, if he did not appear, Judgment ſhould be given againſt him.

(a) An Attorney may plead his Privilege by an Attorney, without any Inconvenience, for he may be ſick, or have Buſineſs in another Court, and the Precedents are both Ways. Stil. 413.

Cro. Car. 580. *Raymond* v. *Burbedge*. In an Action brought by an Attorney by Bill of Privilege, the Judgment was, *quod Nil capiat per Breve*, inſtead of *Nil capiat per Billam*; which was held manifeſt Error, unleſs it could be amended as the Miſtake of the Clerk.

Leon. 329. *Crew* v. *Bailie*, *vide* Title *Outlawry*. In a Bill of Privilege by or againſt an Attorney, no *Capias* lies, but an Attachment of Privilege; and conſequently on ſuch Proceeding there can be no Outlawry.

Dyer 288. a. pl. 53. Cro. Car. 91, 92. 3 Lev. 39. In an Attachment of Privilege by or againſt an Attorney, it hath been held, that Pledges to proſecute muſt be entered on the Imparlance Roll; and that this is not barely Form, but Matter of *(b)* Subſtance.

(b) Seems now aided by the 4 & 5 Ann. c. 16.

2 Mod. 297. 3 Lev. 398. 3 Salk. 283. pl. 8. Ld. Raym. 399. The Judges, Prothonotaries, Attornies, *&c.* of the Court of *C. B.* whoſe Attendance is wholly required in Court, are not ſuable by Original, but by Bill only; but Serjeants at Law, Judges, Servants, and other Clerks, who though they may be intitled to the Privilege of being ſued in that Court, yet muſt they be ſued by Original, and not by Bill.

Trin. 5 G. 2. in *B. R. Durett* v. *Hayward*. In *Aſſumpſit* by Bill againſt the Defendant as *un' clericorum Domini Regis coram ipſo Rege*, the Defendant pleaded that he was a Philazer, *abſque hoc*, that he was a Clerk; and on Demurrer, the Plea was ſet aſide as frivolous and impertinent, for that Philazers are Clerks.

6. Whether there can be Privilege againſt Privilege.

It ſeems a general Rule, that there can be no Privilege againſt *(c)* Privilege; ſo that if an Officer of one Court ſues an Officer of another, *Page 228 the Defendant ſhall not plead his Privilege; for the Attendance of the Plaintiff is as neceſſary in his Court as the Defendant's is in his; and

Bro. *Privilege* pl. 40. Godb. 81. Jenk. 131.

(c) But ſee 2 Str. 835, 1141. Barnard. *K. B.* 182. 2 Barnes 34, 35, 36. Supplem. to Barnes 7. 2 Brownl. 267. Moor 753. 2 Rol. Abr. 274. Jenk. 173. 2 Keb. 346.

there-

therefore the Cauſe is legally attached in the Court where the Plaintiff is an Officer. ‡

‡ This ſeems to be now the ſettled Doctrine.

As where *J. S.* Attorney of *B. R.* brought Treſpaſs againſt the Warden of the *Fleet*, who came into the Court of *C. B.* and prayed the Advice of the Court, whether he being an Officer of the Court ſhould be obliged to anſwer; and on Conſideration of the Equality of Privilege, the Court determined, that he who commences his Suit firſt is intitled to Privilege; and therefore adviſed the Warden to anſwer. 2 Leon. 41. *Povey's* Caſe.

So where one of the Clerks in Chancery was impleaded in *C. B.* by Bill of Privilege by an Attorney of the ſaid Court, and prayed his Privilege; but it was denied him, becauſe the Plaintiff was privileged in that Court as well as the Defendant in Chancery, and was firſt intereſted in his Privilege by bringing his Writ. 4 Leon. 193. *Ben Johnſon's* Caſe.

So where the Plaintiff brought his Bill in the Exchequer, to be relieved againſt a Bond, put in Suit againſt the Defendant in the Petty-Bag Office, which is a Court of Common Law, to which the Defendant pleaded his Privilege as an Officer of the Court of Chancery; and herein the Court agreed, that when both Parties are privileged Perſons, his Privilege ſhall take Place who firſt ſues; ſo that here the Suit in Equity to be relieved againſt the Penalty of the Bond, being firſt attached here, gained a Preference in the Plaintiff in his Suit, which is a diſtinct Suit from that of the Defendant's at Common Law; and therefore the Plea was over-ruled, and an Injunction awarded till Anſwer. In this Caſe it was ſaid, that if both are privileged, but the Attendance of the one is more requiſite than that of the other, his Privilege ſhall be allowed who has moſt Cauſe of Privilege. Hard. 117. *Baker* v. *Lenthal.*

Where an Action is brought by the King, the Defendant ſhall not have Privilege. Ld. Raym. 27.

An Attorney of *C. B.* ſued a Member of the Univerſity of *Oxford*, who prayed his Privilege, which is not to be ſued in another Place; and tho' it was inſiſted that this Privilege was given them by Act of Parliament, yet, in regard the Words were general, the Court held, that there was no Neceſſity to conſtrue them ſo as to extend to Privileges before *in eſſe*; and that therefore this ſpecial Privilege was not taken away by the Statute. Ld. Raym. 342. *Joliffe* v. *Langſton.*

(C) Privilege of Peers and Members of Parliament: And herein,

1. Who ſuch Perſons are that are entitled to this Privilege.

ALL Peers without any Diſtinction as to Degree or Rank, are intitled to Privilege; for they are equally obliged to (*a*) attend the Service of the Publick, and (*b*) are always ſuppoſed amenable, and 4 Inſt. 24. Stil. 118, 222, 253, 454.

Dyer 314. Mod. 66. Bro. *Exig.* 3. Moor 767. Scobel's Memorials 88, 103. Sir Simon Dew's Journals 414. Pick. 59. Finch 355. 2 Ld. Raym. 1247. 3 Seld. Wilk. Edit. p. 1478. (*a*) Dy. 60. a. *in Margine.* Noy 102. Moor 778. pl. 1080. Stamf. P. C. 38. Hawk. P. C. 59. c. 22. ſ. 2. That the King's Grant or Charter of Exemption cannot diſcharge a Nobleman from his Attendance in Parliament. 4 Inſt. 49. (*b*) The Law intends them to be aſſiſting the King with their Counſel for the Commonwealth, and to keep the Realm in Safety by their Proweſs and Valour. 9 Rep. 49. a. *id.* 68. Jenk. Cent. 107. pl. 6. Hob. 61. 10 Rep. 76. b. 12 Co. 96.

to have ſufficient Property to anſwer in Suits and Actions brought againſt them, and on theſe Grounds are not to be arreſted or moleſted in their
*Page 229 Perſons. This Privilege extended formerly to Abbots, as it * does to Biſhops, Members of the Convocation, and Members of the Houſe of Commons at this Day.

The Privilege of Parliament, according to the *(a)* Law of Parliament, is of a very extenſive Nature; but all that is here intended to be treated of is only the taking Notice of and pointing out ſuch Caſes and Reſolutions relative hereto, as are to be found in the Books of Law; not to determine concerning this Privilege as ſettled by the Rules and Orders of each Houſe, of which they themſelves are the *(b)* ſole Judges, though the King's Courts *(c)* incidently take Notice thereof, and are bound to determine in Matters of Privilege when ſo directed by Act of Parliament.

(a) Ld. *Coke* ſays of this Law, *ab omnibus quærenda eſt, a multis ignorata, a paucis cognita.* 4 Inſt. 15.

(b) 13 Co. 63.

4 Inſt. 23, 50, 363. Prinn's Animad. on 4 Inſt. 12. Cro. Car. 181, 604. 2 Ld. Raym 1111.

(c) *Vide* Mod. 66. Have determined in relation to their Journals. Hob. 111. See the Arguments in the Caſe of *Aſhby* v. *White*, Salk. 19. pl. 10. 6 Mod. 45. 2 Ld. Raym. 938. *Barnardiſton* v. *Soame*. 2 Lev. 114. 3 Keb. 365, 369. *Onſlow*'s Caſe. 2 Vent. 37. *The Queen* v. *Paty*. 2 Ld. Raym. 1105.

Co. Lit. 156. 2 Inſt. 48. 3 Inſt. 30. pl. 19.

This Privilege extends only to the Peers of *Great Britain*; ſo that a Nobleman of any other Country, or a Lord of *Ireland*, hath not any other Privileges in this Kingdom than a common Perſon; alſo the Son and Heir apparent of a Nobleman is not entitled to the Privilege of being tried by his Peers, which is confined to ſuch Perſon as is a Lord of Parliament at the Time; but it ſeems that an Infant Peer is privileged from Arreſts, his Perſon being held ſacred.

(d) 9 Co. 117. Stat. 5 Ann. c. 8. 2 Stra. 990. Forteſc. Rep. 163, 165. P. Wil. Rep. 583.

The Peers of *Scotland* had no Privileges in this Kingdom *(d)* before the Union, but now by the twenty-third Article of the Union, the ſixteen elected Peers ſhall have all the Privileges of the Peers of Parliament of *Great Britain*; alſo all the Reſt of the Peers of *Scotland* ſhall have all the Privileges of the Peerage of *England*, excepting only that of Sitting and Voting in Parliament.

—*and the Privileges depending thereon* (ſays the Act); but theſe Words are entirely omitted by *Peere Williams*. The Practice and Uſage of allowing *all* the *Scotch* Peers this Privilege, which ſolely depends on, and is the Conſequence of ſitting and voting in Parliament, are in direct Violation of the expreſs Words of the Act of Union, the only Law whereby the *Scotch* Nobility can at this Day claim any Privilege at all.

2 Inſt. 50. Stil. 222, 234, 252. 2 Chan. Ca. 224.

A Peereſs by *(e)* Birth is entitled to Privilege; ſo of a Peereſs by Marriage, and that as well during the Coverture as after; but as a Peereſs by Marriage *(f)* loſes her Dignity by marrying a Commoner, after ſuch Marriage ſhe is not entitled to any Privilege.

Forteſc. Rep. 162. Ventr. 298. Styl. 222. Eq. Caſ. Ab. 349. (A). Co. Lit. 16. b. 6 Rep. 53. b. Dy. 79. pl. 51. 2 Hawk. P. C. 423. Order of Houſe of Peers, 21 *Feb.* 1692.——(e) But doubted whether a Peereſs by Patent only for Life, is entitled to this Privilege. Styl. 234, 252. held that ſhe is not entitled. Style 254. but adjourned.——*(f)* Co. Lit. 16. 6 Co. 53. Dyer 79.

(g) *Vide* this Caſe *poſtea*, fol. 234.

It was holden by my L. Ch. J. *Holt*, in the Caſe of *(g)* Ld. *Banbury*, that where a Perſon is called by Writ to the Houſe of Peers, he is no Peer till he ſits in Parliament, the Writ giving him no Nobility or Honour; but that it was the Sitting in the Houſe of Lords, and aſſociating himſelf with them that ennobled his Blood; and that therefore, if the King or he dies before a Parliament meets, the Writ is determined, and the Party remains a Commoner; but he held it otherwiſe in a Creation by Letters Patent, by which the Party is immediately noble without any other Act or Ceremony; and though the Parliament never meets, or the King dies, the Nobility remains to him and his Poſterity, according to the Limitations in the Patent.

2. How far this Privilege extends to their Servants and Attendants.

A (*a*) Member of Parliament ſhall have Privilege of Parliament, not only for his (*b*) Servants, but for his Horſes, *&c.* or other Goods diſtrainable. 4 Pryn. Reg. Writs 624. D'Ewe's Journ. 123.

4 Inſt. 24. (*a*) Noblemens Servants are privileged from Arreſts in Time of Parliament. 2 Show. 84. Order of Houſe of Lords, 28 *May*, 1628. Sir W. Jo. 155. Style 139, 167. Sir *Simon D'Ewe*'s Journals, 315, 323, 530, 532, 533, 607, 608, 617. (*b*) Said to extend only to Servants, and not to their Tenants. Mod. 13. And in Marſh 92. it is ſaid to have been ordered by the Lords in Parliament, 16 Car. 1. That only menial Servants, or one who attended on the Perſon of a Knight or Burgeſs of Parliament, ſhould be free from Arreſt.

* *J. S.* brought Debt for Rent againſt *H.* who pleaded that he was Tenant and Servant to Lord *Moon*, and prayed his Writ of Privilege might be allowed; the Plaintiff demurred; it was argued, that the Matter of the Plea was againſt the common and Statute Law; but *per Roll*, Ch. J. you ought not to argue generally againſt the Privilege of Parliament, every Court hath its Privilege; I conceive a Writ of Privilege belongs to a Parliament Man, ſo far as to protect his Lands and (*c*) Eſtate; and you have admitted his Privilege by your Demurrer. *Page 230 Stile 139. *Smith* v. *Hale*, & *vide* Latch 150. and the S.C. Stile 167, 223. (*c*) 1 Jon. 155.

The Warden of the Fleet inſiſted upon a Writ of Privilege, alledging that he was obliged to attend the Houſe of Lords; but it appearing that he was ſued upon an Eſcape, and the Court conſidering the great Inconvenience would enſue, and being of Opinion that it was in their Diſcretion whether they would grant ſuch Writ or no, upon a Motion they ſaid he might plead it if he would, but they would not award ſuch a Writ, or if his Privilege was infringed, he might complain to the Houſe of Lords. 2 Vent. 154.

In Debt, the Defendant pleads he was a Servant to a Member of Parliament, and *ideo capi ſeu arreſtari non debet* the Plaintiff prays Judgment, and *quia videtur quod tale habetur Privilegium quod Magnates, &c. & eorum familiares capi ſeu arreſtari non debent; ſed nullum habetur Privilegium quod non debent implacitari, ideo reſpondeat Ouſter.* Mod. 146. cited to have been adjudged between *Rivers* v. *Couſin*. Hil. 24 E. 4. ret. 4, 7. 10. *in Scacc.*

Defendant after a general Imparlance pleaded, that he was a Servant to a Peer, *viz.* the Earl of *Pembroke*; and by *North* Ch. J. it is not receivable, for it is the Privilege of the Maſter and not the Servant's; but the Defendant ought to ſue his Writ of Privilege, for perhaps his Maſter will not protect him; and if he will not, he is then left to anſwer; like to the Caſe of a Counſellor, where it is the Privilege of the Client that he ſhall not be compelled to diſcover the Secrets of the Client; but if the Client be willing, the Court will compel the Counſel to diſcover what he knows; which Serjeant *Maynard* ſaid was his Father's Caſe before the Lord *Cecil*, in the Court of Wards. *North* ſaid, as it was a Matter of great Conſequence, he would adviſe with the Lord Chancellor and the reſt of the Judges, what uſed to be done in ſuch Caſes; afterwards it was moved again, and *North* ſaid it was moved in the Houſe of Lords, and that they had left it to the Judges to do according to Law; and therefore the Plea was rejected. Paſch. 30. Car. 2. in *C. B. Lea* v. *Wheatley*.

By an Order 24 *Jan.* 1606, in the Houſe of Lords, it was reſolved, that no common Attorney or Solicitor, though employed by any Peer ſhould have the Privilege of this Houſe. 2 Stra. 1065.

By an Order 24 *May* 1724, this Privilege was reſtrained to menial Servants and others neceſſarily employed about Eſtates of Peers.

By

By an Order 22 *Jan.* 1715. it was reſolved, that every Peer ſhould upon his Honour certify to the Houſe, that the Perſons protected were within the Privilege of the Houſe; and ſhould by Letter acquaint the Party arreſting ſuch privileged Perſon with the ſame.

M. 10 G. 2. in *B. R.* *Wickham* v. *Hobart.* 2Stra. 1065

An Attorney was taken in Execution upon a *Ca. Sa.* about two Years ago, but upon a Letter under the Hand and Seal of the Lord *Say and Seal*, the Sheriff diſcharged him as Steward to his Lordſhip; a Rule was obtained at the Side-Bar for the Return of the Writ; and now on Motion in Court to diſcharge this Rule, it was urged in Behalf of the Sheriff, that this Privilege belonged only to the Peer, and not to the Party, and was not returnable to the Proceſs; and that therefore the Court ought not to inſiſt upon a Return, as the Sheriff could not juſtify the Detention of the Defendant, but under Peril of bringing himſelf and the Plaintiff under the *Page 231 Cenſure of the Houſe of * Peers; but on Conſideration of the abovementioned Orders, and on conſidering the Nature of this Caſe, that the Plaintiff was within the ordinary Juſtice of the Court intitled to a Return of his Writ; that without ſuch Return he might be debarred from any further Execution; but principally from the great Inconveniency that might ariſe by allowing Attornies, who are Officers to the Courts in which they reſpectively practiſe, and therefore amenable to thoſe Courts, this Kind of Privilege; the Court gave the Plaintiff Liberty to proceed againſt the Sheriff, but gave him Time till next Term to make his Return.

3. In what Caſes this Privilege is to be allowed.

Bro *Exigent.* that a *Capias* does not lie againſt a Lord of Parliament, nor againſt an Abbot or Biſhop; but if Reſcous be returned upon a Lord of Parliament, a *Capias* lies for the Contempt. Moor 767. Finch of Law 355.

In all Cauſes this Privilege is regularly to be allowed; ſo that a Peer of the Realm, or a Member of the Houſe of Commons, is not to be arreſted or moleſted in his Perſon or (*a*) Eſtate.

(*a*) The Goods of a privileged Perſon taken in Execution during the Privilege of Parliament ought to be re-delivered and freed as well as the Perſon. Jon. 155. §

---

§ See 10 Geo. 3. c. 50.

4 Inſt. 25. *Prin's Survey of Parliament Writs.*

But Privilege of Parliament doth not extend to (*b*) High Treaſon, Felony, Breach of the Peace, or Surety of the Peace.

(*b*) In Treaſon or Felony, or Miſpriſion of Treaſon or Felony, they can only be tried by their Peers; but for all other Offences, as *Præmunire*, Riot, Seducing a young Lady from her Parents in order to debauch her, *&c.* they are to be tried by the Country. 2 Hawk. P. C. 424. ——That neither *Magna Charta*, nor any other Law privileges a Peer from being indicted by a Grand Jury of Commoners, either in the King's Bench or before Commiſſioners of Oyer or the Coroner, *&c.* 2 Hawk. P. C. 424.——But the Court of *B. R.* cannot receive the Plea of Not guilty, or the Confeſſion of a Peer, but only the Lord High Steward; but may allow a Pardon pleaded by a Peer to an Indictment in that Court. 2 Hawk. P. C. 424.———So if a Peer be attainted of Treaſon or Felony, he may be brought before the Court of *B. R.* and demanded what he has to ſay, why Execution ſhould not be awarded againſt him; and if he plead any Matter to ſuch Demand, his Plea ſhall be diſcuſſed, and Execution awarded by the ſaid Court, upon its being adjudged againſt him. 2 Hawk. P. C. 424.

2 Hal. Hiſt. P. C. 199. 2 Hawk. P. C. 424.

And therefore in an Indictment for Treaſon or Felony, Treſpaſs *vi & armis*, Aſſault or Riot, Proceſs of Outlawry ſhall iſſue againſt a Peer of the Realm; for the Suit is for the King, and the Offence is a Contempt againſt him; but in Civil Actions between Party and Party, regularly a *Capias* or *Exigent* lies not againſt a Lord of Parliament.

If

If a Peer of Parliament be convict of a Diſſeiſin with Force, a *Capias pro fine* and *Exigent* ſhall iſſue; for the Fine is given by Statute in which no Perſon is (*a*) exempted. Cro. Eliz. 170 Ld. *Stafford* v. *Thynne*, *vide*

Dyer 314. (*a*) For Execution on a Statute Staple, Merchant, on the Statute of *Acton Burnel*, or on the Statute of 23 H. 8. the Body of a Baron ſhall be taken in Execution; for by theſe Statutes, ſuch Perſons are not exempted. 2 Leon. 173.—So a Cuſtom to commit Perſons who ſhall take an Orphan out of the Cuſtody of a Guardian, is good without Exception of Peers; for a Peer is not privileged in this Caſe, and in a *Homine replegiando*, where he detains the Body, he ſhall be committed. Lev. 162-3.

So in Debt upon an Obligation againſt the Earl of *Lincoln*, who pleaded *Non eſt factum*, which being found againſt him, the Judgment was *Ideo capiatur*; which on a Writ of Error brought by him was objected to, in that a *Capias* does not lie againſt a Peer of the Realm; *ſed non allocatur*; for by this Plea found againſt him, a Fine is due to the King, againſt whom none ſhall have any Privilege. Cro. Eliz. 503. Earl of *Lincoln* v. *Flowes*.

An Information was exhibited in *B. R.* againſt the Earl of *Devonſhire*, for ſtriking in the King's Palace; which being in Time of Parliament, * he inſiſted on his Privilege of a Peer, and refuſed to plead in Chief, but put in his Plea of Privilege; to which there was a Demurrer, and the Plea over-ruled, and he was fined 30,000*l*. * Page 232 Comb. 49. *The King* v. *Earl of Devonſhire*.

In the Caſe of the ſeven Biſhops it was inſiſted, that Peers of the Realm could not be committed in the firſt Inſtance, for a Miſdemeanor before Judgment; and that no Precedent could be ſhewn where a Peer had been brought in by a *Capias*, which is the firſt Proceſs for a bare Miſdemeanor, and they put in a Plea in Writing of their being Peers, *&c.* but the Plea was rejected. 3 Mod. 215.

Alſo Peers of the Realm are puniſhable by Attachment for Contempts in many Inſtances; as for reſcuing a Perſon arreſted by due Courſe of Law; for proceeding in a Cauſe againſt the King's Writ of Prohibition; for diſcharging other Writs wherein the King's Prerogative or the Liberty of the Subject are nearly concerned; and for other Contempts which are of an enormous Nature. 2 Hawk. P. C. 152.

If a Peer be returned on a Jury, on his bringing a Writ of Privilege he may be diſcharged; alſo it ſeems the better Opinion, that without ſuch Writ he may either challenge himſelf or be challenged by the Party. Dyer 314. Moor 767. 9 Co. 49. Co. Lit. 157. Jon. 153.

Alſo in the Caſe of Sir *Edward Bainton*, who being returned on a Jury, the Court would not force him to be ſworn againſt his Will, he being a Parliament Man, and the Parliament then ſitting. Paſch. 27. Car. 2. in *B. R.*

A Day of Grace ſhall not be given againſt a Lord of Parliament; for he is preſumed to be attendant on the Service of the Publick. 9 Co. 49. a.

So if a Peer be made Steward of a Baſe Court or Ranger of a Foreſt, he may, from the Dignity of his Perſon, and the Preſumption that he is engaged in the more weighty Affairs of the Commonwealth, exerciſe theſe Offices by Deputy; though there are no Words for this Purpoſe in his Creation. 9 Co. 49. a.

So if a Licence be granted to a Peer to hunt in a Chaſe or Foreſt, he may take ſuch a Number of Attendants with him as are ſuitable to his State and Dignity, 9 Co. 49. b.

A Peer or Lord of Parliament cannot be an Approver; for it is againſt *Magna Charta* for him to pray a Coroner. 3 Inſt. 129.

If a Peer of the Realm bring (*b*) an Appeal, the Defendant ſhall 2 Hawk. P. C. 427.

(*b*) In an Appeal brought againſt him he ſhall be tried by a Jury of Commoners, and not by his Peers; for the Words of *Mag. Char. nec ſuper eum ibimus*, *&c.* are to be intended only of the Suit of the King. 3 Inſt. 30. 2 Inſt. 49.

not be admitted to wage Battle, by Reaſon of the Dignity of his Perſon.

Jenk. 107. (a) This Privilege is taken away by 24 Geo. 2. c. 18. ſ. 4.

In *Jenkins* the following Privileges are laid down as belonging to Peers: 1. They are intitled to a Letter Miſſive. 2. (a) They have a Knight to try any Iſſue which concerns them. 3. They are not to be arreſted for Debt, Treſpaſs, or any perſonal Action. 4. They are exempted from ſerving on Juries. 5. To have no Day of Grace againſt them. 6. Upon the Trial of a Peer for Treaſon or Felony, they try him upon their Honour only, and not upon Oath. 7. When they paſs through any of the King's Foreſts to attend upon the King, upon blowing a Horn they may have a Buck or Doe, as the Seaſon of the Year is. 8. They have Power in their Houſe to reverſe Judgments given in the King's Bench. 9. They have the Benefit of Clergy though they cannot read. 10. They are not liable to find Carriages for the King when he removes from one Place to another.†

† No Peer hath Privilege of Peerage or of Parliament againſt being compelled by Proceſs of Courts of *Weſtminſter-Hall* to pay Obedience to *Habeas Corpus* directed to him. Order 7th *Feb.* 1757. 8th *June* 1757.

*Page 233

* 4. Of the Commencement and Continuance of this Privilege.

Moor 57, 340. Jenk. 118. Dalſ. 58. Dyer 59, 60. Latch 46, 150.

The Privilege of the Lords commences from the Teſte of the Writ of Summons, and the Privilege of a Burgeſs at his (b) Election; but if he be arreſted, or in Execution before his Election, he ſhall not have Privilege.

(b) *Vide* 1 Sid. 42.

And. 293.

So Perſons outlawed ought not to be Knights or Burgeſſes of Parliament, and ſuch Perſons outlawed may be arreſted by *Cap. Utlag.* Privilege of Parliament notwithſtanding.

Atkin's Power of Parl. 38. 4 Inſt. 44. Brownl. 91. Scobell's Memorials 88, 103, 180.

As to the Time and exact Continuance of this Privilege, it ſeems in good Meaſure unſettled even at this Day. It is indeed agreed in moſt Books that Members of Parliament have Privilege *eundo*, *morando*, (c) & *redeundo*; and that they are intitled to Privilege as well after a Diſſolution as a Prorogation of Parliament.

Sir *Simon Dewe*'s Journals 414. (c) By the 35 H. 8. c. 11. Members of Parliament have their Wages ſo many Days after the Parliament as they may reaſonably ſpend in their return Home. *Vide* Raſt. 664. Appendix to Reg. 1.

2 Lev. 72. Chan. Ca. 221. Sid. 29. pl. 2. Keb. Rep. 3. pl. 7.

By two Orders of the Houſe of Lords, one dated the 28 of *May* 1624. the other the 27 *January* 1628. it is declared, that their Privilege commences from the Teſte of their Writ of Summons to Parliament; and that upon every Seſſion and Prorogation, their Privilege is for twenty Days before and twenty Days after each Seſſion, which one of the Orders ſays is Time enough for them to come from all Parts of the Realm, and to return; but the Commons never aſſented to this, for they claim (d) forty Days before and after each Seſſion.

(d) In Cotton Record. 704. they claim forty Days.

So by Jenk. 118.

Trin. 8 G. 2. in *B. R.* Col. *Pitt*'s Caſe. 2 Stra. 985. Forteſc. Rep. 159, 342. Barnard. *K. B.* 442. Com. Rep. 44.

In the Caſe of Colonel *Pitt*, the Parliament was prorogued 16 *April* 1734, diſſolved the 17*th*, and the new Writs bore Teſte the 18*th* following, and the Defendant *Pitt*, who was a Member of that Parliament, was arreſted on the 20*th*; one of the Queſtions in this Caſe was, Whether the Arreſt was within Time of Privilege? And it was determined that it

was,

was, although the Defendant had lived for two Years before no farther diſtant from *London* than *Hammerſmith*; but the Court did not think it neceſſary, in the Determination of this Cauſe, to aſcertain the exact Time of Privilege that Members of the Houſe of Commons were intitled to after a Diſſolution of Parliament.

5. How Privilege is to be claimed and taken Advantage of.

It ſeems that formerly the uſual and indeed neceſſary Way of taking Advantage of Privilege, was to plead the ſame, or to bring a Writ of Privilege; and that Applications in other Manner, or even by Motion in Court, were held inſufficient. Dalſ. 16. Stil. 177, 186, 214, 222.

As where the Defendant being a Burgeſs of Parliament brought a (*a*) Letter from the Speaker to the King's Bench, to ſtay, &c. but it was diſallowed by the Court; for, as the Book ſays, it ought to have been a Writ of Privilege; and in this Caſe it was ſaid, that when *Thorpe* was Speaker, he had a general *Superſedeas* for all Actions againſt him; and it was held ill. Noy 83. Latch 48, 150. *Hodges* v. *Moor*. (*a*) See Ord. Houſe of Commons 1 *June* 1621.

* A Perſon choſen to ſerve in Parliament, ſhall not have Privilege before the Day of Seſſion; for there is no Clerk of Parliament to certify, and the Court will not admit Affidavits in that Caſe; he ought to ſue his Writ of Privilege in Chancery, on the Return of his Election. *Page 234 Sid. 42. pl. 9. Kel. Rep. 3. pl. 7. T. Raym. 12. See Forteſc. Rep. 162.

Lord *Banbury* was indicted of Murder by the Name of *Charles Knollys*, Eſq; and he pleaded in Abatement, that by Letters Patent K. *Car.* 1. created his Grandfather Earl of *Banbury*, and ſo ſhewed the Deſcent to him, and prayed Judgment of the Indictment, becauſe he was not named Earl. The Attorney General replied, that upon his Petition to the Houſe of Lords to be tried by his Peers, the Lords diſmiſſed his Petition, and diſallowed his Peerage, &c. and upon Demurrer, the Replication was held to be naught, and the Plea good, and the Indictment abated; and in this Caſe the following Points were determined: 1*ſt*, That it was not neceſſary for the Defendant in his Plea to aver that *Banbury* was within any County in *England*; for that in Reality there is not any Neceſſity that he ſhould be created of any Place. 2*dly*, That it was not neceſſary for the Defendant to aver that he was *unus Parium rgni Angliæ*; for whatever is done under the Great Seal of *England*, ought to bear Relation to *England*; and to ſuppoſe him a Peer of *Ireland*, is a foreign Intendment, and ought to be rejected. 3*dly*, That the Concluſion of his Plea, *& hoc paratus eſt verificare unde ex quo*, without *prout patet per Recordum*, or producing a Writ to certify that he was an Earl, was ſufficient; (*b*) though Baron or not Baron is regularly to be tried by the Record of his having ſat in Parliament; but herein the Court took a Difference between a Creation by Writ, and that by Patent; and held, that in the latter Caſe his ſitting or not ſitting in Parliament was not material, as his Creation was by Patent, which gave him all the Privileges of a Peer though he had never ſat in Parliament; beſides his Plea does not barely conſiſt on Matter of Record, but the Deſcents are Matters of (*c*) Fact which might be traverſed, and tried by a Jury. 4*thly*. It was held, that the Replication did not avoid the Defendant's Plea, nor he concluded from his Peerage by the Order of the Houſe of Lords: 1*ſt*, Becauſe in an original Cauſe the Lords have no Juriſdiction, nor is there any Precedents of their having ever determined a Right of Peerage without a previous Petition to the King, 2 Stra. 989. 2 Salk. 509. pl. 1. Skin. 336. pl. 2. Carth. 297. Comb 273. Ld. Raym. 10. S. C. *The King and Queen* v. *Knowles, al' Ld. Banbury*. Trin. 6 W. & M. in *B. R.* (*b*) 22 Aſſ. 24. Bro. Aſſ. 240. 35 H. 5. 46. 6 Co. 53. 9 Co. 31. F.N.B. 247. Regiſt. 287. Cro. Car. 205. (*c*) A Trial of Peerage in ſome Caſes ſhall be by the Country, as where a Ducheſs is ennobled by Marriage. 6 Co. 55.

King, who is the Fountain of Honour, and the King's Reference to them. 2*dly*, That this Diſmiſſion can amount to no more than an Ordinance of one Part of the Legiſlature, and ſuch Ordinance cannot diveſt the Party of that in which he hath a Freehold and Inheritance, and in whoſe Advice and Services the King and Commonwealth are intereſted. 3*dly*, That this Diſmiſſion does not amount to a Judgment of Parliament, and therefore cannot be pleaded in Bar to the Defendant.

Vent. 298. Counteſs of *Huntingdon*'s Caſe.

A Bill of *Middleſex* was iſſued out of *B. R.* by an Attorney of the Court, againſt the Counteſs of *H.* which was diſcharged by *Superſedeas* without Pleading; becauſe it appeared by the Record that ſhe was a Peereſs, and the Attorney committed for ſuing out the Proceſs.

2 Ld. Raym. 1247. 2 Salk. 512. pl. 2. S. C.

A Motion was made in the Behalf of the Lord *Banbury* for a *Superſedeas* to a *Latitat* which was iſſued out of the Court of *B. R.* againſt him, and on which he had been taken; and to induce the Court to grant it, they offered to produce an Exemplification of the Judgment in the Indictment in this Court againſt my Lord, and the Letters Patent of Creation, and an Affidavit that my Lord was the ſame Perſon in the Record of the Judgment; and it was alſo pretended, that if my Lord ſhould put in Bail he would be eſtopped to plead his Peerage; but the Court denied the Motion, and the Ch. J. ſaid, that they could not take Notice that this *Charles Knollys* is Earl of *Banbury*; that there *Page 235 * was a Difference between this Caſe and the Caſe of a Peer that had ſat in the Houſe of the Lords. If my Lord had been ever ſummoned to Parliament and had a Writ to ſhew, that there were no Diſpute about the Identity of the Perſon, it would have been reaſonable to have granted a *Superſedeas*; but in this Caſe of a Lord who has never ſat, they could not do it; for they could not try Peerage on a Motion, but his Lordſhip might plead it, and pray a *Superſedeas*.

Salk. 3. pl. 7. *Smith* v. *Villars*. Stil. 454.

Villars was arreſted as *J. Villars Armiger*, and pretended himſelf to be Earl of *Buckingham*; and upon a Motion, the Queſtion was, How he ſhould put in Bail ſo as not to eſtop himſelf; & *per cur.* he need not join in the Recognizance, and then there is nothing to eſtop him; for the Act of others cannot conclude him.

4 Inſt. 15. Skin. 521.

If a Biſhop has Occaſion to plead to the Juriſdiction of a Court, he muſt plead that he is *unus de paribus hujus regni Angliæ*; for he has no Patent to produce in Teſtimony of his Peerage, but is only a Peer *ratione Baroniæ*, which he holds *in Jure Eccleſiæ*; otherwiſe of a temporal Peer.

M. 7 Geo. 2. Col. *Pitt*'s Caſe, at *Serjeants Inn*. 2 Barnard. K. B. 423, 433, 448. Com. Rep. 444. pl. 208. 2 Str. 985. Forteſc. Rep. 159, 342.

In the Caſe of Colonel *Pitt* who was arreſted two Days after the Diſſolution of that Parliament of which he was a Member, and which was held to be within Time of Privilege, the Queſtion of the greateſt Difficulty was, How he ſhould be relieved, and whether he could not be diſcharged on Motion without bringing his Writ of Privilege; and it was held by ten Judges, that though a Writ of Privilege was heretofore held a ſure and legal Remedy, that notwithſtanding, and eſpecially ſince the Statute 12 & 13 *W.* 3. *cap.* 3. which expreſsly provides, that no Perſon intitled, &c. ſhall be arreſted during Time of Privilege, that he might be diſcharged on Motion; for the Judges are to take Notice of every Act of Parliament, and to take Care that they be duly executed; and this Method was ſince the making of the abovementioned Statute thought more adviſeable by the Judges than a Plea or Writ of Privilege, as the Act does not make the Proceſs void, but only avoidable; and as there could be no Plea to a Proceſs for Irregularity which is aided by the Appearance of the Party, 10 *Mod.* 86. *Str.* 155. 2 *Str.* 989, 1072. and this Caſe was compared to an Arreſt of an Ambaſſador's Servant contrary to the 7 *Ann. c.* 12. *ſ.* 3. 2 *Str.* 988.

988. *Forteſc. Rep.* 163. *Com. Rep.* 446. and to an Arreſt on a Sunday againſt the Statute 29 *Car. c.* 7. and to other Caſes of Privilege, as when a Juror or Witneſs, or the Plaintiff himſelf, is arreſted in going to or returning from the Court; which are all diſcharged upon Motion. †

† A Member arreſted may be diſcharged without a Writ of Privilege on Motion. Fort. 342. & *vide* Fort. 159. Stra. 985. Rep. Temp. Hard. 28.——But it is on filing common Bail; for it is a Diſcharge to his Perſon, not to the Suit. Fort. 342.————A *Scotch* Peer (not one of the Sixteen) ſhall be diſcharged on Motion. Lord *Mordington*'s Caſe. Fort. 165.——If a Member is illegally taken and detained by Proceſs of *B. R.* and is brought by *Habeas Corpus* to be charged in Execution in *C. B.* they will remand him, that he may be diſcharged in *B. R.* Barnes 199.

6. What ſhall be deemed a Breach of Privilege.

The Privilege, Order or Cuſtom of Parliament, either of the Upper Houſe or Houſe of Commons, belongs to the Determination or Deciſion only of the Court of Parliament; ſo that they are the proper Judges of all Breaches of Privilege, and of which the Courts of *Weſtminſter* only take Notice incidently. 13 Co. 63, 64. Prinn's 4 Inſt. 16. Cro. Car. 181, 604.

And accordingly in the Caſe of *Patty* and others who were committed to *Newgate* for a Breach of Privilege in commencing and proſecuting Actions at Common Law againſt the late Conſtable of (*a*) *Aileſbury*, the Court of *K. B.* by the Opinions of three Judges againſt *Holt* Ch. J. refuſed to relieve or diſcharge them on a *Habeas Corpus*, this being a parliamentary Matter in which the Houſe of Commons are the ſole Judges. 2 Ld Raym. 1105. *The Queen* v. *Paty*. (*a*) See the Caſe of *Aſbley* v. *White*. 6 Mod. 45. 2 Ld. Raym. 938.

So in the Caſe of one *Ferrers*, the Sheriff was committed for detaining a Member in Execution. Salk. 19. pl. 10. Dyer 61.

* But where in *Aſſumpſit* the Defendant pleaded the Statute of Limitations, and the Plaintiff replied that the Defendant was a Parliament Man, &c. the Plea was over-ruled; becauſe one may file an Original againſt a Parliament Man, and continue it down without any Breach of Privilege, here being no actual Moleſtation of his Perſon or Eſtate; and that this ſhould be ſo is of abſolute Neceſſity in order to ſave the Bar of the Statute, for ſuch Caſe not being provided by an Exception, the Plaintiff would be barred of his Action, though he could not file an Original. ‡ *Page 236 Sir *George Binion* v. *Evelin*. Lev. 111. Mod. 145. 2 Salk. 512. pl. 2. Show. 99. Carth. 137. 2 Ld. Raym. 1113. S. C.

‡ Now ſee 10 Geo. 3. c. 50. Privilege does not ſtay any Proceedings.

So a Man whilſt Member of Parliament may alien his Eſtate by Fine with Proclamations; and a Perſon who has a Right may be neceſſitated to commence an Action to ſave the Bar that would incur againſt him by the Statute of 4 *H. 7. c.* 24. 2 Ld. Raym. 1113. *per Holt* Ch. J.

So one may commence an Action againſt a Member of Parliament that is Executor. 2 Ld. Raym. 1113. *per Holt.*

7. Of the Proceedings in Courts by and againſt Perſons entitled to Privilege of Parliament.

By the Statute 12 & 13 *W. 3. cap.* 13. *ſect.* 1. it is enacted, "That "any Perſon may proſecute any Suit in any of his Majeſty's Courts at "*Weſtminſter* or Chancery or Exchequer, or the Duchy Court or in the "Court of Admiralty; and in all Cauſes matrimonial and teſtamentary

" in the Court of Arches, the Prerogative Courts of *Canterbury* and *York*, " and the Delegates, and all Courts of Appeal, againſt any Lord of Par- " liament, or any of the Knights, Citizens, and Burgeſſes of the Houſe of " Commons, or their Servants or any other Perſon intitled to Privilege of " Parliament, at any Time immediately after the Diſſolution or Prorога- " tion of Parliament until a new Parliament ſhall meet, or the ſame be " re-aſſembled, and immediately after any Adjournment of both Houſes " for above fourteen Days until both Houſes ſhall meet; and the ſaid " Courts may, after ſuch Diſſolution, Prorogation, or Adjournment, pro- " ceed to give Judgment, and to make final Decrees and Sentences there- " upon; any Privilege of Parliament notwithſtanding.

Sect. 2. " Provided that this Act ſhall not ſubject the Perſon of any of " the Knights, Citizens, and Burgeſſes, or any other Perſon intitled to " Privilege of Parliament, to be arreſted during the Time of Privilege; " nevertheleſs if any Perſon having Cauſe of Action or Complaint againſt " any Peer, ſuch Perſon after ſuch Diſſolution, Prorogation or Ad- " journment as aforeſaid, or before any Seſſions of Parliament, may have " ſuch Proceſs out of his Majeſty's Courts of King's Bench, Common " Pleas and Exchequer againſt ſuch Peer as he might have had out of " Time of Privilege; and if any Perſon have Cauſe of Action againſt any " of the Knights, Citizens, or Burgeſſes, or any other Perſon intitled to " Privilege of Parliament, after any Diſſolution, Prorogation, or ſuch " Adjournment, *&c.* ſuch Perſon may proſecute ſuch Knight, Citizen, or " Burgeſs, or other Perſon intitled to Privilege, in his Majeſty's Courts of " *K. B. C. P.* and Exchequer, by Summons and Diſtreſs Infinite, or by " Original Bill and Summons, Attachment and Diſtreſs Infinite, which the " ſaid reſpective Courts are impowered to Iſſue, until they enter a common " Appearance, or file common Bail; and any Perſon having Cauſe of " Suit or Complaint may, in the Times aforeſaid, exhibit any Bill or Com- " plaint againſt any Peer, or againſt any of the ſaid Knights, Citizens, or
*Page 237 " Burgeſſes, or other Perſon intitled to Privilege, in the * Chancery, Ex- " chequer or Duchy Court, and proceed thereupon by Letter or *Subpœna* " as uſual; and upon leaving a Copy of the Bill with the Defendant, or " at his laſt Place of Abode, may proceed thereon, and for Want of an " Appearance or Anſwer, or for Non-performance of any Order or De- " cree, may ſequeſter the Eſtate of the Party, as is uſed where the De- " fendant is a Peer, but ſhall not arreſt the Body of any of the ſaid Knights, " Citizens and Burgeſſes, or other privileged Perſon, during the Continu- " ance of Privilege of Parliament."

And *ſect.* 3. " Where any Plaintiff ſhall by reaſon of Privilege of " Parliament be ſtayed from proſecuting any Suit commenced, ſuch " Plaintiff ſhall not be barred by any Statute of Limitation, or nonſuited, " diſmiſſed, or his Suit diſcontinued for Want of Proſecution, but ſhall " upon the Riſing of the Parliament be at Liberty to proceed.

See the Statutes 2 & 3 Ann. c. 18. 11 Geo. 2. c. 24.

And *ſect.* 4. " No Suit or Proceeding in Law or Equity againſt the " King's original and immediate Debtor, for the Recovery of any Debt " originally and immediately due to his Majeſty, or againſt any Perſon " liable to render an Account to his Majeſty, for any Part of his Reve- " nues, or other original or immediate Duty, or the Execution of any " ſuch Proceſs, ſhall be impeached or delayed by Privilege of Parliament; " yet ſo that the Perſon of ſuch Debtor or Accountant, being a Peer, " ſhall not be liable to be arreſted, or being a Member of the Houſe of " Commons, ſhall not, during the Continuance of Privilege, be arreſted " by any ſuch Proceedings."

Sect.

Sect. 5. "This Act ſhall not give any Juriſdiction to any Court to hold "Plea of any real or mixed Action in other Manner than ſuch Court "might have done before."†

† By ſtat 11 Geo. 2. c. 24. Perſons intitled to Privilege may be proceeded againſt in any Court of Record in *Wales*, or in the *Counties Palatine*.—By 10 Geo. 3. c. 50. (a beneficial Act procured by Lord *Mansfield*) Peers and Members may be ſued at any Time, and the Suit ſhall not be impeached or ſtaid by Privilege; but the Perſon not to be impriſoned.—The Court may order the Iſſues from Time to Time to be ſold, and Plaintiff's Coſts to be paid, and the Reſidue retained till the Purpoſe of the Writ anſwered, and then the Iſſues or Money returned.—Rule of Court of *B. R.* or *C. P.* or Exchequer, may be inforced by Diſtreſs infinite.

It hath been always held, that a Peer is to put in his Anſwer to a Bill in Equity, on his *(a)* Honour only, and not on his Oath; but when he is *(b)* examined as a Witneſs, he muſt be ſworn.

(a) The 6 *May* 1628, it was reſolved by the Houſe of Lords, that the Nobility of this Kingdom are of ancient Right to anſwer in all Courts as Defendants, upon Proteſtation of Honour only, and not upon the common Oath. W. Jon. 155. Forteſc. Rep. 395. *(b)* Dyer 314. Jon. 153. 2 Mod. 99. 3 Keb. 631.

Alſo if a Peer is by Order of Court to be examined on Interrogatories, or to make an Affidavit, the ſame muſt be on Oath. 2 Salk. 513. & Freem. 422. pl. 566. *vide* Proced. Chan. 92.

As where the Lord *Stourton* brought a Bill againſt Sir *Thomas Meers* to compel him to a ſpecific Performance of Articles for the purchaſing of Lord *Stourton*'s Eſtate, Sir *Thomas* in his Defence inſiſted, that there were Defects in Lord *Stourton*'s Title to the Eſtate; and it being ordered that Lord *Stourton* ſhould be examined on Interrogatories touching his ſaid Title, it was objected, that Lord *Stourton*, being a Peer of the Realm, ought to anſwer upon Honour only; but it was ruled by Lord *Harcourt*, that though Privilege of Peerage did allow a Peer to put in his Anſwer upon Honour only, yet this was reſtrained to an Anſwer; and that as to all Affidavits, or where a Peer is examined as a Witneſs, he muſt be upon his Oath; and that this Examination upon Interrogatories, being in a Cauſe wherein his Lordſhip was Plaintiff, to enforce the Execution of an Agreement, as his Lordſhip would have Equity, ſo he ſhould do Equity, and allow the other Side the Benefit of a Diſcovery, and that in a legal Manner; and accordingly ordered Lord *Stourton* to put in his Examination on Oath. Will. Rep. 146. pl. 39. 2 Salk. 513. S. C. Sir *Thomas Meers* v. Ld. *Stourton*.

It hath been held, that though a Court of Equity will not ‡ proceed againſt a Member that has Privilege of Parliament, yet if a Parliament Man ſues at Law, and a Bill is brought here to be relieved againſt that Action, the Court will make an Order to ſtay Proceedings at Law 'till Anſwer or further Order. Vern. 329. ‡ Obſerve this was long before 10 G. 3. c. 50.

* *R. T.* being choſen a Burgeſs for *Buckingham*, and having a Trial at Bar to be had on *Tueſday* before the Sitting of the Parliament, moved to have his Privilege allowed him; but was denied in regard the Parliament was not ſitting nor to ſit 'till after the Trial had. *Page 238 Raym. 12. Sid. 42. S.C.

It hath been held, that in an Action founded on the abovementioned Statute 12 & 13 *W.* 3. *c.* 13. the Defendant ſhall have an Imparlance; and it was ſaid in this Caſe, that the Practice is to file a Bill in Nature of a ſpecial *Capias* againſt the Defendant, and then to ſummon him; and if he appears upon ſuch Summons, the Plaintiff may declare againſt him, as *in Cuſtodia Mareſcalli*. H. 10 G. 1. in *B. R.* *Wadſworth* v. *Handiſide*.

Peers are intitled to a Letter Miſſive, which Method was introduced upon a Preſumption that Peers would pay Obedience to the Chancellor's Letter; and is founded on that Reſpect that is due to the Peerage. Jenk. 107.

If the Lord doth not appear upon the Letter, a *Subpœna* on Motion is awarded againſt him; becauſe no ſubſequent Proceſs can be awarded but upon a Contempt to the Great Seal; and the Chancellor's Letter is only *ex Gratia*.

1 Vent. 342. Har. Chanc. Pract. 50. Gilb. Chanc. 65, 66. 3 Seld. 1543.

If, on the Service of the *Subpœna*, the Peer doth not appear, or if he appears and does not put in his Anſwer, no Attachment can be awarded againſt him, becauſe his Perſon cannot be impriſoned; but the Proceedings muſt be by Sequeſtration, unleſs Cauſe, *&c.* and this is regularly made out, upon Affidavit made of the Service of the Letter and the *Subpœna*, though ſometimes it is moved for without, ſince the Peer may ſhew Want of Service at the Day aſſigned to ſhew Cauſe why the Sequeſtration ſhould not iſſue; and this Order for a Sequeſtration is never made abſolute without an Affidavit of the Service of the Order to ſhew Cauſe, and a Certificate of no Cauſe ſhewn.

A Bill being filed againſt a Peer or Peereſs, the firſt Application is for my Lord Chancellor's Letter returnable in Term-Time; or it may be *immediate*, if the Peer or Peereſs lives in Town; but in this Caſe there muſt be an Affidavit, that the original Letter is left with the Peer at his Houſe, with the Copy of the Petition as anſwered; and therewith alſo is left an Office-Copy of the Bill ſigned by the Six Clerk; for if the Bill is not ſigned, the Service is irregular.

This Letter is only a Compliment, and no Proceſs to found Proceedings on; ſo that a Peer may appear or not, as he pleaſes; if he fails a *Subpœna* iſſues againſt him, and his Time for appearing and anſwering being out, an Attachment muſt be actually ſealed and entered againſt him, though never executed, to ground a Sequeſtration upon. It is a Motion of Courſe for a Sequeſtration upon an Attachment for Want of an Anſwer.

The Peer muſt be perſonally ſerved with this Order, and he hath eight Days to ſhew Cauſe after perſonal Service of the Order; if no Cauſe, the Order is abſolute; but if the Sequeſtration is for Want of an Appearance, and he appears, the Plaintiff muſt run the ſame Race over again for Want of an Anſwer, and the Peer muſt pray Time to anſwer, as Suitors do.

The Proceeding is the ſame againſt a Member of the Houſe of Commons; there the Party proceeds by Way of Sequeſtration, only with this Difference, that inſtead of a Letter there is always a *Subpœna* ſued out; and when a Cauſe either againſt a Peer or a Commoner ſtands in the Paper, and is called, and cannot proceed (Privilege being in†) the Court never ſtrikes it out as they do in other Caſes; where the Party is not ready, they let it ſtand over from one Term to another, 'till Privilege is out, and never put the Party to ſue out a new *Subpœna* to hear Judgment; and the Direction of the Court to the Regiſter is to put all privileged * Cauſes (which have been put off on that Account) the very firſt Cauſes in the Paper when the Court ſits after Privilege is out.

*Page 239

† This was before 10 G. 3. c. 50 which enacts, That Privilege ſhall not delay Proceedings in Law, Equity, or Eccleſiaſtical Courts.

Will. Rep. 385. pl. 117. Ld. *Clifford*'s Caſe.

A Sequeſtration was granted, unleſs Cauſe, againſt the Lord *Clifford* for Want of an Anſwer; he afterwards put in an Anſwer, which being reported inſufficient, it was moved for a Sequeſtration abſolutely, an inſufficient Anſwer being as no Anſwer; but the Court thought it a Hardſhip in the Caſe of a Peer or Member of the Houſe of Commons, that a Sequeſtration, which in ſome Reſpects is in Nature of an Execution, ſhould be the firſt Proceſs againſt them; and therefore allowed, that in Caſe of an Anſwer which is reported inſufficient, the Plaintiff is to move again *de novo*, for a Sequeſtration *Niſi*.

It was moved for a Sequeſtration *Niſi*, for Want of an Anſwer, againſt a menial Servant of a Peer of the Realm, as the firſt Proceſs for Contempt, in the ſame Manner as in the Caſe of the Peer himſelf; and though the Motion was granted by the Maſter of the Rolls, yet the Regiſter refuſed to draw it up as thinking it againſt the Courſe of the Court; which being moved again before the Lord Chancellor, his Lordſhip, upon reading the Statute 12 & 13 *W.* 3. *c.* 13. likewiſe granted the Motion, it appearing to be both within the Meaning and Words of the Statute; and if it were not ſo, as it was plain no Attachment would lie againſt their Perſons, conſequently there would be no Remedy againſt them, and they would have a greater Privilege than their Lord, if the Proceſs againſt ſuch menial Servant were to be a *Subpœna*. § Will. Rep. 535. pl. 155.

§ It is ſaid a Member of Parliament may be ſued in *C.B.* by Bill. *Dawkins* v. *Burridge*, M. 13 Geo. Stra. 734. Ld. Raym. 1442. —By ſtat. 4 Geo. 3. c. 33. The Creditor of a Member, a Merchant, may on Affidavit ſue out a Writ, and ſerve him, and if he does not make Satisfaction in two Months, he ſhall be Bankrupt from the Time of Service.—Merchant committing Act of Bankruptcy, Creditors may ſue out Commiſſion, and Commiſſioners proceed, notwithſtanding Privilege.—But the Perſon ſhall not be arreſted or impriſoned, except for Caſes made Felony by the Bankrupt Acts.

---

* PROHIBITION.

*Page 240

AS all external Juriſdiction, whether Eccleſiaſtical or Civil, is derived from the Crown, and the Adminiſtration of Juſtice is committed to great Variety of Courts, hence it hath been the Care of the Crown, that theſe Courts keep within the Limits and Bounds of their ſeveral Juriſdictions preſcribed them by the Laws and Statutes of the Realm; and for this Purpoſe the Writ of Prohibition was (*a*) framed; which iſſues out of the Superior Courts of Common Law to reſtrain Inferior Courts, whether ſuch Courts be Temporal, Eccleſiaſtical, Maritime, Military, &*c.* upon a Suggeſtion that the Cognizance of the Matter belongs not to ſuch Courts; and in caſe they exceed their Juriſdiction, the Officer who executes the Sentence, and in ſome Caſes the Judges that give it, are in ſuch ſuperior Courts (*b*) puniſhable, ſometimes at the Suit of the King, ſometimes at the Suit of the Party, ſometimes at the Suit of both, according to the Nature of the Caſe. 2 Inſt. 601. F. N. B. 40. 12 Co. 6. And. 279. 2 Jon. 213. Skin. 628.

(*a*) And is of great Antiquity. 3 E. 1. An Attachment granted againſt the Biſhop and Official, for holding Plea after a Prohibition. 2 Rol. Abr. 280.

(*b*) Eccleſiaſtical Courts holding Plea by Fraud of Matters of which they had not Cognizance, were puniſhable in the Star-Chamber. Dav. 52.

The Reaſon of Prohibitions in general is, that they preſerve the Right of the King's Crown and Courts, and the Eaſe and Quiet of the Subject; that it is the Wiſdom and Policy of the Law, to ſuppoſe both beſt preſerved when every Thing runs in its right Channel, according to the original Juriſdiction of every Court; that by the ſame Reaſon that Show. Par. Ca. 63.

one

one Court might be allowed to incroach, another might; which could produce nothing but Confuſion and Diſorder in the Adminiſtration of Juſtice.

2 Inſt. 602. Rol. Rep. 252. 3 Bulſt. 120 Palm. 297.

So that Prohibitions do not import that the Eccleſiaſtical or other Inferior Temporal Courts are *alia* than the King's Courts, but ſignify that the Cauſe is drawn *ad aliud examen* than it ought to be; and therefore it is always ſaid in all Prohibitions (be the Court Eccleſiaſtical or Temporal to which it is awarded) that the Cauſe is drawn *ad aliud examen contra Coronam & Dignitatem Regiam.*

Under this Head we ſhall conſider:

(A) What Courts may grant a Prohibition. 241.
(B) Whether the granting a Prohibition be diſcretionary or ex debito juſtitiæ. 242.
(C) Who have a Right to ſuch Writ, and may demand it. 243.
(D) Who may join in ſuch Writ. 244.
(E) Of the Suggeſtion and Manner of obtaining a Prohibition. 244.
Page241 (F) When to be granted abſolutely, or hoc uſque only, and therein of directing the Party to declare on his Prohibition. 247.
(G) Whether more than one ſuch Writ is to be awarded. 248.
(H) At what Time to be granted; and therein in what Caſes it may be granted after Sentence. 249.
(I) To what Courts a Prohibition may be awarded; and therein, that the Superior Courts are to determine the Boundaries of all Inferior Juriſdictions. 250.
(K) Prohibitions to Inferior Temporal Courts in what Inſtances to be granted. 253.
(L) Prohibitions to the Spiritual Court in what Inſtances. 255.

And herein,

1. Where they meddle with a Matter purely Temporal. 255.
2. Where they determine on a Matter of Freehold. 256.
3. In what Caſes a Prohibition lies when they determine on Criminal Offences. 257.
4. Where the Eccleſiaſtical Courts determine on Acts of Parliament. 258.

5. In

5. In what Caſes they have a concurrent Juriſdiction, and may determine Incidents. 259.

(M) The Offence of paying Diſobedience to a Prohibition. 262.

(A) What Courts may grant a Prohibition.

THE Superior Courts of *Weſtminſter*, having a Superintendency over all Inferior Courts, may in all Caſes of Innovation, *&c.* award a Prohibition; in this the Power of the Court of *B. R.* has never been doubted, being the Superior Common Law Court in the Kingdom. F. N. B. 53. 4 Inſt. 71.

Alſo the Court of Chancery may award a Prohibition, which may iſſue (*a*) as well in Vacation as in Term-Time, but ſuch Writ is returnable into *B. R.* or *C. B.* Bro. *Prohibition*, pl. 6. 4 Inſt. 81. Will. Rep. 43.

(*a*) If one be ſued in an Inferior Court for a Matter out of the Juriſdiction, the Defendant may either have a Prohibition from one of the Common Law Courts of *Weſtminſter Hall*; or in regard this may happen in a Vacation, when only the Chancery is open, he may move that Court for a Prohibition; but then it muſt appear by Oath made, that the Fact did ariſe out of the Juriſdiction, and that the Defendant tendered a foreign Plea, which was refuſed; and if a Prohibition has been granted out of Chancery *improvide*, and without theſe Circumſtances attending it, the Court will grant a *Superſedeas* thereto. Will. Rep. 476. pl. 135.

As the Juriſdiction of the Court of *C. B.* is founded on Original Writs iſſuing out of Chancery, it hath been heretofore (*b*) doubted, whether this Court could without Writ or Plea depending award a Prohibition; but this Point has been (*c*) determined by the unanimous Senſe of all the Judges, *viz.* That this Court may upon a Suggeſtion grant Prohibitions, to keep as well Temporal as Eccleſiaſtical Courts * within their Bounds and Juriſdictions, and that without any original Writ or Plea depending; the Common Law being, in theſe Caſes, a Prohibition of itſelf, and ſtanding inſtead of an Original.

(*b*) Bro. *Prohibition*, pl. 6. Noy 153.

* Page 242

(*c*) 12 Co. 58, 108. Bro. *Conſultation*, pl. 3.

4 Inſt. 99. 2 Brownl. 17.——Prohibitions for incroaching Juriſdictions iſſue as well out of the *C. B.* as *B. R.* Vaugh. 157. *per* Vaugh. Ch. J.

Accordingly it hath been adjudged, that a Prohibition ought to be granted by the Court of *C. B.* to the Court of Delegates, for ſuing there to avoid an Inſtitution of a Clerk to a Church in *Lancaſhire*, after Induction made of him thereto, though the *Quare Impedit* for this Church could not be brought in *C. B.* but only in the County of *Lancaſter*; becauſe the Title of the Advowſon was not queſtioned by this Prohibition, but the Intruſion upon the Common Law, of which this Court has ſpecial Care. Moor 861. 2 Rol. Abr. 317. *Hutton's* Caſe. Hob. 15. S. C. and there ſaid by Hob. that the Party might likewiſe have a Prohibition out of the *Duchy* Court.

But as to the Courts of *B. R.* † and *C. B.* this Difference hath been made, that in the firſt of thoſe Courts a Prohibition may be awarded upon Noy 77. *Dixy* v. *Brown*. Palm. 422. Latch 114. S. C.

† Where a Prohibition is moved for, the Method is for the Party to file a Suggeſtion in Court, ſtating the Proceedings that have been had in the Court below, and then ſuggeſting the Reaſon why he prays the Prohibition; upon this the Court grants a Rule for the other Party to ſhew Cauſe why a Writ of Prohibition ſhould not iſſue; and if it appear to the Court that the Surmiſe is not true, or not clearly ſufficient to ground the Writ upon, they will deny it; otherwiſe they will make the Rule

upon a (*a*) bare Surmiſe, without any Suggeſtion on Record; and ſuch Writ is only in Nature of a Commiſſion prohibitory, which is (*b*) diſcontinued by the Demiſe of the King; but that as to a Prohibition iſſuing out of *C. B.* the Suggeſtion muſt be on Record, and therefore is conſidered as the Suit of the Party, and in which he may be nonſuited, and is not diſcontinued by the Demiſe of the King.

(*a*) That if it be inſiſted on, a Prohibition cannot be moved for till the Suggeſtion be entered on the Roll. Salk. 136. *per* Holt Ch. J. (*b*) But if an Attachment iſſues upon ſuch Prohibition, or the Party puts in Bail, then it becomes a private Suit, not diſcontinued by the Demiſe of the King; and after ſuch Proceeding the Party may be nonſuited, though not before. Palm. 423. Latch 114. *per Dodderidge* and *Jones*.

Palm. 525. Lane 39. Rol. Abr. 539.

If the King's Farmer, or a Copyholder of the King's Manor, be ſued in the Eccleſiaſtical Court for Tithes, upon a Suggeſtion in the Court of Exchequer that he preſcribes to pay a certain *Modus* in Lieu of Tithes, he ſhall have a Prohibition out of the ſaid Court, and ſuch *Modus* ſhall be tried there.

Sid. 92. but for this *vide* Cro. Car. 341.

The Grand Seſſions of *North Wales* may ſend a Prohibition and write to the Spiritual Courts there, as well as the Courts here may.

Jon. 330. Vaugh. 411.

(B) Whether the granting a Prohibition be diſcretionary, or ex debito juſtitiæ.

Hob. 67. in the Caſe of *Aſton Pariſh.* v. *Caſtle Birmidge Chapel.*

IT is laid down in *Hob.* that though a Surmiſe be a Matter of Fact, and triable by a Jury, yet it is in the Diſcretion of the Court to deny a Prohibition, when it appears to them that the Surmiſe is not true. *Vide* the Note *ſupra*.

Winch 78. it is ſaid to be a Matter diſcretionary.—But in Raym. 3, 4 Sid. 65. Prohibitions are ſaid by

This Authority has been often quoted in Queſtions of this Kind, and in ſome Caſes denied to be Law; but yet it ſeems the better Opinion, and to have been ſo holden by the greater Number of our Judges, that the awarding a Prohibition is a Matter diſcretionary, that is, that from the Circumſtances of the Caſe the Superior Courts are at Liberty to exerciſe a legal Diſcretion herein, but not an arbitrary one, in refuſing Prohibitions, where in ſuch like Caſes they have been

the Judges to be *ex debito juſtitiæ*, and not *de gratia*. In Raym. 92. *Hide* Ch. J. affirms, that a Prohibition is *ex gratia*, but *Keling* and *Twiſden* poſitively denied it.—Salk. 33. pl. 6. Comb. 148. they are held to be diſcretionary.—Ld. Raym. 220, 578. it is ſaid by *Holt* Ch. J. that *Hale* and *Windham* held Prohibitions to be diſcretionary in all Caſes.—And of this Opinion is *Holt*; and ſo in Ld. Raym. 586.

granted,

Rule abſolute for the Prohibition; and if the Matter be doubtful, they will order the Party to declare in Prohibition. Hob. 67. When the Court inclines to grant the Motion for a Prohibition, the Defendant has a Sort of Right to inſiſt that the Plaintiff ſhall declare; but where the Court inclines againſt the Motion, the Plaintiff has not any ſuch Right, for there might be Judgment by Default, and the Court be obliged to prohibit, againſt their own Opinion; and it is not any Injury to the Plaintiff, as he may apply to another Court. *Rex* v. *Epiſc. Ely.* M. 30 Geo. 2.——Where the Party is ordered to declare in Prohibition he ought not to take out the Writ, but ſerving the other Side with a Rule is ſufficient; and if in that Suit he obtain Judgment, the Judgment is *ſtet Prohibitio*, otherwiſe it is *quod eat conſultatio*: Therefore if the Party be excommunicated, the mandatory Part of the Writ, to abſoil the Party, is not to be obeyed till after Trial had. *The Dean* and *Biſhop of Wells.* M. 25 Geo. 2.——In Caſes of *Tithe*, and ſuch Sort of Matters, where many Things are in Controverſy, it is very frequent to order the Prohibition to ſtand as to Part, and a Conſultation to go as to other Part.——In Suits for *Tithes* a Prohibition ſhall not be granted until a Copy of the Libel be delivered to the Judges. 2 & 3 E. 6. c. 13. ſ. 14.

* granted, or where by the Laws and Statutes of the Realm they ought to be granted. * Page 243

It hath been determined in the Houſe of Lords, that no Writ of Error will lie upon the Refuſal of a Prohibition; but when a Conſultation is awarded, it is with an *Ideo conſideratum eſt*, and then a Writ of Error will lie. Ld. Raym. 545. in the Biſhop of St. *David's* Caſe.

If a Maſter of a Ship ſues in the Admiralty for his Wages, and a Prohibition is moved for, upon a Suggeſtion that the Contract was made on Land, and the Court is of Opinion that a Prohibition ought by Law to be granted; in this Caſe they will not compel the Party to find (*a*) ſpecial Bail to the Action in the Court above. Salk. 33. pl. 4. Carth. 518. Com. 74. Ld. Raym. 576. S. C. *Clay* v. *Snelgrave*.

(*a*) But *Holt* Ch. J. confeſſed that the Court had ſometimes interpoſed, and procured Bail to be given, but that was by Conſent. Ld. Raym. 578.

If there is Judgment againſt a Simoniſt, who by the Aſſent of Parties is to continue for a certain Time on the Benefice, and who at the Expiration of the Time refuſes to remove, but commits Waſte on the Houſe or Glebe, a Prohibition to ſtay his doing Waſte may be had by the Patron, Incumbent, or any other Perſon, becauſe that is the King's Writ; and any one may pray a Prohibition for the King, and it is grantable *ex debito juſtitiæ*, and not in the Diſcretion of the Court. ‡ Comp. Incumb. 43. Sid. 65.

‡ But *vide ante* page 242.

(C) Who have a Right to ſuch Writ, and may demand it.

THE King may ſue for a Prohibition, though the Plea in the Spiritual Court be between two common Perſons, becauſe the Suit is in Derogation of his Crown and Dignity. F. N. B. 40.

So if the Eccleſiaſtical Court will hold Plea of any Matter which belongs not to their Juriſdiction †, upon Information thereof to the King's Courts, either by the Plaintiff, Defendant, or by a mere Stranger, a Prohibition will iſſue. 2 Inſt. 607.

† A Prohibition *pro defectu juriſdictionis* is granted as well where the inferior Court has a Juriſdiction, but exceeds it, as where it has no Juriſdiction at all; for if the Judge of ſuch inferior Court do not act agreeable to the Power he has, it is the ſame as if he had no Juriſdiction; therefore though the Court will not intermeddle with the Determinations of Viſitors, but preſume they have done right, while they keep within their viſitatorial Power; yet if they exceed it, or do not act in a regular viſitatorial Manner, they will grant a Prohibition. *Dean* and *Biſhop of Glouceſter*. Tr. 24 Geo. 2.—*Note*, where there is not any *defectus juriſdictionis*, but only *triationis*, the Defendant muſt plead it below, and have his Plea diſallowed before he can be intitled to a Prohibition. *Smith* and *Bradley*. E. 24 Geo. 2.

As if a Man libels in the Spiritual Court for a Matter which does not appertain to that Court, but to the Common Law, as a Matter of Frank-tenement; yet he himſelf, againſt his own Suit, may pray a Prohibition, and ſhall have it. 2 Rol. Abr. 312. Leon. 130. Goulſ. 149. 12 Co. 56.

So where the Plaintiff in the Spiritual Court brought a Prohibition to ſtay his own Suit there, for that he ſuing for Tithes by virtue of a Leaſe made by the Vicar of *A.* for three Years, the Defendant claimed to be diſcharged of the Tithes by a former Leaſe and Compoſition by Deed; and in this Caſe it was held, that the Plaintiff himſelf may have a Prohibition Cro. Jac. 351. 2 Bulſt. 283. Lit. Rep. 20. *Wort* v. *Cliſton*.

hibition to ſtay the Suit; for the Eccleſiaſtical Judges are not to meddle with the Trial of Leaſes or real Contracts, though they have Juriſdiction of the original Cauſe (*viz.* the Tithes); for the Leaſe is in the Reality, and is not merely accidental; and it makes no Difference, that the Plaintiff bring this Prohibition to ſtay his own Suit; for if the Temporal Court has Knowledge by any Means, that the Spiritual Court meddles with Temporal Trials, a Prohibition ought to be awarded.

2 Rol. Abr. 312. *Robert's* Caſe. (*b*) Cro. Eliz. 251. Keilw. 110.

If a Vicar ſues a Pariſhioner for Tithes in the Spiritual Court, and the Parſon appropriate appears there (*b*) *pro intereſſe ſuo*, and prays a Prohibition, it ſhall be granted.

*Page 244 Moor 915. Cro. Eliz. 55.

* If Leſſee for Years is ſued in the Spiritual Court for Tithes, he in Reverſion may have a Prohibition.

March 22, 45.—A Prohibition *quia timet* does not lie. Allen 56.

But no Man is intitled to a Prohibition unleſs he is in Danger of being injured by ſome Suit actually depending; and therefore upon a Petition to the Archbiſhop, or other Eccleſiaſtical Judge, no Prohibition lies.

(D) Who may join in ſuch Writ.

Noy 131. Leon. 286. Cro. Car. 129.

IF ſeveral Libels are exhibited againſt *A.* and *B.* in a Matter in which the Court hath not Conuſance, *A.* and *B.* cannot join in a Prohibition; ſo if the Griefs be ſeveral, as ſome Books ſay.

Yelv. 128-9. *Burgeſs* and *Dixon* v. *Aſhton*. Owen 13. *Bartue's* Caſe, L. P. adjudged.

But where the Vicar of *A.* libelled ſeveral Perſons ſeverally for Tithes, who joined in a Prohibition, ſuggeſting a *Modus*; and though the Court held in this Caſe, that the Prohibition was not regularly brought, being in all their Names, when there were ſeveral Libels; yet inaſmuch as this was on a Cuſtom, and Matter triable at Common Law, in which the Eccleſiaſtical Court was properly prohibited, though not in exact Form, they refuſed to award a Conſultation, but directed that the Parties ſhould put in ſeveral Declarations, as if there had been ſeveral Prohibitions.

Ld. Raym. 127. *per Treby* Ch. J. & *vide* for this Vent. 266. Raym. 425. Comb. 448.

So if *A.* libels againſt *B.* and *C.* for Defamation, and they ſue a Prohibition, they ſhall join in Attachment upon it; and it is no Objection to ſay, that the Defamation was ſeveral.

Owen 13. *per Cur.*

Where two or more are allowed to join in a Prohibition, and one of them dies, the Writ ſhall not abate; becauſe nothing is by them to be recovered, but they are only to be diſcharged.

(E) Of the Suggeſtion and Manner of obtaining a Prohibition.‡

‡ *Vide ante* 242. n.

2 Salk. 549. pl. 8. *per Holt* Ch. J.

WHERE the Matter ſuggeſted for a Prohibition appears upon the Face of the Libel, an Affidavit is never inſiſted upon; but if it does not appear upon the Face of the Libel, or if a Prohibition is moved

moved for, for more than appears upon the Face of the Libel, to be out of their Juriſdiction, there ought to be an Affidavit of the Truth of the Suggeſtion. Will. Rep. 65, 477. S.P. cited.

The Suggeſtion in the Temporal Courts may be traverſed. 2 Inſt. 611. 2 Co. 44.

Moor 525.———Prohibition not to be granted upon Proceſs before Libel or Appearance. Salk. 35. pl. 8.———Where it is in Nature of a *Superſedeas*. Lev. 253.———That a Perſon may alter his Suggeſtion. Show. 179.—Where a Variance between the Libel and Suggeſtion is not material. Yelv. 79.

On Rule to ſhew Cauſe why a Prohibition ſhould not be granted to ſtay a Suit againſt the Plaintiff in the Court of the Archdeacon of *Litchfield*, for not going to his Pariſh-Church, nor any other Church, on *Sundays* or Holidays, nor receiving the Sacrament thrice a Year, * upon Suggeſtion of the Statute *Eliz.* and Toleration Act, and then qualifying himſelf within the Act, and alledging that he pleaded it below, and they refuſed to receive his Plea; Cauſe was ſhewn, that this Fact was falſe, and that the Plaintiff was not a Diſſenter, nor had qualified himſelf *ut ſupra*, and therefore hoped the Court would not ſuffer the Rule to ſtand unleſs there was an Affidavit of the Fact; for by that Means any Perſon might come and ſuggeſt a falſe Fact, and ouſt the Spiritual Court of their Juriſdiction; which the Court admitted; and therefore for want of ſuch Affidavit the Rule was diſcharged. 2 Ld. Raym. 1211. *Burdett* v. *Newell*. *Page 245

If a Plea to an inferior Juriſdiction be properly tendered, which they refuſe, though this be a good Cauſe for Prohibition, yet an Affidavit muſt be made of the Refuſal. Skin. 20. pl. 20. Hard. 406. 3 Keb. 217.

A Motion was made for a Prohibition to the Eccleſiaſtical Court of *London*, for calling a Woman *Whore*, upon a Suggeſtion that the Words were actionable there by Cuſtom of the Place; but the Court would not grant a Prohibition without Oath made, that if any ſuch Words were ſpoken, it was in *London*, and not elſewhere. 4 Mod. 367.

On a Libel for calling the Plaintiff *Old Thief and Old Whore*; the Defendant ſuggeſted for a Prohibition, that if any ſuch Words were ſpoken, they were ſpoken at the ſame Time; but this Suggeſtion was held ill, becauſe the Words ought to have been fully confeſſed. Vent. 10. *Day* v. *Pitts*.

By 2 & 3 *Ed.* 6. *chap.* 13. it is enacted, "That if any Party at any "Time hereafter, for any Matter or Cauſe before (*a*) rehearſed, limited, "or appointed by this Act, to be ſued or determined in the King's Ec- "cleſiaſtical Court, or before the Eccleſiaſtical Judge, do ſue for any "Prohibition to any of the King's Courts where Prohibitions before this "Time have been uſed to be granted, that then in every ſuch Caſe the "ſame Party, before any Prohibition ſhall be granted to him or them, "ſhall bring and deliver to the Hands of ſome of the Juſtices or "Judges of the ſame Court, where ſuch Party demanded Prohibition, "the very true Copy of the Libel depending in the Eccleſiaſtical "Court concerning the Matter where the Party demandeth Prohibi- "tion, ſubſcribed or marked with the Hand of the ſame Party, and "under the Copy of the ſaid Libel ſhall be written the Suggeſtion, "wherefore the Party ſo demandeth the ſaid Prohibition; and in caſe "the ſaid Suggeſtion, by two honeſt and ſufficient Witneſſes at the "leaſt, be not proved true in the Court where the ſaid Prohibition "ſhall be granted and awarded, that then the Party, that is letted or "hindered of his or their Suit in the Eccleſiaſtical Court by ſuch Pro- "hibition, ſhall, upon his or their Requeſt and Suit without Delay, "have a Conſultation granted in the ſame Cauſe in the Court where the "ſaid Prohibition was granted, and ſhall recover double Coſts and Da- "mages againſt the Party that ſo purſued the ſaid Prohibition; the "ſaid

(*a*) Rehearſed in the Statutes 27 H. 8. c. 20. and 32 H. 8. c. 7. to which this Act refers.

" ſaid Coſts and Damages to be aſſigned or aſſeſſed by the Court where " the ſaid Conſultation ſhall be ſo granted; for which Coſts and Da- " mages the Party to whom they ſhall be awarded may have an Action " of Debt by Bill, Plaint or Information, in any of the King's Courts of " Record."

In the Conſtruction of the above-mentioned Statute the following Opinions have been holden.

2 Inſt. 662. Comp. Incumb. 600. Dyer 170. b. That this Statute referring to the Statutes 27 *H.* 8. *c.* 20. and 32 *H.* 8. *c.* 7. which extend to Tithes and Offerings generally, all ſuch Tithes and Church-Duties as are mentioned in thoſe Statutes, are as much within this Act as if particularly enumerated.

Yelv. 102. 2 Ld. Raym. 1172. And therefore it extends to Prohibitions to Suits for ſmall Tithes as well as great.

*Page 246 Noy 148. Yelv. 104. L. P. * So it hath been adjudged, that the Suggeſtion of a *Modus decimandi* ought to be proved within ſix Months, being within the Act.

Rol. Rep. 55. *Reynolds* v. *Hay.* So where one that was ſued for Tithe of Hay in the Spiritual Court, ſuggeſted for a Prohibition, that he was to pay ſo much upon an Arbitrament; and it was held, that this Suggeſtion ought to be proved, as well as one made of a *Modus decimandi*: So on a Suggeſtion upon the Statute 31 *H.* 8. *cap.* 13. that Lands are Tithe-free, becauſe the Clauſe requiring the Proof of a Suggeſtion is general, and not limited to Real Compoſition.

Jon. 231. *Strande* v. *Hoſkins.* Cro. Car. 208. So upon a Suggeſtion, that the Suit in the Spiritual Court was for Tithes of Heath and Barren Ground improved within ſeven Years after the Improvement, contrary to the Statute; in this Caſe Proof of the Suggeſtion within ſix Months was held neceſſary.

Comb. 147. But it hath been held, that there needs no Proof of the Suggeſtion where the Suit is for Tithes contrary to common Right, or where the (*a*) Contract of the Party is ſuggeſted.

(*a*) For this *vide* Yelv. 104, 119.

2 Leon. 29. Brown. and Goulſ. 99. Hetl. 145. Rol. Rep. 15. 2 Keb. 134. Lit. Rep. 297.

Cro. Eliz. 736. Moor 911. It hath been held, that the Suggeſtion need not be proved (*b*) ſtrictly, nor with preciſe Certainty as to all its Circumſtances; but that if it be proved in Subſtance, or in ſuch a Manner as to (*c*) ſhew that the Eccleſiaſtical Court has not Juriſdiction, it is ſufficient.

(*b*) That Proof by Hearſay is ſufficient. Palm. 377.—Or that it is ſo by common Fame. Noy 28. (*c*) As where a *Modus* was alledged to be, that one ſhould pay 20*s.* in Satisfaction of Tithes, and the Proof was, that he ſhould pay 40*s.* this was held ſufficient Proof; becauſe thereby the Court above had ſufficient Juriſdiction. Hetl. 100. So where the Suggeſtion was to pay 2*s.* 6*d.* for Tithes, and the Witneſſes proved the *Modus* to be to pay 3*s.* this was held good by two Judges againſt one; becauſe it ouſted the Eccleſiaſtical Court of Juriſdiction. Noy 44. Hetl. 110. & *vide* Yelv. 55. 2 Keb. 57, 407.———So if one ſurmiſe that the Inhabitants of *B.* (of which he himſelf is one) have paid a *Modus*, and the Proof be that he himſelf had paid it, this is ſufficient; becauſe it ouſts the Eccleſiaſtical Court of its Juriſdiction. Noy 28.

2 Bulſt. 154. The Suggeſtion muſt be proved by honeſt and ſufficient Witneſs, which is required by the expreſs Words of the Statute; and therefore the Teſtimony of one attainted of Felony, excommunicated or convicted of Recuſancy, is, as in other Caſes, to be rejected.

M. 27 Car. 2. in *C. B.* *Sharp* v. *Hobart.* But it hath been held, that Perſons, ſuch as Pariſhioners of the Pariſh, &c. who may not be ſufficient and able Witneſſes at a Trial at Law, may notwithſtanding be ſufficient Witneſſes to prove the Suggeſtion; the chief Intent of the Statute being to prevent frivolous and vexatious Suggeſtions; alſo it hath been held, that after the Admitting and Record-

ing

ing the Proof of the Suggeſtion, nothing is to be objected againſt the Perſons of the Witneſſes or their Evidence.

If a Suggeſtion conſiſts of two Parts, it is ſaid to be ſufficient to produce one Witneſs to the one, and another to another. Vent. 107.

It hath been held, that the Six Months for Proof of the Surmiſe ſhall be accounted according to the Kalendar; for that this being a Computation which concerns the Church, it is but reaſonable that it ſhould be done according to the Computation uſed in the Eccleſiaſtical Law. Hob. 179. Lit. Rep. 19. 2 Mod. 58.

It is ſaid in *(a) Moor*, that the Time of Six Months given by the Statute to prove the Suggeſtion, ought to be intended ſix Months in Term-time, and that the Vacation ſhould be no Part of the Time; but this hath been ſince *(b)* adjudged otherwiſe, and that the Time ſhall commence from the *Teſte* of the Writ of Prohibition, and not from the Time of the Rule made for awarding it. (a) Moor 573. (b) Noy 30. 2 Ld. Raym. 1172. 2 Salk. 554. pl. 20, 656. pl. 2.

If the (c) Surmiſe be proved before one of the Judges within the ſix Months, although it be not recorded till after the ſix Months by the Court, it is well enough. Noy 30. (c) That it muſt be entered in the Office. 2 Show. 308. pl. 316.

* It hath been held, that Proof which is not ſufficient may be ſupplied by better Proof within the ſix Months, but not after. *Page 247 Lit. Rep. 155. Bendl. 143.

The Party on Failure of Proof of the Suggeſtion, ſhall not only have double Coſts and Damages, but alſo his (*d*) Coſts and Damages in the Action he brings for the Recovery of them. (d) *Vide* ſtat. 8 & 9 W. 3. c. 11.

But if the Prohibition be grounded partly on a *Modus*, which needs Proof, and partly on the Contract of the Parties, which needs no Proof, there ought not to be double Coſts; for the mixing the Contract with the Manner of tithing privileges the Whole. Brownl. Goulſ. 99. Yelv. 119.

So where for a Variance between the Libel and Suggeſtion, a Conſultation was awarded, and double Coſts adjudged to the Defendant; and this was held to be Error by the very Letter of the Statute, which gives double Coſts *(e)* only for want of proving the Suggeſtion, and for no other Cauſe. Yelv. 79, 80. (e) Carth. 463.

So where a Prohibition was obtained upon a Suggeſtion which was not proved within the ſix Months, in which the Defendant took Iſſue with the Plaintiff, which was found for the Plaintiff; and in this Caſe it was reſolved, that the Defendant ſhould not have double Coſts for want of the Suggeſtion's being proved; for the Statute is, that he ſhall have a Conſultation and double Coſts; but in this Caſe he could not have a Conſultation, the Matter and Iſſue being found againſt him; but ought to have prayed a Conſultation upon the Suggeſtion's not being proved, and then ſhould have had his double Coſts, Latch 140. *Watkinſon* v. Sir *G. Pacey*.

The Surmiſe or Suggeſtion may be brought in by Attorney, and need not be in proper Perſon. Leon. 286.

A Prohibition is not to be granted the laſt Day of Term, but on Motion a Rule may be obtained to ſtay Proceedings till the enſuing Term. Latch 7. 2 Rol. Rep. 456.

(F) When to be granted absolutely, or hoc usque only; and therein of directing the Party to declare on his Prohibition.

6 Mod. 308. PRohibitions are granted either absolutely, or *hoc usque* only till such an Act be done; the first of these is peremptory, and ties up the Inferior Jurisdiction till a Consultation be awarded; the second is *ipso facto* discharged upon complying with the Act, and that without any Writ of Consultation.

Vent. 252. 2 Salk. 553. pl. 19. When a Prohibition's moved for, because a Copy of the Libel is denied to be delivered, the Court requires that Oath should be made of the Denial, and the Prohibition is only *quousque* the Copy is delivered.

6 Mod. 308. A Prohibition *quousque* they give Copy of the Libel, if it be granted before any Libel exhibited, does not bind them from exhibiting any Libel, and after they shall not proceed till they give a Copy of it.

Ld. Raym. 442. (a) 2 H. 5. c. 3. A Prohibition was denied to be granted to the Admiralty Court, upon a Suggestion that they refused to give the Party sued there a Copy of the Libel, because the (a) Statute extends only to the Ecclesiastical Courts.

2 Ld. Raym. 991. *per Holt* Ch. J. and so ruled by him in a like Case. It was formerly held by all the Judges of *England*, that when there was a Proceeding *ex officio* in the Ecclesiastical Court, they were not bound to give the Party a Copy of the Articles; but the Law is otherwise; for in such Cases, if they refuse to give a Copy of the Articles, a Prohibition shall go *quousque* they deliver it.

*Page 248 (b) Cro. Eliz. 16, 94. 5 Mod. 247. Ld. Raym. 86, 236. Comyns 3. pl. 3. Comb. 376. * On (b) Motions for Prohibitions it is frequent in doubtful Cases to grant them *nisi*, or that the adverse Party should shew Cause why they should not be granted; also in (c) nice and difficult Cases it is usual to direct the Plaintiff to (d) declare on his Prohibition, and so proceed to (e) Issue, that the Merits of the Cause may be brought before the Court with the greater Exactness, and they thereby be the better enabled to judge of the Reasonableness of granting or refusing them. §

Will. Rep. 7. pl. 2. (c) Cro. Eliz. 736. 4. Mod. 151-2. Lev. 125. Raym. 88. (d) Stile's Pract. Reg. 43. F. N. B. 44. (e) If the Jury, upon an Issue joined in a Prohibition *de Modo decimandi*, find a different *Modus*, yet the Defendant shall not have a Consultation; for it appears that he ought not to sue for Tithes *in Specie*, there being a *Modus* found. Vent. 32.

§ *Vide ante* 242. n.

Leon. 181. The Court is not obliged to give Direction for such Declaration, but are absolute Judges of the Sufficiency or Insufficiency of the Suggestion.

7. Mod. 113, 114. Leon. 128. If the Declaration varies from the Suggestion, this is naught, and a Consultation will be awarded. †

for the Surmise is as the Writ.

† Where an Issue is joined on a Declaration in Prohibition, if the Jury find a Verdict for the Plaintiff, yet they shall give no more than 1*s*. Damages; for it is in Nature of an Issue to inform the Conscience of the Court; but after he has had Judgment, *quod fiet prohibitio*, he may bring his Action upon the Case, and recover the Damages he has sustained. *Carter* and *Leeds*, M. 2. Geo. 2.—— Costs in Prohibition shall be taxed from the Suggestion, so as to take in the Costs of the Motion. The stat. 8 & 9 W. 3. c. 11. extends only to Cases after Plea pleaded, or Demurrer joined; but if there be Judgment by Default, and the Plaintiff have Damages on a Writ of Enquiry for the Contempt in proceeding after the Prohibition delivered, which is confessed by the Default, he will be intitled to Costs at the Common Law. However, as this Part of the Declaration is no more than Form, Costs re allowed only from the Time of the Rule for a Prohibition. *Wills* and *Turner*, Hil. 2 Geo. 1. *C. B.* Sir *E. Bettison* v. Dr. *Hinchman*, M. 7 Geo. 1. *C. B.*

(G) Whe-

(G) Whether more than one such Writ is to be awarded.

BY the 50 *E.* 3. *cap.* 4. it is enacted, "That where a Conſultation is "once duly granted upon a Prohibition made to the Judge of (*a*) "Holy Church, that the (*b*) ſame Judge may proceed in the Cauſe by "virtue of the ſame Conſultation, notwithſtanding any (*c*) other Pro- "hibition (*d*) thereupon to be delivered; provided always, that the "Matter in the Libel of the ſaid Cauſe be not inlarged or otherwiſe (*e*) "changed."

(*a*) Intended Spiritual Judge, and therefore this Statute extends not to the Court of Admiralty. 2 Brownl. 35. (*b*) Eccleſiaſtical Judge in general, or Perſon competent, and not the ſame individual Perſon. Poph. 159. Palm. 418. Latch 6, 75. (*c*) But if the firſt Prohibition was unduly obtained, as on Proceedings by *Engliſh* Bill in Chancery, &c. a ſecond Prohibition may be awarded notwithſtanding this Statute. Cro. Eliz. 736. (*d*) Whether proceeding out of the ſame Court or another, if for the ſame Cauſe. Cro. Eliz. 277. (*e*) 2 Rol. Rep. 207.

This Statute hath been conſtrued to extend to thoſe Caſes where a Con- ſultation hath been lawfully granted; that is, upon the Right and Merits of the Thing in Queſtion, and not to ſuch Caſes where for Defect of Form, Miſpriſion of a Clerk, Miſpleading an Act of Parliament, &c. Conſultations have been awarded. 2 Brownl. 26, 247. Leon. 130. 3 Bulſt. 182. Moor 917.

So if a Conſultation be awarded for Default of Proof of the Suggeſtion purſuant to the Statute 2 & 3 *E.* 6. *c.* 13. the Plaintiff is not precluded, but may bring (*f*) another Prohibition; for this Statute goes to the Sug- geſtion made upon the (*g*) ſame Libel, and to a Conſultation duly granted, and not to the Caſe of not having Witneſſes ready to prove the Suggeſtion thro' Negligence. Jones 231. Moor 908. Yelv. 102. Cro. Car. 208. 2 Keb. 719. (*f*) But muſt pay double Coſts.

Carth. 463. (*g*) It is ſaid by Juſtice *Holloway*, that after a Conſultation awarded for not proving his Suggeſtion, &c. the Party ſhall be for ever barred from having another Prohibition on the ſame Libel. Comb. 63.——[*Sed. qu.*]

A Motion was made for a Prohibition to a Suit for Tithe-Lamb, upon Suggeſtion of a *Modus* to pay 2*d.* a Lamb for Lambs falling in the Plaintiff's Farm in the Pariſh. It was objected, that a Prohibition was granted before to ſtop this Suit, upon a Suggeſtion, which was tried and found for the Plaintiff, and a Conſultation granted. But it was anſwered, that that Suggeſtion was for every Lamb which fell in * the Pariſh, whereas this only is for Lambs falling in a particular Farm, and ſo not within this Statute; but the Court inclined againſt the Prohi- bition, thinking it within the Statute. 2 Vent. 47. *Page 249

If upon the Trial of a Suggeſtion the Plaintiff be nonſuit, no new Pro- hibition ſhall be granted, although the Nonſuit was occaſioned for want of ſome of the Plaintiff's Witneſſes, who were to prove the Truth of the Suggeſtion, and who were neceſſarily obliged to be abſent. Keb. 286.

If the Eccleſiaſtical Court refuſe to grant a Copy of the Libel, for which a Prohibition is granted, and thereupon they grant the Copy, and afterwards proceed in the Cauſe, the Matter not being within their Juriſ- diction, another Prohibition lies. Moor 917.

If the Defendant in a Prohibition die, his Executors may proceed in the Eccleſiaſtical Court, and the Judges of the Court, out of which the Prohibition was granted, will alſo in ſuch Caſe make a Rule to the Spi- ritual Court to proceed; but the Plaintiff may, if he pleaſe, have a new Prohibition againſt the Executors. Lit. Rep. 155.

(G) At

(H) At what Time to be granted; and herein in what Cases it may be granted after Sentence.

2 Inſt. 602. 2 Rol. Abr. 318, 319. Noy 137. Sid. 65. Cro. Eliz. 571. Moor 462, 907.

IT is clearly agreed, that in all Caſes where it appears upon the Face of the Libel, that the Admiralty, Spiritual Court, &c. have not a Juriſdiction, a Prohibition may be awarded, and is grantable as well after as before Sentence; for the King's Superior Courts have a Superintendency over all Inferior Juriſdictions, and are to take Care that they keep within their due Bounds.

Skin. 299. pl. 2. Carth. 463. March 153. 2 Rol. Rep. 24. Comb. 356.

Vide the Authorities *ſupra*. and Cro. Car. 97. 2 Show. 145. pl. 153, 155. pl. 141. Vent. 61.

But where the Court has a (*a*) natural Juriſdiction of the Thing, but is reſtrained by ſome Statute; as by 23 *H.* 8. *c.* 9. for not citing out of the Dioceſe, there the Party muſt come before Sentence; for after pleading and admitting the Juriſdiction of the Court below, it would be hard and inconvenient to grant a Prohibition.

6 Mod. 252. 7 Mod. 137. Godb. 163, 243. 5 Mod. 341. Hetl. 19. 12 Co. 76.—(*a*) 2 Salk. 543. pl. 1. Ld. Raym. 27. Salk. 30. Like Point; becauſe the Cauſe belongs to the Spiritual Court, and though not to that Spiritual Court, yet it belongs to ſome other, and not to the King's Temporal Courts; *& vide* Carth. 33, 34. where it appeared on the Face of the Libel, that the Party was cited out of his proper Dioceſe.——Cro. Jac. 429. Cro. Car. 97. Comb. 448. where the Party obtained a Prohibition before Sentence, but did not ſerve it till two Terms after, which was after Sentence definitive, and it was held to be too late.

2 Ld. Raym. 835. *Dike v. Brown.*

Upon a Motion for a Prohibition the Caſe was, The Defendant libelled in the Spiritual Court for Tithes of Faggots made of Loppings of Trees; and the Suggeſtion for a Prohibition was, that theſe Loppings were cut from the Stumps of Timber-Trees above the Growth of twenty Years; and it was alledged, that Sentence was given in the Spiritual Court, and therefore the Plaintiff comes here too late to have a Prohibition: But *per Holt* Ch. J. the Sentence will not hinder the having a Prohibition in any Caſe, but in Caſe of Prohibitions grounded upon 23 *H.* 8. *c.* 9. for not citing out of the Dioceſe; but becauſe the Plaintiff had not pleaded this Matter in the Spiritual Court, they denied the Prohibition, becauſe the Spiritual *Page 250 Court has a general * Juriſdiction of Tithes; and if any ſpecial Matter deprives them of their Juriſdiction, it muſt be pleaded there; and if it had been pleaded there, and Iſſue joined upon it, and upon the Trial it had been found not to be *Silva Cædua*, it had been well; but if they had refuſed to admit the Plea, a Prohibition ſhould have been granted.

(I) To

(I) To what Courts a Prohibition may be awarded: And herein, that the Superior Courts are to determine the Boundaries of all Inferior Jurisdictions.

THE King's Superior Courts of *Westminster* have a Superintendency over all Inferior Courts of what Nature soever, and are by Law intrusted with the Exposition of such Laws and Acts of Parliament as prescribe the Extent and Boundaries of their Jurisdiction; so that if such Courts assume a greater or other Power than is allowed them by Law, or if they refuse to allow of Acts of Parliament, or expound them otherwise than according to the true and proper Exposition of them, the Superior Courts (*a*) will prohibit and controul them.

F. N. B. 43, 45. 4 Inst. 231, 249. 3 Bulst. 120. 2 Rol. Abr. 317-8.

(*a*) The Honour of *B. R.* to keep Inferior Courts in Order. 2 Rol. Rep. 471.

Hence Prohibitions are grantable to almost all Sorts of Courts which differ from the Common Law in their Proceedings, to the Courts (*b*) Christian, to the Admiralty, nay to the (*c*) Delegates, and even to the Steward and Marshal, upon the Statute of *Articuli super Chartas.*

Show. P. C. 63.

(*b*) That the Spiritual Jurisdiction exercised within this Realm is derived from the King. Dav. 97. (*c*) Where they exceed their Authority, or proceed in Matters not properly within their Cognizance, may be prohibited. Moor 460, 463. Latch 85, 86.

A Prohibition lies to the Convocation *Si concilium teneant de aliquibus quæ ad Coronam Reges pertinent, vel quæ personam Regis, vel Statum suum vel Statum Concilii sui contingunt.*

4 Inst. 322. —Lay to the High Commission Court. 4 Inst. 333. Lit. Rep. 152, 189, 274.

Prohibitions have been granted to the Marches of *Wales*, of which there are many Instances;

4 Inst. 243. 2 Rol. Abr. 317.

Rol. Rep. 309, 311. Winch 78, 103. Raym. 191. Vent. 300. Jon. 248.

As where a Bill of Foreclosure was brought against one in the Grand Sessions for the County of *Montgomery*, upon a Mortgage of Lands that lay there, but the Party himself was not an Inhabitant; and it was held in this Case, that a Prohibition ought to go; for that the Party living out of the Jurisdiction could not be served with Process, and consequently could not be guilty of a Contempt, on which a Sequestration on his Lands could be grounded.

2 Ld. Raym. 1408. *Vaughan* v. *Evans.*

So Prohibitions have been granted to the County Palatine of *Chester* in many Instances where they have exceeded their Jurisdiction.

Hutt. 59. 2 Rol. Abr. 318.

Stile 285. 3 Bulst. 116. Hob. 15. Rol. Rep. 246, 331. Sid. 180.

*So Prohibitions have been granted to the Duchy Court of *Lancaster*, (*d*) for holding Plea of Land, not Parcel of the Duchy, (*e*) for determining on the Validity of Letters Patent granted of a Manor.

*Page 251

(*d*) 2 Rol. Abr. 317-8. Hob. 77.

(*e*) 3 Bulst. 119. Rol. Rep. 252. Skin. 43. pl. 14.

2 Salk. 550. pl. 11. So where a Suit was commenced in the Duchy Chancery Court, to diſcover Matters whereby the Defendant there would forfeit his Freehold; and a Prohibition was granted.

Comb. 261. A Prohibition was moved for to the Chancery Court of the Cinque Ports, in which a Bill was filed, ſetting forth a Cuſtom, that every Ship that uſed the Pier of *Ramſgate* ſhould pay 4*d.* for all their Gettings in the Year, for the Maintenance of the Pier, and for a Diſcovery of the Defendant's Gettings; and ſuch Prohibition was held to lie, as to the Cuſtom, which is only triable by Law; but the Court held, that ſuch Bill might be proper as to the Diſcovery.

Vent. 212. *Mekins* v. *Minſhaw.* A Prohibition was prayed to the Court of the Chamberlain of *Cheſter*, where an *Engliſh* Bill was preferred, ſetting forth, that *J. S.* being indebted to the Plaintiff, the Defendant upon good Conſideration promiſed, that if *J. S.* did not pay it, he would, and that he wanted ſuch preciſe Proof as the Law required, and ſo prayed to be relieved by the Equity of the Court; the Defendant confeſſed the Promiſe in his Anſwer, and ſaid that he had paid the Money; and a Prohibition was granted; for the Plaintiff had now obtained the End of his Suit, and might have Remedy at Law upon the Evidence of the Defendant's Anſwer.

2 Salk. 555. 5 Mod. 272, 278. S. C. *Bredon* v. *Gill.* Ld. Raym. 219. Comb. 474. The Plaintiff in Prohibition ſuggeſts, that by the Laws of *England*, when Iſſue is joined between the Parties, that it ought to be tried by the Evidence *viva voce*, and not by Notes or Minutes of their Teſtimony: That an Information was exhibited againſt him before the Commiſſioners of Exciſe, purſuant to 12 *Car.* 2. *cap.* 23. & 15 *Car.* 2. *cap.* 11. ſetting forth, that he was a common Brewer, and did keep a common Store-houſe without acquainting the ſaid Commiſſioners therewith; that he was found guilty; and that he appealed from their Sentence to the Commiſſioners of Appeals, before whom the Informer did produce as Evidence the Minutes taken before the Commiſſioners of Exciſe, and that the Witneſſes who gave Evidence there were ſtill alive; which Minutes were allowed as Evidence by the Commiſſioners of Appeals, &c. and after great Conſideration a Prohibition was granted *quoad* the Admitting this Evidence.

Vide Show. 396. If the Commiſſioners for determining Policies of Inſurance graſp at more Power, or proceed otherwiſe than as they are enabled by the Acts of Parliament which create their Juriſdiction, they will be prohibited by the King's Superior Courts.

Lit. Rep. 10. A Prohibition lies to the Vice-Chancellor's Court in *Oxford* and *Cambridge*, where they exceed their Juriſdiction.

M. 26 Car 2. in *B. R. Richardſon's* Caſe. On a Motion for a Prohibition to the Court of the Vice-Chancellor of *Cambridge*, it was ſuggeſted, that one *Richardſon* had a Libel preferred there againſt him, becauſe he had preferred an Information in this Court againſt divers Perſons for a Riot committed within the Juriſdiction of their Court, and the Libel was read in this Court; and upon that the Court declared, that their Juriſdiction was concurrent, but not exempt from this Court, and that they ought to plead their Privilege here, if they had any ſuch Privilege, but they ought not to proceed againſt the Informer as a Criminal; and ſo the Court granted a Prohibition, *niſi*, upon the Motion of Serjeant *Scroggs*.

Lit. Rep. 163. If Juſtices of Peace take upon them more Juriſdiction than they are allowed by Law, as where they determined on the Statutes of Uſury, a Prohibition lies.

*Page 252 4 Inſt. 229. Cro. Car. 333. * So a Prohibition lies to the Court of *Stannaries*, which is confined to Tin Matters only, and where the Parties who ſue, or one of them, is a Tinner, if they exceed their Juriſdiction.

A Pro-

A Prohibition was granted to the Council of *York*, for holding Pleas in Replevin and Avowries; the Court being clear of Opinion that these are Matters determinable at Common Law. Bulſt. 110.

So a Prohibition hath been granted to the Court of Requeſts, for injoining a Creditor to give Time to his Debtor to pay his Debt, upon Security given. Bulſ. 20.

It hath been reſolved, that a Prohibition lies to the Court of the Earl Marſhal, for proceeding againſt a Perſon for painting Arms and marſhalling Funerals. Show. P. C. 58. in the Caſe of Dr. *Oldis* and *Donmille*, where there is good Learning on this Subject. 4 Mod. 128. S. C.

So a Prohibition was held to lie to the Court of Honour, to prohibit a Suit there for theſe Words, *you a Knight, you are a pitiful Fellow*; and in this Caſe *Holt* Ch. J. at firſt doubted whether there was, or could be any ſuch Court; but ſaid a Prohibition would lie to a pretended Court. 2 Salk. 553. pl. 18. 7 Mod. 125. *Chambers* v. Sir *John Jennings*.

It is ſaid by my Lord *Coke* in 3 *Bulſt.* that the Court of King's Bench may prohibit (*a*) any Court in *Weſtminſter-Hall*, if they exceed their Juriſdiction; but this Notion of Lord *Coke*, and of which he was very fond, eſpecially as to Proceedings in Courts of Equity, hath been ſo ſhaken and contradicted of late Years, that his Authority herein ſeems to be but of very little Weight; but for this we muſt refer to Title *Courts and their Juriſdiction*. 3 Bulſt. 120. (*a*) If the Judges of *C. B.* hold Plea of an Appeal, a Prohibition is to be granted by *B. R.* of Privilege.

3 Bulſt. 120.———So if the Court of Exchequer hold Common Pleas without a Writ of Privilege. 3 Bulſt. 220. *& vide* 2 Salk. 550. pl. 12.——So an *Engliſh* Court, or Court of Equity, holding Plea of a Thing whereof Judgment was given at Common Law, hath been prohibited. Moor 836. Cro. Jac. 335.—But for this *vide Juriſdiction of the Court of Chancery*, and Ld. Raym. 531.

The Superior Courts of *Weſtminſter* not only grant Prohibitions where Inferior Courts aſſume a Juriſdiction, which properly belongs to ſuch Superior Courts, but alſo in Caſes where one Inferior Court incroaches upon another, and that even in Matters in which ſuch Superior Courts have not a Juriſdiction. Lit. Rep 42. 2 Rol. Rep. 471.

As if the Eccleſiaſtical Court grant the Probate of a Will made within a Manor, when by Cuſtom or of Right ſuch Probate belongs to the Lord of the Manor. 5 Co. 73. Show. P. C. 63.

So where the Marches of *Wales* held Plea of a Matter that belonged to the Court Chriſtian, it was held that a Prohibition lay. 2 Rol. Abr. 313. Winch 78.

So in *London*, where the Lord Mayor and Court of Aldermen have the Government of City-Orphans, if any Orphan ſue in the Eccleſiaſtical Court or elſewhere, for a Legacy or Duty due to them by Cuſtom, a Prohibition lies. 4 Inſt. 249. Hob. 257.

If a Biſhoprick be void, and the Juriſdiction devolved on the Metropolitan, he muſt hold the Courts within the Inferior Dioceſes, otherwiſe he will be prohibited. Hob. 178.

If there be a Controverſy, whether ſuch a Will ought to be proved before a Peculiar or before the Ordinary; whether by the Archbiſhop of one Province or another, or both; and what ſhall be (*b*) *Bona notabilia*: Mod. 211. *per North* Ch. J. In (*b*) But in Lucas's Rep. 272. this Point is taken Notice of and denied to be Law, for that the Spiritual and Common Law are the ſame as to *Bona notabilia*; and there ſaid, that if a Prohibition lay, there muſt be frequent Inſtances of it. ‡

‡ Where the Eccleſiaſtical Court proceeds in a Matter merely ſpiritual, if they proceed in their own Manner, though that is different from the Common Law, no Prohibition lies; as in Probate of

In theſe and the like Caſes the Common Law retains the Juriſdiction of determining.

Page 253 (K) Prohibitions to Inferior Temporal Courts in what Inſtances to be granted.

F. N. B. 45. 2 Inſt. 229, 243, 601. 2 Rol. Rep. 379. Rol. Rep. 252.

IT is clearly agreed, that a Prohibition doth lie as well to a Temporal Court as to the Spiritual, Court of Admiralty, or other Court, whoſe Proceedings are different from the Common Law, if ſuch Temporal Court exceed the Bounds of its Juriſdiction, or take Cognizance of (*a*) Matters not ariſing within its Juriſdiction.

(*a*) Or if but Part only, cannot have Juriſdiction. Ld. Raym. 698.

F. N. B. 47. As if Treſpaſs *Vi & Armis* be brought in the County-Court, a Prohibition lies to the Plaintiff or Sheriff.

F. N. B. 47. So if one ſueth another in a Court-Baron or other Court, which is not a Court of Record, for Charters concerning Inheritance or Freehold, he ſhall have a Prohibition.

Rol. Rep. 54. A Perſon having obtained Judgment in *B. R.* for his Debt and Damages, brought his Action for the Recovery of them againſt the Bail in the Court of the Tower of *London*, in which Action the Party was taken on a *C pias*, and was (*b*) reſcued; after which the Plaintiff brought his Action on the Caſe in the ſame Court for the Reſcue; and all this appearing to the Court of *B. R.* they granted a Prohibition.

(*b*) If an Officer let a Man at Liberty who is in Execution upon a Bond ſued in an Inferior Court, the Bond not being made within the Juriſdiction thereof; this is no Eſcape. 2 Mod. 29. *Squibb* v. *Hole*.—So where the Plaintiff, in an Action brought againſt an Officer, declared in *Hull* upon a Bond made at *Hallifax*, and had Judgment and Execution, and the Defendant eſcaped; and in an Action brought for this Eſcape the Declaration was held ill, becauſe it did not alledge the Bond to be made *Infra Juriſdictionem Curiæ*. Rol. Abr. 809. *Richardſon* v. *Bernard*.

2 Salk. 439. pl. 2. So where an Action of Debt was brought in the *Marſhalſea*, on a Judgment in *B. R.* and a Prohibition was granted.

Keb. 648. A Suit was ſurmiſed to be before the Lord Preſident of the Marches, for an Office, between the Grantee of the Lord Preſident and a Stranger, wherein the only Queſtion would be, Whether the Grant of that Office belonged to the Lord Preſident; and becauſe in this Caſe he would be as it were (*c*) both Judge and Party, a Prohibition was granted.

(*c*) Salk. 396. pl. 1. That where a Judge has an Intereſt, neither he nor his Deputy can determine a Cauſe or ſit in Court, and in ſo doing a Prohibition lies. Hard. 503.

19 H. 6. 5. 2 Rol. Abr. 280. F. N. B. 46. If there be one intire Contract above 40*s.* and a Man ſues for it in a Court-Baron, ſevering it into divers ſmall Sums under 40*s.* a Prohibition ſhall be granted, becauſe this is done to defraud the Court of the King.

Wills, if they refuſe one Witneſs; but if they have Conuſance of the original Matter, and an Incident happen which is of temporal Conuſance, or triable at Common Law, they muſt try it as the Common Law would; as in a Suit for a Legacy, if the Defendant plead a Releaſe or Payment, they muſt admit the Evidence of one Witneſs; but if they admit the Proof, they are to judge whether he be credible or not; therefore if they determine againſt his Evidence, the Party has no Remedy but by Appeal. *Vide* Noy 12. Yelv. 92. Salk. 547. *Vide poſt*. 261.

An Action was brought in the Hundred-Court for 40*s.* in which Action the Plaintiff confeſſed that he was ſatisfied one Shilling, which being done with an Intent to give that Court Juriſdiction, and to defraud the Superior Courts, a Prohibition was granted. Palm. 564. *Clarke* v. *Corke.*

If there be ſeveral Contracts between *A.* and *B.* at ſeveral Times for divers Sums, each under 40*s.* but amounting in the Whole to a Sum ſufficient to intitle the Superior Court to a Juriſdiction, they ſhall be ſued for in ſuch Superior Court, and not in an Inferior one, which is not of Record. Vent. 65. ſaid to have been adjudged in the Caſe of the *Savoy Court* [and *Standford.*

So in a Prohibition to the Court of the Honor of *Eye*, where the Caſe was: One contracted with another for divers Parcels of Malt, the * Money to be paid for each Parcel being under 40*s.* and he levied divers Plaints thereupon in the ſaid Court; wherefore the Court here granted a Prohibition; becauſe though there be ſeveral Contracts, yet inaſmuch as the Plaintiff might have joined them all in one Action, he ought to have ſo done, and ſued here, and not put the Defendant to unneceſſary Vexation, any more than he can ſplit an entire Debt into divers, to give the Inferior Court Juriſdiction *in fraudem Legis.* *Page 254 Vent. 73. *Girling* v. *Alders.* 2 Keb. 617. S. C. Show. 11. S. C. cited.

It is laid down by my Lord *Coke*, and admitted in a great Variety of Caſes, that no Inferior Court can hold Plea of an Obligation, Contract, Battery, or other tranſitory Action, if not made within the Juriſdiction, and that the Cauſe of Action muſt be alledged to ariſe within ſuch Juriſdiction, 2 Inſt. 231. Sand. 74. 2 Jon. 230. Show. 10. & *vide* Tit. *Courts and their Juriſdiction.*

And therefore, in an Action on a Promiſe in an Inferior Court, not only the Promiſe, but the Conſideration muſt be alledged to ariſe within the Inferior Juriſdiction, and muſt be ſo proved on the Trial. Rol. Abr. 545.

But if the Plaintiff had ſhewn that the Money had been lent *infra Juriſdictionem Curiæ*, or if it had been for Goods there ſold, the Plaintiff would have had no need to ſay that the Defendant aſſumed to pay *infra Juriſdictionem Curiæ*; becauſe the Law creates the Promiſe upon the Creation of the Debt, which Debt being within the Juriſdiction, the Promiſe ſhall be intended there alſo. Ld. Raym. 211.

In all Caſes where Inferior Courts aſſume a Juriſdiction, or hold Plea of a Matter not ariſing within their Limits, the Party hath his Remedy, and may ſtay their Proceedings by Prohibition; but ſuch Prohibition can only regularly be obtained by its appearing on Oath made, that the Fact did ariſe out of the Juriſdiction, and that the Defendant tendered a foreign Plea, which was refuſed. 6 Mod. 146. Carth. 402. Salk. 201. pl. 3. Will. Rep. 476. pl. 135.

In the Caſe of (*a*) *Mendyke* v. *Stint* it was greatly inſiſted upon, that, though the Party neglected to plead to the Juriſdiction, yet the Matter ariſing out of the Inferior Juriſdiction, the Superior Courts ought to grant a Prohibition; for that otherwiſe the Parties, their Counſel and Attornies, would give a Juriſdiction to Inferior Courts which they were not intitled to by Law; but it was otherwiſe adjudged in this Caſe; and it ſeems to be now agreed, that after admitting the Juriſdiction, or after (*b*) Imparlance, the Party cannot apply for a Prohibition. (*a*) 2 Mod. 271-2. (*b*) *Vide Imparlance* under Tit. *Pleadings.*

But in the above-mentioned Caſe theſe Things were agreed by the Court. 1. That if any Matter appears in the Declaration, which ſheweth that the Cauſe of Action did not ariſe *infra Juriſdictionem*, there a Prohibition may be granted at any Time. 2. If the Subject Matter in the Declaration be not proper for the Judgment and Determination of ſuch Court, there alſo a Prohibition may be granted at any Time. 3. If the Defendant, who intended to plead to the Juriſdiction, 2 Mod. 273.

diction, is prevented by any Artifice, as by giving a ſhort Day, or by the Attorney's refuſing to plead it, &c or if his Plea be not accepted, or is over-ruled; in all theſe Caſes a Prohibition likewiſe will lie at any Time.

Ld. Raym. 346. *Coke v. Licence.* A Motion was made for a Prohibition to be directed to the Sheriff's Court in *Briſtol*, upon Suggeſtion that Cauſes of Action ariſing out of the Juriſdiction of the Sheriff's Court ought not to be ſued there; and this Motion was made in Behalf of the Defendant in the Action, before he had appeared to ſtay the Proceedings of the Court, who proceeded to attach his Goods in the Hands of a Garniſhee. And Sir *B. Shower* oppoſed the Motion; becauſe the Defendant could not pray a Prohibition upon Suggeſtion of a Matter which he could not plead; and as here he could not plead this before Appearance, ſo he ought not to *Page 255 make ſuch a Motion before Appearance. And *per Holt* C. J. * A Man ſhall not plead to the Juriſdiction until he appear; but if the original Cauſe of Action aroſe out of the Juriſdiction of the Court, the Garniſhee may plead it; and of that Opinion he ſaid was *Hale* C. J. but if it was Debt upon a Simple Contract, it is attachable where the Perſon of the Debtor is.

Show. Rep. 9. cited. Ld. Raym. 347. So in the Caſe of *Clerk* v. *Andrews*, where *Shower* moved for a Prohibition to the Court of the Sheriffs of *London* to ſtay Proceedings, where they attached the Debt of the Garniſhee, becauſe it aroſe out of the Juriſdiction; but it was denied, becauſe the Debt was upon Simple Contract, which follows the Perſon of the Debtor.

(L) Prohibitions to the Spiritual Court in what Inſtances: And herein,

1. Where they meddle with a Matter purely Temporal.

F. N. B. 40. IF one ſues another in the Spiritual Court for a Chattle or Debt, the Defendant ſhall have a Prohibition. So if he ſues for a Treſpaſs.

2 Rol. Abr. 291. 7 Co. 44. If the Spiritual Courts take upon to try the Boundaries of Pariſhes, a Prohibition lies.

Rol. Rep. 332. Cro. Eliz 228. 3 Leon. 129. 3 Keb. 286. S. P. *per Hale* Ch. J. becauſe the Preſcription is the Ground thereof.

2 Rol. Abr. 282. Show. 10. cited. Noy 147. S. P. As if a Suit be by a Parſon for Tithes, and the Defendant plead, that the Place for which the Tithes are ſued is in another Pariſh, a Prohibition lies; becauſe they meddle with that which is out of their Juriſdiction, tho' the original Thing be of their Cognizance, and this comes in (*a*) obliquely.

but that it muſt ſo appear by the Pleadings in the Spiritual Court. Vent. 335. S. P. and that a Plea thereof muſt be tendered in the Eccleſiaſtical Court. (*a*) So where the Defendant pleaded that he reſorted to and received the Sacrament in a different Pariſh from that in which he inhabited. *Vide* Bulſt. 159. Hard. 406. Salk. 166. pl. 6. 6 Mod. 188.

2 Rol. Abr. 291. So if a Vicar of a Pariſh libels againſt another to avoid his Inſtitution to the Church of *D.* which he ſuppoſes to be a Chapel of Eaſe appertaining to his Vicarage, and the Defendant ſuggeſts, that *D.* is a Pariſh of itſelf, and not a Chapel of Eaſe; a Prohibition will be granted, for they ſhall not try the Bounds of the Pariſh.

So

So if the Queſtion be in the Court Chriſtian, Whether a Church be a Parochial Church, or but a *Chapel of Eaſe*; a Prohibition lies. 2 Rol. Abr. 291. ſeveral Caſes to this Purpoſe.

But if the Bounds of two Vills lying in the ſame Pariſh come in Queſtion in the Spiritual Court, no Prohibition lies; for that ſuch Bounds are triable in the Eccleſiaſtical Court, though thoſe of Pariſhes are not. Lev. 78. *Petler* v. *Taleman.*

The Eccleſiaſtical Courts have Cognizance of a Way to a Church, and for not repairing ſuch Way the Parties may be proceeded againſt in the Spiritual Court. March 45.

So if a Parſon is prevented from carrying away his Tithe by the Stopping up the uſual Way, he may have his Remedy in the Eccleſiaſtical Court, grounded on the Statute 2 & 3 *E.* 6. *c.* 13. Bulſt. 67. Jon. 230.

* But if the Queſtion be, Whether he is to have one Way or another, or whether ſuch a Way be a (*a*) Highway or not; this cannot be tried in the Spiritual Court. *Page 256 March 45. Bulſt. 67.

(*a*) 2 Rol. Abr. 287. S. P. adjudged.

So if the Church-wardens of a Church ſue for a Way to the Church, which they claim to appertain to all the Pariſhioners by Preſcription, a Prohibition ſhall be granted; for this Right being grounded on the Preſcription, is to be tried in the Temporal Courts. 2 Rol. Rep. 41, 267.

If a Man be admitted, inſtituted, and inducted, and a Suit is commenced in the Eccleſiaſtical Court to avoid the Inſtitution, ſuppoſing it not valid; though the Thing be of their Cognizance, yet becauſe the Induction, which is Temporal, and gives a Lay Right, may depend upon it a Prohibition lies. Hob. 15. Latch 205. Bulſt. 179. Lit. Rep. 165. Poph. 133. Rol. Abr. 282. Show. Rep. 10.

If there be a Suit for Tithes in the Eccleſiaſtical Court, and the Tenant pleads, that the Party who ſues is not Incumbent, but that *J. S.* is; and this Plea, becauſe it goes to the Right of the Incumbency, is rejected, a Prohibition lies; for by denying the Tenant this Liberty he might be twice charged for his Tithes. Cro. Eliz. 228. 3 Leon. 265. *Green* v. *Penilden.*

There are are frequent Inſtances of Prohibitions being granted to the Eccleſiaſtical Courts to ſtay Suits for Fees by Chancellors, Regiſters and Proctors in thoſe Courts, on this Foundation, that Demands *pro Opere & Labore* are properly determinable at Common Law, and that Fees cannot be ſettled by the Canon Law; and that the Spiritual Court can only give Coſts and Expences of Suit, but that no Action of Debt will lie for ſuch Coſts at Common Law; and that the Profits of an Office being Temporal, the Remedy for them ought to be by *Quantum meruit*; or in caſe it be an Office of Freehold, by Aſſize; the Denial of juſt Fees being a Diſſeiſin; and therefore it ſeems to be now ſettled, that neither a Proctor nor Regiſter can ſue for Fees in the Spiritual Court; but that the proper Remedy is, in caſe of a Fee certain, by an *Indebitatus aſſumpſit*, or in caſe of an uncertain Fee, by *Quantum meruit*; and in ſuch Suits it is ſaid not to be neceſſary to prove a Retainer, that being implied by Law. 2 Rol. Rep. 59. 3 Leon. 268. Mod. 167. 2 Keb. 615. 3 Keb. 303, 441, 516. Salk. 333. pl. 11. and 4 Mod. 254. where *per Holt*, if a Proctor might ſue in the Spiritual Court for his Fees, he would avoid the Statute of Limitations; & *vide* Ld. Raym. 703. Cum. 18. and Vent. 165. where notwithſtanding it is ſaid, that for ſuch Fees as are due by Provincial Conſtitutions they may ſue in the Spiritual Court. Lucas's Rep. 262.

If a Legatee takes a Bond from the Executor for Payment of the Legacy, and afterwards ſues him in the Spiritual Court for the Legacy, a Prohibition will be granted; for by the taking the Obligation the Nature of Yelv. 38. 2 Vern. 31. but 2 Rol. Rep. 160.

S. P. *cont.*

of the Demand is changed; and it becomes a Debt or Duty recoverable in the Temporal Courts. †

† Where a Perſon is ſued in the Eccleſiaſtical Court for a Seat in the Church, if he would obtain a Prohibition, and ouſt the Ordinary of Juriſdiction, he muſt ſhew ſuch a legal Title as cannot be tried in the Eccleſiaſtical Court, which can only be by *Preſcription*, and *Preſcription* can in ſuch Caſe be no otherwiſe proved than by ſhewing Repairs; therefore in a Declaration in Prohibition, the Plaintiff regularly ought to ſet out a Cuſtom of repairing; but if he do not, if the Defendant does not demur, but goes to Trial, it will be aided by the Verdict, for the Plaintiff ought not to have a Verdict, unleſs he proves a Cuſtom to repair. Comyns 368.

2. Where they determine on a Matter of Freehold.

F. N. B. 40. 2 Rol. Abr. 286 Lit. Rep. 164. Matters of Freehold and the Rights of Inheritances, are only determinable in the Temporal Courts; ſo that if the Eccleſiaſtical Courts intermeddle with thoſe, a Prohibition lies.

Cro. Jac. 270. Vent. 41. cited. As in a Feoffment of Tithes and Lands, where there is no Livery, if they do adjudge the Tithes to paſs, notwithſtanding there is no Livery, a Prohibition will lie.

So if a Man deviſes, that his Lands ſhall be ſold for the Payment of his Debts, and that the Overplus ſhall be paid to ſuch and ſuch Perſons *Page 257* in certain Shares; the Legatees in this Caſe cannot ſue in the Eccleſiaſtical Court; for the Proviſions intended them ariſe originally out of Lands, and their proper Remedy in this Caſe is in a Court of Equity.

Dyer 151, 264. Hob. 265. 2 Rol. Abr. 284-5. 2 Show. 50. pl. 36. Cro. Car. 16.

Sid. 279. 2 Keb. 5. Lev. 179. But if a Rent be deviſed out of a Farm for Years, the Eccleſiaſtical Courts may hold Plea thereof; for the Term for Years being only a *(a)* Chattel is Teſtamentary, and conſequently the Rent deviſed thereout.

(a) Where the Legacy was to ariſe as well out of a Term for Years, as out of Lands of Inheritance, and the Executor received it; but being dead without Payment, ſo that no Action of Account could be brought at Common Law againſt his Executor §, it was held that the Eccleſiaſtical Court ſhould have Cognizance thereof. Cro. Jac. 279.

---

§ Action of Account is given againſt Executors, by ſtat. 4 Ann. c. 16. ſ. 27.

2 Rol. Abr. 285-6. Noy 91. Latch 228. Palm. 450. Godb. 390. Cro. Car. 65. 2 Rol. Rep. 306. The Rights of Offices for Life in the Eccleſiaſtical or Courts of Admiralty are determinable at Common Law; as in the Queſtion concerning the Validity of two Patents, by which the Office of a Regiſter to a Biſhop was granted, it was held, that this ſhould not be tried in the Spiritual Court, though the Subject Matter be Spiritual; becauſe the Office itſelf being Matter of Freehold is for that Reaſon of Temporal Cognizance.

Raym 88. Lev. 125. 4 Mod. 27. Comb. 306.

Bro. *Juriſdiction*, pl 41. Treſpaſs on a Glebe being Freehold cannot be determined in the Eccleſiaſtical Court.

Ld. Raym. 212. *Hilliard* v. *Jeffreſon*. A Parſon libelled againſt the Defendant in the Spiritual Court of *York* for having cut Elms in the Church yard; and a Prohibition was granted, upon Suggeſtion that they grew on his Freehold.

3. In

3. In what Caſes a Prohibition lies when they determine on Criminal Offences.

It is clearly agreed, that the Spiritual Courts have no Juriſdiction as to Crimes and Capital Offences; ſo as to puniſh Perſons guilty of Treaſon, Felony, or other Offences, which are cognizable in the King's Temporal Courts; but it is held, that a Spiritual Perſon may, eſpecially after a Conviction for a Criminal Offence at Common Law, be proceeded againſt *pro ſalute animæ*, and in order to a Deprivation; and this Juriſdiction they are indulged in from a Neceſſity of purging their Body of all ſcandalous Members; but they are not to inflict a collateral Puniſhment for ſuch Matters as are only indictable at Common Law; and if they take upon them to do ſo, a Prohibition lies. Keilw. 181. Dyer 293. Cro. Jac. 430. March 174. Hob. 288. 2 Ld. Raym. 1507.

And therefore if a Clerk be convicted of Homicide or Manſlaughter, and afterwards libelled againſt, the Libel ought not to charge that he is an Homicide, or that he is guilty of Manſlaughter, *&c.* and if it doth, a Prohibition lies; but the regular Way is only to charge that he was convicted of Homicide, *&c.* and ſo the Sentence of Deprivation ought to be grounded on the Conviction in the Temporal Court, without any further Examination of the Matter, by which the Verdict there given is not to be impeached, but affirmed; and though the Perſon convicted doth deſire that he may be admitted to his Defence in the Spiritual Court, to prove his Innocency againſt the Verdict, yet this is not to be allowed him; becauſe this would be to impeach in an improper Court a Sentence given in a proper Court. Hob. 121, 288. Cro. Jac. 430. *Searl's* Caſe. Comp. Incumb. 53-4.

So where a Libel was exhibited in the Eccleſiaſtical Court againſt a Woman *Cauſa Jactitationis Maritagii*, and ſhe ſuggeſted, that the Perſon libelling was indicted at the Seſſions in the *Old Baily* for marrying her, he then having a Wife living, *contra formam ſtatuti*, and that he was thereupon convicted, and had Judgment to be burnt in the Hand; * ſo that being tried by a Jury, and a Court which had a Juriſdiction of the Cauſe, and the Marriage found, a Prohibition was prayed, and granted. 3 Mod. 164. *Boylev. Boyle.* *Page 258

If a Matter of Eccleſiaſtical Cognizance be made Felony or Treaſon by Act of Parliament, the Spiritual Courts (unleſs there be a Saving of their Juriſdiction in ſuch Statute) cannot take Cognizance thereof, nor of any Defamation in relation thereto. Jon. 320.

A Layman forges Orders, and obtains a Benefice, for which he is proſecuted in the Eccleſiaſtical Court in order to Deprivation; and he prays a Prohibition, becauſe Forgery is triable at Common Law; but the Prohibition was denied, for the Forgery is touching an Eccleſiaſtical Matter, and he is ſuable there for it in order to his Deprivation only. Lev. 138. Sid. 217. Keb. 721, 762. *Sladerv. Smalbroke.*

If the Spiritual Court proceeds againſt a Man for writing a Libel, a Prohibition lies; for this is an Offence indictable at Common Law. Comb. 71.

The Eccleſiaſtical Courts cannot puniſh or hold Plea *pro reformatione morum* in Caſe of legal Perjury, or *pro læſione fidei* in a Temporal Matter; as that the Party will pay a Debt, make a Feoffment, *&c.* So if a Jury give a falſe Verdict, they cannot be puniſhed for this in the Eccleſiaſtical Courts. F. N. B. 42. 2 Rol. Abr. 304.

But for Perjury in their own Courts, and in Matters in which they have Cognizance, as Matrimony, Tithes, Teſtaments, *&c.* they may puniſh, and no Prohibition lies. Jenk. 184. Keilw. 39. pl. 5.

If a Preſentment be made by the Church-wardens of a Pariſh in the Eccleſiaſtical Court, that *J. S.* a Pariſhioner, is a Railer and Sower of Diſcord among the Neighbours, a Prohibition lies; for this belongs to the 2 Rol. Abr. 286. Hob. 246. Heil. 132.

the Leet, and not to this Court, unleſs it was in the Church, or ſuch like.

4. Where the Eccleſiaſtical Courts determine on Acts of Parliament.

4 Leon. 16. Vaugh. 206. 2 Inſt. 614, 618. 2 Lev. 64.

The Conſtruction of Acts of Parliament is of Temporal Cognizance; ſo that if the Spiritual Courts expound them in a different Senſe than they ought to do, a Prohibition lies; as if upon the Statute 32 *H.* 8. *cap.* 38. which only prohibits Marriages within the *Levitical* Degrees, the Eccleſiaſtical Courts ſhould moleſt or call in Queſtion Marriages without thoſe Degrees, a Prohibition lies; becauſe they act contrary to that which is declared to be lawful by the Statutes of the Realm; but where they are not bounded by any Law, their Juriſdiction ſtill continues, and therefore within the *Levitical* Degrees they are ſtill Judges of Inceſt.

Jon. 259, 260.

So if it be made a Queſtion in the Eccleſiaſtical Court, Whether the Words of the Statute 25 *H.* 8. *c.* 22. have given ſufficient Power to the Archbiſhop to grant Marriage Licences, and they determine againſt the Power, a Prohibition lies; for by this they determine againſt an Act of Parliament, which is a Temporal Affair; but if they allow the Power, they may determine as to the Form of the Licence, the Notice, and other Circumſtances requiſite, *&c.* for in theſe they have a Juriſdiction, as ſuch Licences have been, and ſtill are, notwithſtanding this Statute, of Eccleſiaſtical Cognizance.

2 Rol. Abr. 303.

If an Adminiſtration is granted to the next of Blood, and upon this an Appeal is ſued to the Delegates, and there they intend to revoke the ſaid Sentence, and to grant it to another, who is not nearer of Blood by our Law, but is by the Eccleſiaſtical Law; a Prohibition lies; becauſe this being ordained by Statute ought to be interpreted according to our Law.

*Page 259 Vent. 207. Lady *Cheſter*'s Caſe. 3 Keb. 30.

* If there be a Controverſy, whether a Perſon hath diſpoſed of the Guardianſhip of his Child purſuant to the Statute 12 *Car.* 2. *cap.* 24. or whether he hath revoked ſuch Diſpoſition; this cannot be determined in the Eccleſiaſtical Courts.

2 Ld. Raym. 850. *Wenmouth* v. *Collins.*

On a Motion for a Prohibition to the Eccleſiaſtical Court, to ſtay a Suit there againſt a Perſon for Brawling in the Belfry, and ſtriking a Man there, the Statute of 5 & 6 *E.* 6. *cap.* 4. was ſuggeſted; and it was alledged, that all Statutes are conſtruable by the Common Law, and that the Perſon ſtriking was Mayor of the Town, and that he came there to ſuppreſs a Riot; but *(abſente Holt)* the Prohibition was denied; becauſe this Offence was conuſable in the Eccleſiaſtical Court before this Statute *ratione Loci*; and that the Statute, though it provides a Penalty, does not alter the Juriſdiction.

Godb. 218. *Wheeler*'s Caſe.

The Defendant was preſented in the Eccleſiaſtical Court for working upon Holidays, *viz.* carrying Hay on St. *John Baptiſt*'s Day in Church-Time; but a Prohibition was granted, becauſe this was out of the Statute by the very Words of the Act 5 & 6 *E.* 6. *cap.* 3. it being a Work of Neceſſity; and this being an Holiday by Act of Parliament, it belongs to the Judges of the Common Law to determine whether it was broken or not.

5. In

5. In what Caſes they have a concurrent Juriſdiction, and may determine Incidents.

The Eccleſiaſtical Courts have in ſome Inſtances a concurrent Juriſdiction with the Temporal Courts; as in laying violent Hands on a Clerk, (*a*) a Penſion by Preſcription, *&c.* So that if a Clergyman be beaten, an Action at Law lies for the Battery; as alſo a Suit in the Spiritual Court for Irreverence to his Character; but ſuch Proceedings in the Eccleſiaſtical Court muſt be *pro Salute Animæ*, and to puniſh the Sin, but not to recover Damages. 2 Inſt. 492. 9 E. 2. *Articuli Cleri.* Cro. Eliz. 655. 6 Mod. 156. *vide* 4 Co. 20. a. in the Abbot of St. *Alban's* Caſe.

(*a*) Vent. 3, 120, 265. Ld. Raym. 578. 2 Salk. 550. pl. 10. 6 Mod. 252.

But if a Clerk be arreſted by (*b*) Proceſs of Law, he cannot for this ſue in the Eccleſiaſtical Court. Bro. *Prohibition*, pl. 21. 2 Inſt. 492.

(*b*) If a Perſon be proceeded againſt for Defamation in the Spiritual Court, for giving Evidence in a Court of Juſtice, he may have a Prohibition. Bro. *Prohibition*, 21. 2 Bulſt. 296. Rol. Rep. 61.—*Cook* ſued *Webb* in the Spiritual Court for ſaying that he had a *Baſtard*; *Webb* the Defendant alledged in the Spiritual Court, that the Plaintiff was adjudged the reputed Father of a Baſtard by two Juſtices of Peace, according to the Statute, whereupon he ſpoke theſe Words, and they of the Spiritual Court accepted his Confeſſion, but would not allow his Juſtification, wherefore he prayed a Prohibition; which was granted him. Cro. Jac. 535. *Webb* v. *Cook*.

So if a Clergyman be only aſſaulted, no Remedy is to be had in the Spiritual Court, but in the Common Law Courts. Cro. Eliz. 753. *Prynn's* Caſe. 2 Inſt. 608.

So if one be ſued in the Eccleſiaſtical Courts for laying violent Hands on a Clergyman; the Party being an Officer or Conſtable may (*c*) ſuggeſt, that the Plaintiff made an Affray upon another, and that he, to preſerve the Peace, laid Hands on him, and ſo have a Prohibition.

(*c*) On the Statute 5 & 6 E. 6. c. 4. againſt brawling, *&c.* in a Church or Church-yard, it hath been held, that he who ſtrikes another cannot juſtify or excuſe himſelf by ſhewing that the other aſſaulted him. Cro. Jac. 367. ‡—But in laying Hands on a Clerk may juſtify. Moor 915. Cro. Eliz. 655.

---

‡ *Sed qu.* If this is conſiſtent with the Nature of our Law, and the Principles of political Liberty, as eſtabliſhed in this Country? for in a Society where there are Laws, Liberty is the Right of doing every Thing which the Laws permit: And certainly Self-preſervation is the firſt Law of Nature, and conſequently of civil Society; for, according to *Cicero*, *Eſt enim hæc non ſcripta, ſed nata lex: Quàm non didicimus, accepimus, legimus, verum ex naturâ ipſa arripuimus, hauſimus, expreſſimus; ad quam non docti, ſed facti; non inſtituti, ſed imbuti ſumus; ut ſi vita noſtra in aliquas inſidias, ſi in vim, ſi in tela aut latronum, aut inimicorum incidiſſet; omnis honeſta ratio eſſet expediendæ ſalutis. Silent enim leges inter arma, nec ſe exſpectari jubent, cum ei qui exſpectare velit, ante injuſta poena luenda ſit, quam juſta repetenda. Etſi perſapienter, & quodammodo tacite, dat ipſa lex poteſtatem defendi, &c.*

Alſo it is ſaid, that though the Crime of laying violent Hands on a Clergyman, be within the expreſs Words of the Statute of *Circumſpecte Agatis*, that yet the Party is not puniſhable in the Spiritual Court before he is found guilty in a Temporal Court; and that if he be proceeded againſt ſooner, a Prohibition lies. 7 Mod. 80.

* In Caſe of Criminal Converſation with a Man's Wife, an Action lies at Common Law, in which the Huſband recovers Damages, and the Offender is likewiſe puniſhable in the Eccleſiaſtical Court for Adultery. *Page 260 Cro. Car. 89. Cro. Jac. 538. Jon. 440.

So in Caſe of a lewd Woman who hath a Baſtard chargeable on the Pariſh, though by the Statute 7 *Jac.* 1. *cap.* 4. ſhe is to be ſent to the Houſe of Correction; yet ſhe may be proceeded againſt for Incontinency in the Spiritual Court. 7 Mod. 80.

The

The Defendant libelled againſt Plaintiff in the Eccleſiaſtical Court,
2 Salk. 552. 7 Mod. 79. *Galizard* and *Rigault*; and 2 Ld. Raym. 809. S. C. where it is ſaid, that the Court was of this Opinion; but at the Prayer of the Defendant's Counſel they ordered that it ſhould be argued by Civilians; but afterwards, an Apparent Fault being in the Pleadings, they refuſed to hear the Civilians, and gave Judgment that the Prohibition ſhould ſtand.
for having ſolicited the Chaſtity of his Wife, after the Plaintiff had been indicted for an Aſſault upon the ſame Woman, with an Intent to raviſh her, and convicted and fined upon it; and after an Action of Aſſault and Battery againſt him for the ſame Offence, which Action was depending at the ſame Time that the Proſecution was in the Spiritual Court; and all this Matter appearing on the Pleadings, the Queſtion was, whether a Prohibition ſhould go to ſtay the Proceedings in the Eccleſiaſtical Court, or a Conſultation ſhould be awarded; and it was held in this Caſe that a Prohibition ſhould be granted; for that this being an Attempt and Solicitation to Incontinence, coupled with Force and Violence, it did by Reaſon of the Force, which is Temporal, become a Temporal Crime *in toto*.

So if *A.* calls *B. Whore* and *Thief*, the Action ſhall be ſued at Common
2 Rol. Abr. 295. 2 Ld. Raym. 809.—
Law; and *B.* cannot libel againſt *A.* in the Spiritual Court for the Word *Whore*, and have an Action at Law for the Word *Thief*.

So if *A.* ſays of *B. you are a Bawd, and thou keepeſt a Bawdy-houſe*; the keeping a Bawdy-houſe being a Matter indictable at Common Law, makes the whole of Temporal Cognizance; but calling *Whore* or *Bawd* only are puniſhable in the Eccleſiaſtical Courts. 2 Salk. 552. pl. 15. 2 Ld. Raym. 809. *& vide* 2 Inſt. 488. where Lord *Coke*, *Mere Spirituali ſunt quæ non habent mixturam temporalium*.

3 Lev. 17. *Crandon* v. *Walden*.
But on a Motion for a Prohibition for ſaying of a Parſon that *He preaches nothing but Lies and Malice in the Pulpit*, on Suggeſtion that theſe Words are actionable at Common Law, the Court refuſed to grant it; for that theſe Words concerning and relating to an Eccleſiaſtical Perſon and an Eccleſiaſtical Matter, it was fit to be tried there.

2 Ld. Raym. 1101. *Evans* v. *Brown*.
So where the Words were, *You are known by the Name of Bawdy* Nell, *and do live with another Woman's Huſband*; and an Action being brought at Law for theſe Words, grounded on a ſpecial Damage ſuſtained by the Defendant's ſpeaking them, and alſo a Suit in the Eccleſiaſtical Court, it was moved for a Prohibition; for being actionable at Law by Reaſon of the ſpecial Damage, the Party ought not to be twice puniſhed for the ſame Offence; but the Court refuſed to grant a Prohibition.

Salk. 24. pl. 6. 120. 6 Mod. 155, 172. Ld. Raym. 386. See 12 Mod. 214.
If there be a mutual Contract of Marriage between a Man and a Woman *per verba de futuro*, and either of them refuſes; for this Breach of Contract an Action lies at Common Law for the Temporal Loſs to the Party, although there might have been a Remedy in the Eccleſiaſtical Courts for enforcing ſuch Contract. †

† No Suit now in the Eccleſiaſtical Courts to compel Marriage by reaſon of any Contract, &c. 26 G. 2. c. 23. ſ. 13.

If the Church-wardens take away the Bells of a Church, they may be proceeded againſt in the Eccleſiaſtical Courts for ſuch ſacrilegious Taking; and the rather, as (*a*) they are Church-wardens, although an Action lies againſt them at Common Law by their Succeſſors; and the Remedy in this Caſe is ſaid to be moſt proper in the Spiritual Court,
*Page 261 * Carth. 467. 5 Mod. 411.
becauſe at Common Law Damages only are recovered, but in the Eccleſiaſtical Court they decree a Reſtitution of the Thing in *Specie*.

Sid. 281. *Welcome* v. *Lake*. (*a*) It is ſaid in 2 Salk. 547. pl. 2. that a Prohibition was granted to ſtay a Suit in the Eccleſiaſtical Court for taking away two Bells out of the Steeple, for theſe Reaſons. that the Churchwarden is a Corporation, and the Property is in him, and he may bring Trover at Common Law; *& vide* 2 Inſt. 492. Rol. Rep. 255.

J. S.

J. S. ſued his Brother whom his Father made Executor, for his reaſonable Part of the Goods of the Father, in the Spiritual Court, according to the Cuſtom of the Province of *York*; upon which a Prohibition was moved for, and inſiſted, that this was a Temporal Cauſe founded upon a Cuſtom, and that there was an original Form in the Regiſter, by which it appeared that it was a Matter conuſable at Common Law; but it was holden by three Judges, in the Aſence of *Hale*, that in this Caſe both Courts had a *(a)* concurrent Juriſdiction. 2 Lev. 128. *Trafford* v. *Trafford*.

(*a*) Where in Matters of Legacies the Courts of Equity and Eccleſiaſtical Courts have a concurrent Juriſdiction, *vide* 2 Vern. 47. 2 Vent. 362. Preced. Chan. 546.

If a Pariſh-Clerk be guilty of ſeveral ſcandalous Offences, and which are puniſhable at Common Law, yet he may be proceeded againſt in the Spiritual Court in order to a Deprivation, though his Office be for Life. 2 Ld. Raym. 1506. Fitzg. 189.

It is laid down as a Rule in a great Variety of Caſes, that the Eccleſiaſtical Courts having Cognizance of the principal Thing they ſhall have it of Incidents and Acceſſaries; but this hath been underſtood in this Manner, that if ſuch incident ‡ Matter be merely Temporal, or if a Temporal Matter be pleaded in Bar to an Eccleſiaſtical Demand, they muſt proceed in the Eccleſiaſtical Court, according to the Temporal Law, otherwiſe they will be prohibited. 2 Inſt. 493, 613. 12 Co. 65. 2 Bulſt. 227. Cro. Eliz. 66. Hob. 12. Hetl. 87. 2 Rol. Abr. 298. Sid. 89, 161. Cro. Jac. 269. Ld. Raym. 73.

‡ *Vide* 252. n.

As if a Releaſe be pleaded to a Demand of Tithes, or Payment in Bar of a Legacy, which can only be proved by one Witneſs, and for this Reaſon is rejected by the Eccleſiaſtical Courts, becauſe their Law requires two Witneſſes; there a Prohibition will be granted. § 2 Rol. Rep. 42. Godb. 272. Cro. Eliz. 666.

Hob. 188, 247. Latch 217. Noy 12. Moor 413. Vent. 291. Sid. 161. Show. 158. Carth. 142. 2 Salk 547. pl. 1. Ld. Raym. 220. 3 Mod. 283. Comb. 160. Holt 752. pl. 1.

§ *Vide* 252. n.

So although Tithes, Oblations, Mortuaries, and Penſions, are of Eccleſiaſtical Conuſance, yet if to a Demand of theſe a (*b*) *Modus* or Cuſtom is pleaded, ſuch Cuſtom, like all others, muſt be determined in the Temporal Courts; and (*c*) if the Eccleſiaſtical Courts take upon them to determine it, a Prohibition will lie. 2 Inſt. 653. Latch 48. 2 Lev. 163. 3 Bulſt. 231. Rol. Rep. 419. 2 Co. 45.

(*b*) But if a *Modus* be there pleaded and admitted, no Prohibition ſhall go; *ſecus* if the Queſtion be, *Modus* or no *Modus*. 2 Salk. 551. pl. 13. *Per Holt* Ch. J. If they agree in the *Modus*, and only vary in the Manner of Payment, no Cauſe for a Prohibition. Winch 33. (*c*) The Reaſon why the Spiritual Court ought not to try Cuſtoms is, becauſe they have different Notions of Cuſtoms, as to the Time which creates them, from thoſe that the Common Law hath; for in ſome Caſes the Uſage of ten Years, in ſome twenty, in ſome thirty Years, make a Cuſtom in the Spiritual Court, whereas by the Common Law it muſt be Time whereof, *&c.* Noy 28. Ld. Raym. 436.

But if there be but one Witneſs to prove a Nuncupative Will, and the Eccleſiaſtical Court refuſe the Probate thereof, becauſe to every ſuch Will the Law requires two Witneſſes, no Prohibition lies; becauſe there is no other Way of authenticating ſuch Will but in the Spiritual Court. Carth. 143.

So where the Church-wardens libelled for a Church-rate, which was ſentenced againſt them, and then they appealed to the Metropolitan, but pending the Appeal one of the Appellants releaſed to the Appellee all Actions, Suits, and Demands, but the other Appellant proceeded in his and his Partner's Name to reverſe the Sentence; whereupon the Appellee Yelv. 172. Noy. 129. Cro. Jac. 234. *Starkey* v. *Barton* and *Gere*.

Appellee prayed a Prohibition; but it was adjudged, that no Prohi-
*Page 262 bition lay, the principal Matter being of Eccleſiaſtical * Cognizance, Things dependant thereon will be ſo too; and whether this Releaſe will bar both the Church-wardens is what they are to determine and not the Court of *B. R.*

Hard. 510. *Goddin* v. *Wainwright.* A Libel was exhibited on a Cuſtom, that the Conſtable of the Town ſhould collect the Rates aſſeſſed for repairing the Pariſh-Church; which he refuſed to do; and on a Motion for a Prohibition it was ſuggeſted, that it was not triable there, whether the Party was Conſtable and duly elected or not; but the Court denied to grant one, becauſe this Matter is pleadable there, and Prohibitions ought not to go unleſs upon a Trial of the Matter their Law and Proceedings croſs the Common Law, and in that Caſe a Prohibition lies only till Trial here, and after that a Conſultation ſhall be granted.

5 Mod. 69. Salk. 115. pl. 4. Ld. Raym. 73. *Chamberlain* v. *Hewitſon.* See 12 Mod. 891. But it hath been reſolved, that if a Feme Covert ſue another in the Spiritual Court for Incontinence with her Huſband, and recover Coſts, if the Huſband releaſe them the Wife is barred; for ſince the Huſband is liable to the Charges of the Suit expended by the Wife, he ſhall have the Coſts in Recompence; beſides, the Wife cannot have a Chattel Intereſt excluſive of her Huſband.

Ld. Raym. 74. *per Curiam.* But if the Huſband and Wife are divorced *a Menſa & Thoro*, and the Wife has Alimony allowed her, and ſhe ſues for Defamation, or other Injury, and recovers Coſts, the Huſband releaſes them, yet the Wife ſhall recover them; becauſe they come inſtead of that ſhe has expended out of her Alimony, which was a ſeparate Maintenance, and not in the Power of the Huſband.

(M) The Offence of paying Diſobedience to a Prohibition.

F. N. B. 40. Bro. *Att. Pro.* pl. 5. pl. 9. pl. 11. And. 279. THE Diſobeying a Prohibition is a Contempt to the Superior Court that awards it, and puniſhable by Attachment, which iſſues againſt the Judge and (*a*) Party for proceeding after ſuch Prohibition, and for which they are ſubject to Fine and Impriſonment, according to the Diſcretion of the Superior Court.

(*a*) Though the Writ of Prohibition was not directed to the Party. 19 H. 6. 54.—And ſuch Attachment may be awarded againſt a Peer of the Realm. 21 E. 3. 3. pl. 7.

2 Jon. 47. Dr. *Wainright*'s Caſe. ‡*Vide* 252. n. An Attachment was granted, upon Affidavit that the Party proceeded after a Prohibition delivered to him, in a Suit for a Seat in a Church which the Plaintiff claimed by Preſcription; ‡ and upon his Appearance and Examination upon Interrogatories he confeſſed the Matter, and was fined five Marks.

Moor 599. Leon. 111. And not only an Attachment lies for proceeding in the ſame Cauſe pending a Prohibition, but alſo for inſtituting a new Suit for the ſame Thing; as if a Parſon libels for Tithes, and a Prohibition is brought, and he libels for Tithes of another Year, the firſt not being determined, an Attachment ſhall be awarded.

In

In an Attachment upon a Prohibition the Plaintiff ſhall recover Damages and Coſts againſt the Party for proceeding after the Writ of Prohibition awarded. † Cro. Car. 559. 2 Jon. 128. Vent. 348. 3 Lev. 360.

† *Vide ante* 248. n. Alſo *vide* 6 Com. Dig. 459-64.

---

*RELEASE.

*Page 263

A Releaſe is the giving or diſcharging of a Right of Action which a Man hath or may claim againſt another, or that which is his; or it is the Conveyance of a Man's Intereſt or Right which he hath to a Thing to another who (*a*) hath Poſſeſſion thereof, or (*b*) ſome Eſtate therein.

(*a*) But it is contrary to the Nature of a Releaſe to give Poſſeſſion. 4 Co. 25. Hutt. 65.—And therefore one Tenant in Common cannot releaſe to his Companion, becauſe they have diſtinct Freeholds. Co. Lit. 200. (*b*) A Releaſe cannot operate but upon an Eſtate, Intereſt or Right. Rol. Rep. 197.

Releaſes are diſtinguiſhed into expreſs Releaſes, or Releaſes in Deed, and thoſe ariſing by Operation of Law; and are made of Lands and Tenements, Goods and Chattels, or of Actions, real, perſonal, and mixt. Co. Lit. 264. a.

Theſe are to be adapted to the Nature of the Caſe, and the Purpoſes for which the Releaſe is intended; ſo that if a Man be diſſeiſed of Lands, or diſpoſſeſſed of Goods, and releaſe all Actions, he may, notwithſtanding enter into his Lands, or retake his Goods, the Right and Property being ſtill in him though he has diveſted himſelf of his Remedy. Hob. 163. 4 Co. 63.

So where a Man has divers Means to come to his Right, he may releaſe one, and yet take Advantage of the other; but if a Man has not any Means to come to his Right but by way of Action, there by a Releaſe of all Actions his Right by Judgment of Law is gone, becauſe by his own Act he has barred himſelf of all Means to come at it. 8 Co. 152. Co. Lit. 286.

Heretofore Releaſes were conſtrued with much Nicety and great Strictneſs, and being conſidered as the Deed or Grant of the Party, were according to the Rule of Law taken ſtrongeſt againſt the Releaſor; they now receive ſuch Interpretation as other Grants and Agreements do, and are favoured by the Judges as tending to Repoſe and Quietneſs. Dyer 56-7. a. Plow. 289. Hetl. 15. 8 Co. 148. Show. 154.

Hence it hath been eſtabliſhed as a general Rule in the Conſtruction of Releaſes, that where there are general Words only in a Releaſe they ſhall be taken moſt ſtrongly againſt the Releaſor; but where there is a particular Recital in a Deed, and then general Words follow, the general Words ſhall be qualified by the ſpecial Words. Mod. 99. Ld. Raym. 235.

For the better underſtanding hereof we ſhall conſider,

(A) Releaſes that are expreſs and by Deed. 264.

And

And herein,

1. Of the Words and Ceremony requiſite in an expreſs Releaſe. 264.
2. How far a Covenant or Agreement may operate as a Defeaſance or Releaſe. 265.
3. How far a Diſpoſition by Will may operate as a Releaſe. 267.

(B) Releaſe by Operation of Law, how created, and the Effect thereof. 267.

*Page 264 (C) Releaſes of Lands and Hereditaments, how they enure. 270.

And herein,

1. Of Releaſes that enure by way of *Mitter le Eſtate.* 270.
2. Releaſes by way of *Mitter le Droit.* 271.
3. Releaſes that enure by way of Extinguiſhment. 273.
4. Releaſes that enure by way of Enlargement: And therein of the modern Manner of Conveyancing by Leaſe and Releaſe. 274.
5. What Eſtate or Intereſt paſſes by the Releaſe: And therein of the Words requiſite to an Enlargement. 277.

(D) Who in reſpect of their Right and Intereſt are capable of releaſing. 278.

(E) Of Releaſes by Executors and Adminiſtrators. 280.

(F) How far the Husband's Releaſe ſhall bind the Wife. 281.

(G) To whoſe Benefit a Releaſe ſhall enure; and who ſhall be bound thereby, tho' not a Party to the Releaſe. 281.

(H) How far a Poſſibility or Contingent Intereſt may be releaſed. 283.

(I) How the operative Words in a Releaſe have been conſtrued. 285.

And therein of the Words,

1. Claims and Demands, what are releaſed thereby. 285.
2. By a Releaſe of all Actions and Suits. 288.

(K) Releaſe, in what Caſes reſtrained to the ſpecial Purpoſe for which it was given. 289.

(L.) What

(L) What Right and Intereſt ſhall be ſaid to be releaſed: And therein of Wiſrecitals and Exceptions in Releaſes. 291.

(A) Releaſes that are expreſs and by Deed: And herein,

1. Of the Words and Ceremony required in an expreſs Releaſe.

Littleton tells us, that the proper Words of a Releaſe are *Remiſiſſe, relaxaſſe & quietum clamaſſe*, which have all the ſame Signification. Lit. Sect. 445.

Lord *Coke* adds, (*a*) *Renunciare, acquietare*; and ſays, that there are other Words which will amount to a Releaſe; as if the Leſſor grants to the Leſſee for Life, that he ſhall be diſcharged of the Rent; this is a good Releaſe. Co.Lit. 264. (*a*) Plow. 140.

So it hath been held, that a Pardon by Act of Parliament of all Debts and Judgments amounts to a Releaſe of the Debt, the Word *Pardon* including a Releaſe. *Page 265 Sid. 265.— So the Words *ei Reddidit* enure as a Releaſe. Cro. Jac. 696.——So an Obligee's acknowledging himſelf on good Conſideration ſatisfied or diſcharged of all Bonds, Debts and Demands, is in Judgment of Law a good Releaſe. 9 Co. 52. Show. 331.

An expreſs Releaſe muſt regularly be in Writing and by Deed, according to the common Rule *Eodem modo quo oritur eodem modo diſſolvitur*; ſo that a Duty ariſing by Record muſt be diſcharged by Matter of as high a Nature; ſo of a Bond or other Deed. Co.Lit. 264. b. Rol.Rep.43. 2 Leon. 76, 213. 2 Rol. Abr. 408. 2 Saund. 48. Moor 575. pl. 787.

But a Promiſe by Words may before Breach be diſcharged or releaſed by Words only. Sid. 177. 2 Sid. 78. Cro. Jac. 483, 620. Cro. Car. 383.

As where in *Aſſumpſit* the Plaintiff declared that the Defendant for valuable Conſideration aſſumed to go a certain Voyage in ſuch a Ship before *Auguſt* following, and alledged a Breach in the Non-performance; to which the Defendant pleaded, that, before any Breach, the Plaintiff the fourth of *April* at ſuch a Place *exoneravit eum* of the ſaid Promiſe; and on Demurrer the Plea was held ſufficient, without ſhewing how he diſcharged him, or that ſuch Diſcharge was in Writing *Langdon* v. *Stokes*.

But where in *Aſſumpſit* for 5*l.* upon Exchange of a Horſe to be paid upon Requeſt, the Defendant pleaded that before the Action brought the Plaintiff did exonerate him of this Agreement; and this Plea was reſolved to be ill, for though a Parol Agreement may be diſcharged by Parol before Cauſe of Action accrued, yet after that it cannot be diſcharged but by Deed; and here the Cauſe of Action did accrue at leaſt upon Requeſt, and therefore he ſhould have pleaded the Exoneration before the Requeſt. Mod. 262. 2 Mod. 259. S. C. *Edward* v. *Weeks*.

In Treſpaſs for riding the Plaintiff's Horſe, the Defendant pleaded that ſuch a Day the Plaintiff *exoneravit* him of the Treſpaſs; and this was held an ill Plea, in not ſhewing that the Diſcharge was in Writing. Sid. 293. *Weſtlake* v. *Perſe*.

A Releaſe of a Right in Chattels cannot be without Deed. Leon. 283. *per Anderſon* Ch. J.

2. How far a Covenant or Agreement may operate as a Defeaſance or Releaſe.

Moor 23. pl. 80, 811. Rol. Abr. 939. Bridg. 118. 2 Bulſ. 95, 290. Hard. 113. 3 Lev. 41. 2 Salk. 573. pl. 1. 575. pl. 4. 2 Ld. Raym. 786. Carth. 210. Ld. Raym. 419, 691.

A Covenant perpetual, as that the Covenantor will not ſue without any Limitation of Time, is a (*a*) Defeaſance or abſolute Releaſe; and this Conſtruction has been made to avoid Circuity of Action; for if in ſuch Caſe the Party ſhould contrary to his Covenant ſue, the other Party would recover preciſely the ſame Damages which he ſuſtained by the other's ſuing; but if the Covenant be, that he will not ſue till ſuch a Time, this does not amount to a Releaſe, nor is it pleadable in Bar as ſuch, but the Party hath Remedy only on his Covenant.

(*a*) A Defeaſance is only a conditional Releaſe, and may be executed as well after as at the Time of the original Contract. 2 Sand. 48. Cro. Eliz. 623.

CroEliz. 352. And. 307. RolAbr. 939. *Deux* v. *Jefferies*. *Page 266

As in Debt upon an Obligation, the Defendant pleaded that the Plaintiff by Indenture, &c. did covenant that he would not ſue the Bond before *Michaelmas*, intending thereby that this was a Suſpenſion of the Action, and conſequently a Releaſe; but upon Demurrer the * Court adjudged that it only amounted to a Covenant, and that for Breach thereof an Action of Covenant would lie.

Carth. 63. Salk. 573. pl. 1. *Ailoffe* v. *Scrimſhire*, & *vide* Show. 46. S. C.

So if the Obligee covenants and grants to and with the Obligor, that during ninety-nine Years he will not put the Bond in Suit; this is only a Covenant on which an Action will lie, but it cannot be pleaded in Bar of the Bond.

Cro. Car. 551. March 95. 2 Salk. 575. pl. 3. Ld. Raym. 688. See 12 Mod. 415, 448, 550, 551.

If two are jointly and ſeverally bound in an Obligation, and the Obligee by Deed (*b*) covenants and agrees not to ſue one of them; this is no Releaſe, and he may notwithſtanding ſue the other.

(*b*) But if two are jointly and ſeverally bound in a Bond, a Releaſe to the one diſcharges the other. Ld. Raym. 420.

2 Vent. 217. *Gawden* v. *Draper*. Ld. Raym. 691. S. C. cited *per Holt*, and admitted to be good Law; but he ſaid, that if the 300 *l.* had been a Rent, he ſhould have been of Opinion that the ſecond Deed would have amounted to a Grant of the Rent for the ſaid Time; & *vide* Lev. 152.

A. covenants with *B.* to pay him 300 *l.* for the Uſe of the Wife of *A.* only for her Life; in Covenant brought on this, and Breach aſſigned that there was ſo much of the 300 *l.* Arrear, Defendant pleads that there was another Indenture between him and the Plaintiff ſince the Date or Delivery of the Deed of Covenant declared on, reciting the ſaid Covenant and Agreement for the Payment of the 300 *l.* wherein it was covenanted and agreed, that ſo long as *A.* and his Wife did cohabit, the Payment of the 300 *l.* ſhould ceaſe; and avers, that they did cohabit for the Time the ſaid Arrear became due, and pleads this in Bar of the firſt Agreement; and though in this Caſe there could not have been any great Miſchief in conſtruing the Deed pleaded a Defeaſance or Releaſe, there being no other Parties to the Deed; yet as this was a Sum in groſs, and the Covenant temporary and not perpetual, it was adjudged no Bar.

43 Aſſ. pl. 44. Co. Lit. 265. Ld. Raym. 690. cited.

If the Collateral Anceſtor of the Diſſeiſee releaſe to the Diſſeiſor with Warranty, and the Diſſeiſor makes a Deed reciting the Releaſe with Warranty, and covenants though he be impleaded or ouſted yet he will not take Advantage of the Deed or Warranty, that is a Defeaſance; and if the Diſſeiſor pleads the Releaſe with Warranty in Bar of an Action brought

brought by the Diſſeiſee, he ſhall be rebutted from the Warranty by his own Deed; but in this Caſe if the Diſſeiſor had covenanted only not to bring a *Warrantia Chartæ*, or not to vouch, there it would only have been a Covenant, becauſe there would have remained a Remedy upon the Warranty.

A. having a Rent-charge iſſuing out of three Acres, *B.* purchaſed two Acres thereof, and *A.* covenanted and granted to and with *B.* not to diſtrain in thoſe two Acres for the Rent. By *Glanvil* it was held a Releaſe; but *Anderſon contra*; but *per Cur,* If it be a Releaſe, the Tenant of the other Acre may plead it, for thereby the Rent was extinct. Noy 5.

If *A.* be bound to *B.* in a certain Sum, and *B.* covenants and grants with *C.* a Stranger to the Bond, that if *A.* did ſuch a Thing, the Obligation ſhould be void; this does not amount to a Releaſe. Bro. *Eſtranger al Fait*, pl. 21.

If a Letter of Licence contains the following Words, *viz.* that if the Creditor ſues within ſuch a Time his Debts ſhall be forfeited; ſuch Licence is pleadable in Bar as a Releaſe, for the Words, *ſhall be forfeited*, make an abſolute Defeaſance upon a Suit commenced. Carth. 64, 210. Show. 46, 330, 350. See 3 Danv. 427. pl. 7, 8. Comb. 123. Carth. 63, 210. Holt 619. pl. 1. 2 Show. 446.

Obligees reciting the Bond covenants to ſave the Obligor harmleſs, it is an abſolute Releaſe; and if upon a Contingency, it is a conditional Releaſe, becauſe it has an expreſs Relation to the Bond. 2 Salk. 573. pl. 2.

An Award that all Suits ſhall ceaſe hath the Effect of a Releaſe, and the Submiſſion and Award may be pleaded in Diſcharge as well as a Releaſe. 2 Mod. 228. *Strangford* v. *Green.*

* 3. How far a Diſpoſition by Will may operate as a Releaſe. * Page 267

It ſeems agreed, that a Will, though ſealed and delivered, cannot amount to a Releaſe, becauſe it is ambulatory and revokable during the Teſtator's Life; alſo by reaſon of the Executors Conſent requiſite to every Diſpoſition of a perſonal Thing by Will, and the Injury that might accrue to the Teſtator's Creditors, were a Will allowed to operate as a Releaſe. Stil. 286. Vent. 39.

And therefore where in Debt upon an Obligation, by the Repreſentative of a Teſtator, the Defendant pleaded that the Teſtator by his laſt Will in Writing releaſed to the Defendant; this was adjudged ill, and that no Advantage could be taken hereof by Plea. Sid. 421. *Pidgeon* v. *Harriſon.*

But it hath been held in Equity, that though a Will cannot enure as a Releaſe; yet provided it were expreſſed to be the Intention of the Teſtator that the Debt ſhould be diſcharged, the Will would operate accordingly; and Lord *Cowper* ſaid, that in ſuch Caſe it would be plainly an abſolute Diſcharge of the Debt though the Teſtator had ſurvived the Legatee. Will. Rep. 83. pl. 16. *Elliot* v. *Davenport.* 2 Vern. 521. S. C.

So in another Caſe it was held by Lord *King*, that a Releaſe by Will can only operate as a Legacy, and muſt be Aſſets to pay the Teſtator's Debts; and if a Debt ſo releaſed by Will be afterwards received by the Teſtator himſelf in his Life-time, the Legacy is extinct, and ſuch Releaſe by Will intimates no more than that the Executors ſhould not after the Teſtator's Death trouble or moleſt the Debtor. Will. Rep. 332. pl. 95. *Rider* v. *Wager.*

A. deviſed to his Servant *B.* a Legacy of 50*l.* and 20*l. per Ann.* for his Life; and by his Will acquits, exonerates, and diſcharges *B.* of all Debts, Accounts, Reckonings, and Demands whatſoever at the Death of the Teſtator; *B.* had a Trunk of Teſtator's in which were Medals, Jewels, 2 Vern. 115. *Fiſh* v. *Geſſon.*

&c. and it was made a Doubt, and directed to be tried at Law, whether by theſe Words the Trunk, &c. paſſed or not.

2 Vent. 136. *Roberts* v. *Bennet.* *A.* deviſes 100*l.* to *B* and by his Will releaſes to *B.* all Debts and Demands, and afterwards *A* lends *B.* 100*l.* and the Queſtion was, Whether the Will ſhould diſcharge the 100*l.* lent without any new Publication, in which the Court doubted, however decreed Payment of the 100*l.* Legacy, and left the Executor to recover the 100*l.* lent, if he could, at Law.

2 Vern. 522. admitted. If a Debt is mentioned to be deviſed to the Debtor without Words of Releaſe or Diſcharge of the Debt, and the Debtor die before the Teſtator; this will be a lapſed Legacy, and the Debt will ſubſiſt.

(B) Releaſe by Operation of Law, how created, and the Effect thereof.

Co. Lit. 264. b. RElеaſes by Operation of Law are created ſometimes by Deed, or may be without; as if the Lord diſſeiſe the Tenant, and make a Feoffment in Fee; or if the Diſſeiſee diſſeiſe the Diſſeiſor's Heir, and make a Feoffment in Fee; this is a Releaſe in Law of the Seignory in the firſt Caſe, and both of the Right and Action of the Diſſeiſee in the ſecond.

Co. Lit. 264, 265. *Page 268 If a Diſſeiſee releaſe to his Diſſeiſor's Leſſee for Life, his Right is gone for ever; but if he diſſeiſe his Diſſeiſor's Heir, and make a Leaſe * for Life, his Right is releaſed but during the Leſſee's Life, for a Releaſe in Law is more favourably taken according to the Party's Intent than an expreſs Releaſe in Deed.

Co. Lit. 264. Plow. 184-5. Hutt. 128. If the Obligor makes the Obligee his Executor, and he accepts of the Executorſhip, this in Law is a Releaſe of the Action, (*a*) but ſtill the Debt or Duty remains, for which the Executor may retain, but ſuch Retainder can only be againſt Creditors who are in an equal Degree with himſelf.

(*a*) But if there are not Aſſets, the Action is not ſo much as ſuſpended, and the Executor may ſue the Heir of the Obligor where the Heir is bound. Rol. Abr. 940. Salk. 304.—So if a Creditor is made Executor with others, he may ſue the others, eſpecially if he hath not adminiſtered. Cro. Car. 372. Jon. 345. Off. of Exec. 32.

8 Co. 136. Off. of Ex. 31. Salk. 300. So if the Obligee makes the Obligor his Executor, who adminiſters ſeveral Goods, but dies before Probate, this in Law is a Releaſe; ſo an Adminiſtrator who is a Creditor may retain ſo much of the Inteſtate's Aſſets as will ſatisfy himſelf; but an Executor *de ſon tort* who is a Creditor cannot retain, becauſe this would be allowing him to take Advantage of his own Wrong.

Cro. Car. 372. Jon. 345. Rol. Abr. 934. *Dorcheſter* v. *Webb.* *A.* and *B.* are bound in an Obligation jointly and ſeverally to *C.* and after *A.* makes *D.* his Executor, and dies, and *D.* takes upon him the Execution of the Will, and fully adminiſters all the Goods of *A.* and after the Obligee makes the ſame *D.* his Executor, and dies; and the Queſtion was, Whether this was a Releaſe or Extinguiſhment of the Obligations as to *B.* and adjudged to be no Releaſe, becauſe he had it in another's Right.

Ld. Raym. 605. *Caweth* v. *Philips.* Debt upon Bond by the Plaintiff as Executor of the Obligee; the Defendant pleaded that the Obligee made the Defendant Executor during the Minority of the Plaintiff, and that the Plaintiff became Executor at his

his Age of ſeventeen; the Plaintiff demurred; and *per Cur*,' This cannot be a Suſpenſion of the Action, becauſe the Defendant was only Executor in Truſt for the Plaintiff during his Minority.

If *A.* and *B.* be jointly and ſeverally bound to *C.* and *A.* makes *C.* his Executor, or (as the Caſe was) makes *D.* his Executor, who makes *C.* his Executor; in this Caſe if *C.* has not received Satisfaction of the Aſſets of *A.* he may ſue *B.* for being jointly and ſeverally bound, he may ſue which of them he pleaſes. 2 Lev. 73. *Cock* v. *Croſs*

If an Obligor adminiſters to the Obligee, and makes his Executor, and dies, the Creditor of the Obligee may well bring an Action againſt him. Sid. 79.

If the Obligee makes the Obligor his Executor, this is a Releaſe in Law, in regard it is the proper Act of the Obligee, who thereby makes the Executor the only Perſon capable to receive and pay, *&c.* 8 Co. 136. Salk. 306.

But if the Obligee dies Inteſtate, and Adminiſtration of the Goods of the Obligee is by the Ordinary granted to the Obligor, this does not (*a*) extinguiſh the Debt, for he comes into the Adminiſtration by the Act of Law, whereas the other is the Act of the Party. 8 Co. 136. Leon 90. 2 Mod. 315.

(*a*) But if an Adminiſtrator having no Aſſets pays a Debt of the Inteſtate to the Value of the Bond out of his own Money, this will amount to a Releaſe. Salk. 306.

If the Debtee makes the Debtor and another Co-Executors, and one of them makes his Executor, and dies, the ſurviving Co-Executor ſhall not have an Action to recover the Debt againſt the Executor of the Debtor, becauſe the Debt was once extinct; for it could not be brought but in the Names of both the Co-Executors, notwithſtanding one alone adminiſtred; and it could not be brought in both their Names, becauſe the Debtor could not ſue himſelf. Plow. 264. Leon. 320.

* If the Obligee makes the Obligor and others his Executors, and the Obligor refuſes, but the others adminiſter, and the Obligor dies firſt, yet the Debt is releaſed, for the Obligor notwithſtanding the Refuſal might have come in and adminiſtred, and the Probate by the others was for his Benefit. *Page 269 Salk. 308. *per Holt.*

It is ſaid by Ch. Juſt. *Holt*, that a Creditor making his Debtor Executor does not operate as a Legacy, or amount to a Bequeſt to him of the Sum due, but to a Payment and Releaſe; the Meaning whereof is, that ſuch Executor having Aſſets ſufficient to pay the Debts and Legacies of the Teſtator, is diſcharged of the Debt due from himſelf, as he by Law is intitled to all the Reſidue of the Teſtator's perſonal Eſtate after Payment of Debts and Legacies; but it hath been adjudged, that in Caſe of a Deficiency of Aſſets either for the Payment of Debts or Legacies, ſuch Debt is to be deemed Aſſets, and the Executor accountable therewith as ſo much of the Teſtator's perſonal Eſtate. Salk. 304, 306. Cro. Car. 373. Off. of Ex. 30. Yelv. 160. Chan. Ca. 292. and the Caſe of *Selwin* v. *Browne*, which *vide* Title *Executors*.

If an Infant at the Age of ſeventeen make his Debtor Executor, this in Law is a Releaſe; for as the Law gives him Power to make an Executor, it gives his Executor the ſame Advantages with others. Co. Lit 264.

If a Feme Obligee marries the Obligor, or one of the Obligors; or if there be two Feme Obligees, and one of them marries the Obligor; theſe are Releaſes in Law. 8 Co. 136. Co. Lit. 264.

But if a Woman, Executrix of the Obligee, takes the Debtor to Huſband, this is no Releaſe in Law, becauſe ſhe hath the Debt in another Right; and if this amounted to a Releaſe in Law, it would be a *Devaſtavit*, which is a Wrong the Law will not ſuffer. 8 Co. 136. Co Lit 264. Cro. Eliz. 111. S. P adjudged that it was ſuſpended but not extinguiſhed, for that after the Huſband's Death an Action would lie againſt his Executor. Moor 236. pl. 368 Leon. 320.

If

2 Rol. Abr. 935. Hob. 10. Moor 855. *Frier* v. *Gildridge.*

If *A.* and *B.* are bound in an Obligation jointly and ſeverally to *C.* and *C.* makes *D.* the Wife of *A.* his Executrix, and dies, and *D.* adminiſters, and after *A.* the Huſband of *D.* makes *D.* his Executrix, and dies, leaving ſufficient Aſſets to pay the Debt, and after *D.* dies, and *E.* takes Adminiſtration of the Goods of *C.* the Obligee not adminiſtred, yet he can have no Action upon the Obligation againſt *B.* the other Obligor, becauſe that when the Obligor made the Executrix of the Obligee his Executrix, and left Aſſets, the Debt was preſently ſatisfied by way of Retainer, and then by Conſequence no new Action could be had for the Debt.

Co. Lit. 264. 8 Co. 136. Dyer 140.

By an Intermarriage all Contracts between the Huſband and Wife for Debts due *in præſenti* or *in futuro*, or upon a Contingency which may become due during the Coverture, are releaſed and extinct, becauſe the Huſband and Wife make but one Perſon in Law; and it is holden by Juſt. *Gould*, that if there was an expreſs Agreement that they ſhould not be releaſed by the Intermarriage, it would be void, as inconſiſtent with the State of Matrimony.

Hob. 216, 217. Hutt. 17. Noy 26. Cro. Jac. 571. Palm. 99. Rol. Rep. 343. 2 Rol. Abr. 407. Godb. 271. 2 Rol. Rep. 162. Lit. Rep. 32. Hetl. 122. 2 Sid. 58.

But it is the better Opinion, and founded on great Variety of Caſes, that Promiſes, Covenants, and Agreements for the Performance of a Thing which is not to happen during the Coverture, as Payment of Money after the Huſband's Deceaſe, are not releaſed by the Marriage.

Alſo it hath been adjudged by two Judges againſt *Holt* Ch. Juſt. that where *A.* entered into a Bond to his intended Wife, conditioned to leave her at his Death 1000 *l.* if ſhe ſurvived him, that ſuch Bond was not releaſed by the Marriage, as nothing would be due during the Coverture, and as it would be contrary to the expreſs Agreement of * the Parties. But the Ch. J inſiſted ſtrenuouſly, that a Bond differed from a Promiſe or Covenant, being *debitum in præſenti*, though *ſolvenaum in futuro*; and that the Rule of Law could not be controuled by the Intention of the Parties.

*Page 270

Ld. Raym. 515. Carth. 511. Comb. 242. Lill. Ent. 214. Salk. 325. Holt 309. pl. 12. Comyn 67. pl. 42. Freem. 512. pl. 687. 515. pl. 691. 12 Mod. 288. *Gage* v. *Acton.*

2 Vern. 290, 480. Preced. Chan. 237.

Alſo where a Man entered into a Bond to his intended Wife, conditioned to leave her 1000 *l.* and the Huſband mortgaged his Eſtate and died, not leaving perſonal Aſſets to diſcharge the Bond; and it was decreed in Equity, that admitting the Bond void at Law, yet it ought to be made good in Equity, and that ſhe ought to redeem and hold the Land till ſhe was ſatisfied her Debt. ‡

‡ See 2 Peere Williams 243. *Cannel* v. *Buckle*, where the Feme gave a Bond to her intended Huſband, that in caſe of their Marriage ſhe would convey her Lands to him in Fee; they married, the Wife died without Iſſue, and then the Huſband died: The Bond, though void in Law, yet was good Evidence of the Agreement in Equity; and the Heir of the Huſband ſhould compel a ſpecific Performance againſt the Heir of the Wife.

(C) Releases of Lands and Hereditaments how they enure: And herein,

1. Of Releases that enure by way of *Mitter le Estate.*

RElease, says my Lord *Coke*, may enure four Manner of Ways: 1. By way of *Mitter le Estate.* 2. By way of Enlargement or Creation of Estate; upon both which a Rent may be reserved. 3. By way of *Mitter le droit.* 4. By way of Extinguishment; upon which two last no Rent can be reserved. Co. Lit. 193. b. 273. b.

When two or more become seised of the same Estate by a joint Title, as by a Contract or Descent as Jointenants or Coparceners, and one of them releases to the other his or her Claim, Right and Pretensions, such Release is said to enure by way of *Mitter le Estate.* Co. Lit. 273. b.

For if there be two Jointenants, and one of them releases to the other, the Releasee is in by the original Conveyance; and such Release is no Alienation, nor doth it make (*a*) a Degree; (*b*) nor can this be any Injury to a Stranger's *Præcipe*, for he may bring it against them all, and if any of them disclaim, the Rest must defend for the Whole, or lose their Interest. Co. Lit. 273. b.

(*a*) But if there are three Jointenants, and one releases to another of them, such Release makes a Degree. Co. Lit. 273. b. Winch 3.——So does the Release of one Coparcener to another. Co. Lit. 273. b. (*b*) Booth 33.

And herein it is to be observed, that Jointenants can only regularly pass their Estates by Release; and that by reason of the Privity which must necessarily be in Releases which enure by way of *Mitter le Estate*, a Fee-simple passes without the Word *Heirs.* *Vide* Title *Jointenants.*

But if there be two Tenants in Common, they cannot release to each other, but they must pass their Estate by Feoffment, *&c.* because this Estate being established by different Notorieties, each having passed by distinct Liveries, they must pass to each other by a distinguishing Livery, or else it cannot be known in whom such Parts are which formerly had passed by a distinct Livery. *Vide* Title *Jointenants and Tenants in Common.*

As to Coparceners, they having in respect of the descending Line distinct Estates, they may pass the same by Feoffment, *&c.* or may release to each other, and shall join in an Assise, as each is seised *per my & per tout.* *Vide* Title *Coparceners.*

If there are two Coparceners, and the one enters in the Name of both, and the other releases to him, this countervails Entry and Feoffment, and is good Cause of Voucher; but where one enters in his own Name only, and claims to him alone, and the other releases to him, * this is only an Extinguishment of the Right, and no making of the Estate. 21 E. 3. 27. Bro. *Releases.* 16. 2 Rol. Abr. 403. * Page 271

If there be two Parceners of a Rent, and one of them marry the Tertenant, and the other release to her, this shall enure by way of *Mitter le Estate*, and yet the Rent was suspended at the Time of the Release; but if she had released to the Husband, it would have enured by way of Extinguishment. Co. Lit. 273. b. Raym. 413. cited.

One Jointenant of a Reversion depending on a Lease for Life may release to the other; but if the Rent be Arrear, the one cannot release his Interest in the Arrearages to the other. 2 Rol. Abr. 403. Ley 167.

If *A.* Feme Sole and *B.* are Jointenants for Life, and *A.* takes *C.* to Husband, and after *A.* and *C.* levy a Fine to *B.* by which they grant the 2 Rol. Abr. 409.

Land

2 Rol. Rep. 398, 485. *Euſtace* v. *Scawen.* Land to *B.* & *quicquid habent*, &c. and his Aſſigns, with Warranty, and after *B.* dies, living *A.* yet the Leſſor may enter into the Whole, and there ſhall not be any Occupant of any Part, becauſe this Fine enures as a Releaſe, not by *Mitter le Eſtate*, but by way of Extinguiſhment.

Winch 3. *Waſe* v. *Pretty.* If one joint Copyholder releaſe to his Companion; this is good without Surrender or Admittance, for the firſt Admittance was of them and every of them, and the Ability to releaſe was from the firſt Conveyance and Admittance.

Winch 3. If Land be given to two upon Condition that they ſhall not alien, and one of them releaſes to the other, this is no Breach of their Condition.

Vaugh. 45. If two Jointenants in Fee let the Land for Life, reſerving a Rent to them and their Heirs; if one releaſe to the other and his Heirs, this Releaſe is good, and he only, to whom it was made, ſhall have the Rent of Tenant for Life, and a Writ of Waſte without Attornment to ſuch Releaſe, for the Privity which was once between the Tenant for Life and them in the Reverſion.

2 Jon. 136. Raym. 413. *Harriſon* v. *Belſey.* Vent. 345. S.C. but ſays it was adjudged that the contingent Remainders were deſtroyed.—[See *Fearne* on Contingent Remainders. 3d Edit. 259, &c.] *A.* and *B.* Jointenants for their Lives, Remainder to the firſt Son of *A.* in Tail, and ſo to the ſecond, &c. Remainder to the right Heirs of *B.* before any Iſſue had *A.* releaſes to *B.* and his Heirs, and after hath Iſſue a Son; and the Queſtion was, If by this Releaſe before the Birth of a Son the contingent Remainders were deſtroyed; and though it was urged that this uniting of the Eſtate for Life with the Remainder in Fee, being by Conveyance and Act ſubſequent to the Limitation of the contingent Remainders, and before they came in Being had deſtroyed them; yet it was adjudged by three Judges againſt *Dolben*, that theſe contingent Remainders were not deſtroyed, for that to ſome Purpoſes the whole Fee was executed in *B.* immediately upon the firſt Conveyance, and this Releaſe of *A.* gave him no greater Eſtate nor in any other Degree than he had before, for after ſuch Releaſe he is in of the whole Eſtate by the Leſſor, as he was before, and as he would have been had it come to him by Survivorſhip.

2. Releaſes by way of *Mitter le Droit* how they enure.

Co. Lit. 274, 276. Releaſes are ſaid to enure by way of *Mitter le Droit* where a Perſon is diſſeiſed, and he releaſes to the Diſſeiſee, his Heir or Feoffee, who being in Poſſeſſion are therefore capable of taking a Releaſe of the Right.

Lit. Sect. 472. If there be two Diſſeiſors and the Diſſeiſee releaſe to one of them, he ſhall hold out his Companion, becauſe the Diſſeiſor comes in by no lawful or eſtabliſhed Act of Notoriety, which ought to be defeated before the *Page 272 Manner of poſſeſſing can be altered; and therefore though he * poſſeſſed as a Jointenant before the Releaſe, yet after the Releaſe he ſhall oust his Companion, becauſe he was poſſeſſed of the Whole before by Wrong, and now being poſſeſſed by Right, it follows that the Poſſeſſion of the other Wrong-doer is no Poſſeſſion at all.

Co Lit. 276. (*a*) That the Feoffees are in by Title, and are preſumed to have a Warranty which is much favoured in Law. Co. Lit. 276. But if a Diſſeiſor had infeoffed two, the Releaſe of the Diſſeiſee to one ſhould enure to both, (*a*) becauſe coming in by the legal Notoriety of a Feoffment, that muſt be defeated by an Act of equal Notoriety before the Title can be altered, becauſe the Feoffment muſt ſtand good as an Act that gives Warning to all Perſons in whom the Freehold ſubmits, till by ſome Act of equal Solemnity it appears that the Freehold is in another.

Co. Lit. 274-5. So where a Diſſeiſor makes a Leaſe for Life, the Remainder in Fee, and the Diſſeiſee releaſes to the Tenant for Life, or to the Remainder-Man;

Man; this enures to them both, becauſe coming in by a known Conveyance, it cannot be altered unleſs it were defeated by an Act of equal Notoriety.

If a Diſſeiſor makes a Leaſe for Life, and the Diſſeiſee releaſes to Tenant for Life, this ſhall not enure to him in Reverſion, becauſe the Releaſe cannot alter the Eſtate that paſſed by the Feoffment without ſome Act that deſtroys the Feoffment. Co.Lit. 276.

So if there be two Diſſeiſors, and they make a Leaſe for Life, and the Diſſeiſee releaſes to Tenant for Life, this ſhall enure to them all. Co.Lit. 276.

If there be Tenant for Life, the Remainder in Fee, and Tenant for Life is diſſeiſed by two, and he releaſes to one of them, he ſhall not hold out his Companion; ſo if the Remainder Man had releaſed to one of the Diſſeiſors, he ſhould not hold out his Companion. Co.Lit. 276.

But if Tenant for Life and he in Remainder join in a Releaſe to one Diſſeiſor, he ſhall hold out his Companion, becauſe when the Poſſeſſion is notoriouſly in them both, each of them are capable of a Releaſe, and when one has obtained a Releaſe, it makes his Poſſeſſion rightful, and his holding out his Companion makes it immediately notorious that the Eſtate is in him alone. Co.Lit. 276.

So alſo if the Diſſeiſors make a Leaſe for Years, and the Diſſeiſee releaſes to one of them, this ſhall enure to them both, becauſe he cannot make it notorious that the Eſtate is in him alone, becauſe he cannot hold out his Companion during the Continuance of the Leaſe for Years. Co.Lit. 277.

So if two Jointenants are diſſeiſed by two, and one releaſes to one of them, he ſhall not hold out his Companion, becauſe he cannot hold him out of the Whole, becauſe he has not the whole Right, and ſo there can be no Act of Notoriety whereby the Eſtate may appear to be in one Diſſeiſor. Co.Lit. 276.

If the King's Tenant for Life be diſſeiſed by two, and he releaſes to one of them, this enures to both, becauſe he can only be diſſeiſed of an Eſtate for Life ſince the Reverſion in the King cannot be diveſted.† Co.Lit. 277.

† There is not any ſuch Poſition in fo. 277. either a or b.—In 276. a. it is ſaid, if the King's Tenant for Life be diſſeiſed by two, and he releaſeth to one of them, he ſhall hold out his Companion, for the Diſſeiſor gained but the Eſtate for Life.

If there be Tenant for Life, Remainder in Fee, and they are diſſeiſed, Tenant for Life cannot releaſe to him in Remainder, becauſe the naked Right cannot be transferred. Co.Lit. 276.

If the Heir of the Diſſeiſor be diſſeiſed, and the Diſſeiſee releaſes to ſuch Diſſeiſor, and after the Heir recovers againſt ſuch Diſſeiſor, the Right of Propriety goes long with it, becauſe, when the Heir recovers, he defeats the Poſſeſſion of the Diſſeiſor as if it had never been, ſo that the Diſſeiſor can never recover in any Action, for in the Writ of Right he muſt lay the Poſſeſſion in himſelf or ſome of his Anceſtors; and this he cannot do in this Caſe, for here there never was any Poſſeſſion in him but what was totally defeated and deſtroyed; and he cannot recover by the old Poſſeſſion of the Diſſeiſee, for that * was turned into a naked Right, which could not be transferred but to a true and real Poſſeſſion; and here being no Poſſeſſion but ſuch as ſtands defeated, it is the Conveyance of a naked Right, which the Law will not allow. Co.Lit. 276. 8 Co. 152. *Page 273

If the Heir of the Diſſeiſor be diſſeiſed, and the Diſſeiſee releaſes to the Diſſeiſor upon Condition, and the Condition be broken, this reveſts the naked Right in the Diſſeiſee, becauſe when the Condition is broken the Releaſe is as if it had never been, and therefore the Diſſeiſee may recover by virtue of his ancient Seiſin. Co.Lit. 277.

Co.Lit. 276. If two Men gain an Advowſon by Uſurpation, and the right Patron releaſes to one of them, he ſhall not hold out his Companion, but it ſhall enure to them, for their Clerk came in by Admiſſion and Inſtitution, which are judicial and notorious Acts.

3. Releaſes that enure by way of Extinguiſhment.

Co.Lit. 279. b. 280. In ſome Caſes where the Releaſee cannot have the Thing releaſed by way of *Mitter le Droit*, *&c.* yet the Releaſe ſhall enure by way of Extinguiſhment againſt all Manner of Perſons; as when the Lord releaſes his Seignory to his Tenant of the Land, or when the Grantee of a Rent-Charge or Common releaſes to the Tenant, and ſuch Releaſes abſolutely extinguiſh the Rent, *&c.* although the Releaſee be only Tenant for Life.

Lit. Sect. 456. If a Leaſe be made to one for Life, reſerving Rent to the Leſſor and his Heirs; if the Leſſee be diſſeiſed, and after the Leſſor releaſes to the Leſſee and his Heirs all his Right in the Land, and after the Leſſee enters; in this Caſe the Rent is extinct, but the Right of the Reverſion doth not paſs.

Lit. Sect. 454. If there be Lord and Tenant, and the Tenant be diſſeiſed, and the Lord releaſes to the Diſſeiſee all the Right which he has to the Seignory or in the Land, this Releaſe is good, and the Seignory extinct.

Co.Lit. 268. Lit Sect. 454. § See the ſtat. 21 H. 8. c. 19. & Co. Lit. 268. b. † For the Diſſeiſee is Tenant to him in Right and in Law. But yet if the Tenant, notwithſtanding he is diſſeiſed, puts his Beaſts on the Land, and the Lord takes them for Rent Arrear, the Diſſeiſee ſhall compel § him to avow on him; and if the Lord avows upon the Diſſeiſor as his Tenant, and the Diſſeiſee ſhall reply and ſhew the ſpecial Matter how he was Tenant and was diſſeiſed, this ſhall abate the Lord's Avowry.†

Co.Lit. 268. But if the Tenant be diſſeiſed, and the Lord accept Rent from the Diſſeiſor, and then the Lord diſtrains his Beaſt for Rent in Arrear, he may compel the Lord to avow on him, and the Lord cannot traverſe the Diſſeiſor's Title, having once admitted it by Acceptance of the Rent from him.

Co.Lit. 268. b. 48 E. 3. 9. And according to my Lord *Coke*, if after ſuch Acceptance the Diſſeiſee ſhould put in his Beaſts, and the Lord ſhould diſtrain them, the Diſſeiſee cannot compel the Lord to avow on him, becauſe it was his own Laches to let the Diſſeiſor continue till Rent was due and accepted.

Co.Lit. 268. So if the Diſſeiſor dies ſeiſed, the Heir of the Diſſeiſor comes in by Title, and then the Diſſeiſee cannot compel him to avow upon him, for he has loſt the Right of Poſſeſſion; and the Diſſeiſee cannot put his Beaſts on the Ground, and therefore cannot compel the Lord to avow on him, and therefore the Lord muſt take the Heir who has ſuch Right of Poſſeſſion to be his rightful Tenant; but becauſe the Diſſeiſee may enter and occupy the Land before the Deſcent caſt, therefore the Lord may releaſe to him and diſcharge the Contract, which is to his Benefit, and is ſtill ſo far ſubſiſting that he may take Advantage of it.

*Page 274 Co.Lit. 280. * So where Donee in Tail releaſes to the Diſſeiſor all his Right, yet if he in the Reverſion releaſes to him afterwards, it ſhall extinguiſh the Rent.

Co.Lit. 268. There is a Diverſity between a Seignory and a bare Right to Land, for a Releaſe of a bare Right to Land to one who has but a bare Right, is void; but a Releaſe of a Seignory to him who has but a Right, is good to extinguiſh the Seignory.

But

But if there be Lord and Tenant, and the Tenant makes a Feoffment in Fee, and afterwards the Lord releaſes to the Feoffor; this extinguiſhes nothing, for by the Feoffment the Relationſhip between the Lord and Tenant is deſtroyed, and the Feoffor only of Neceſſity becomes Tenant in the Avowry till the Lord procures his Arrears. Co. Lit. 269. Lit. Sect. 457.

If a Feme Meſne marries her Tenant, and the Lord releaſes to the Feme, the Seignory is extinct; but if he releaſe to the Huſband, both the Seignory and Meſnalty is extinct. Co. Lit. 280.

If the Tenancy be given to the Lord and a Stranger, and the Heirs of the Stranger, the Lord releaſes all his Right to his Companion; this not only paſſes his Eſtate in the Tenancy, but alſo extinguiſhes his Right in the Seignory. Co. Lit. 280.

If Leſſee for Years be ouſted, and he in the Reverſion diſſeiſed, and the Leſſee releaſes to the Diſſeiſor the Diſſeiſee may enter, for the Term for Years is extinct and determined; but were it in the Caſe of a Leſſee for Life, it would be otherwiſe, becauſe the Diſſeiſor has a Freehold whereupon the Releaſe of Tenant for Life may enure. Co. Lit. 275.

Leſſee for Years deviſed the Term to his Wife for Life, the Remainder of the Years to *J. S.* who by Deed releaſed all his Right, Intereſt, Term for Years, Poſſeſſion, and Demand in the ſaid Land to him who had the Reverſion in Fee; and by this it was held, that the Poſſeſſion was extinguiſhed in the Reverſion, and that the Reverſioner may after the Death of the Wife well enter. Jon. 389. *Johnſon* v. *Trumper.*

If the Lord releaſes his Right in one Acre, this extinguiſhes the whole Seignory. Moor 56. pl. 161. *per Cur.* Dalſ. 60. & v. And. 235.

So if a Man has a Rent-charge out of twenty Acres, and he releaſes all his Right in one Acre, this extinguiſhes all the Rent. Bro. *Releaſes*, pl. 18.

But it hath been held, that if the Grantee of a Rent-charge releaſes Part of his Rent, ſuch Releaſe does not extinguiſh the whole Rent. Co. Lit. 148. & *vide* Cro. Eliz. 742.

If the Lord releaſes to his Tenant all his Right to the Land and Seignory, *Salvo ſibi dominio ſuo*; this does not extinguiſh the Tenure, but only the annual Services. Dyer 157. b. pl. 29.

4. Releaſes that enure by way of Enlargement: And therein of the modern Manner of Conveyancing by Leaſe and Releaſe.

Releaſes enure by way of Enlargement when the Poſſeſſion and Inheritance are ſeparated for a particular Time, and he who hath the Reverſion or Inheritance releaſeth to the Tenant in Poſſeſſion all his Right or Intereſt in the Land; ſuch Releaſe is ſaid to enlarge his Eſtate, and to be equal to an Entry and Feoffment, and to amount to a Grant and Attornment; and herein the Law requires Privity of Eſtate, that the Releaſor have a Right, and the Releaſee ſuch a (*a*) Poſſeſſion as will make him capable of taking an Eſtate. Co. Lit. 273. Finch 44. 5 Co. 124. Dyer 302.

(*a*) Poſſeſſion countervails, and is equal to Livery. Dyer 269. pl. 20. Margin.

* And therefore if there be Leſſee for Life or Years in Poſſeſſion, the Leſſor may enlarge their Eſtates by Releaſe; ſo if they aſſign or grant over, the Eſtate or Intereſt of Grantee or Aſſignee may be enlarged by the Releaſe of him in Reverſion. *Page 275 Co. Lit. 273. 2 Rol. Abr. 401.

So if there be a Leſſee for Life, Remainder in Tail, the Remainder in Fee; he in Remainder in Fee may enlarge the Eſtate of the Leſſee by Releaſe notwithſtanding the meſne Remainder. 44 Aſſ. 35. but *vide* Brownl 207.

But

Co. Lit. 272. But if *A.* makes a Leaſe for Life, and Leſſee for Life makes a Leaſe for Years, and *A.* releaſes to the Leſſee for Years and his Heirs; this is void, becauſe there is not the Conſent of the Tenant for Life, who is immediate Tenant to the Reverſioner, and ought to attorn to his Grants.

Co. Lit. 270. Dyer 4. pl. 2. Carter 62. So if a Man leaſes for twenty Years, and the Leſſee aſſigns for ten Years, a Releaſe by the Reverſioner to the Aſſignee is void for want of Privity; but a Releaſe to the Leſſee is good, for he hath the Poſſeſſion notwithſtanding the Aſſignment; the Poſſeſſion of the Leſſee being always conſidered the Poſſeſſion of the Leſſor, and that he holds as his Bailiff.

Co. Lit. 273. If a Man makes a Leaſe for Years, the Remainder for Life, and afterwards releaſes to the Tenant for Years; this is good, becauſe the Tenant for Years holds of the Reverſioner, and pays him the Services, and ought to attorn to his Grants, and not he in the Remainder for Life; and therefore where Tenant for Years accepts a Releaſe of the Reverſion, it muſt in Conſequence be good; and in this Caſe a Releaſe to him in the Remainder for Life would be good likewiſe, becauſe the Leſſee in the original Creation took the Eſtate for Years, ſubject to ſuch Remainder for Life, and therefore there needs no Conſent from the Leſſee for Years to enlarge the Eſtate.

Co. Lit. 273. a. If Tenant by the Curteſy grants over his Eſtate, he is not afterwards capable of taking a Releaſe, for his Eſtate is created merely by Law, and he remains Tenant to the Heir, and ſubject to Waſte, and is compellable to attorn to the Grants of the Reverſioner; yet is he not capable of a Releaſe, becauſe he has no notorious Poſſeſſion *in paiis*, which may be enlarged into a Fee.

2 Rol. Abr. 400-1. But the Grantee of Tenant in Dower, or by the Curteſy, is capable of taking a Releaſe, becauſe of the Privity and Notoriety of Poſſeſſion.

Co. Lit. 273. b. Keilw. 129. pl. 97. If a Feme Covert be Tenant for Life, a Releaſe to the Huſband and his Heirs is good, for there is both Privity and an Eſtate in the Huſband, whereupon the Releaſe may ſufficiently enure by way of Enlargement, for by the Intermarriage he gains a Freehold in Right of his Wife.

Co. Lit. 273. a. b. If an Infant makes a Leaſe for Life, and the Leſſee aſſigns it over to another with Warranty, the Infant at full Age brings a *Dum fuit infra ætatem* againſt the Aſſignee, and he vouches the Aſſignor, who enters into the Warranty, the Demandant cannot releaſe in Fee ſo as to enlarge the Eſtate, becauſe the Vouchee has no Poſſeſſion.

Lit. Sect. 490. Co. Lit. 266. 284. b. Hob. 338. But he who aliens pending the Writ may, as long as that Writ is pending, accept a Releaſe from the Demandant; ſo may a Vouchee after he hath entered into the Warranty, for though they be not Tenants, yet the Law and the Parties have allowed them as Tenants *inter ſe* for that Suit.

Co Lit. 270. b. If a Man makes a Leaſe for Life, the Remainder for Life, and the firſt Leſſee dies, a Releaſe to him in the Remainder, and to his Heirs, is good before he enters to enlarge his Eſtate, becauſe he hath an Eſtate of a Freehold in Law in him, which may be enlarged by Releaſe before Entry.

*Page 276 Co. Lit. 270. * But at Common Law, a Releaſe to a Leſſee for Years before Entry is void; yet it is ſaid by my Lord *Coke*, that if a Man makes a Leaſe for Years, the Remainder for Years, the firſt Leſſee enters, a Releaſe to him in the Remainder for Years is good to enlarge his Eſtate.

Co. Lit. 270. b. And if a Leaſe for Years be made to two, albeit the Leſſor before they enter cannot releaſe to them to enlarge their Eſtate, yet one of them may before Entry releaſe to the other.

If an (*a*) Advowſon be granted for Years, the Patronage for Years is in the Grantee, and he may accept a Releaſe in Fee of the Patron; but if one, two, or three Avoidances are granted, the Patronage is not ſeparated, nor can ſuch Grantee accept of a Releaſe in Fee of the Patron in Fee who hath the Inheritance. Jon. 19.

(*a*) If a Man ſeiſed of a Rent in Fee grants it for Life he may enlarge it by Releaſe. 43 Aſſ. 8. 2 Rol. Abr. 400.

If *A.* a Member of a Corporation, diſſeiſe *B.* to his own Uſe, or if a Mayor and Commonalty diſſeiſe *B.* and *B.* in the firſt Caſe releaſes to the Mayor and Commonalty, or in the ſecond to a particular Member of the Corporation; nothing paſſes by theſe Releaſes, for they are diſtinct Perſons, and claim in different Rights, conſequently there is no Privity. 8 H. 6. 1. Bro. *Releaſes*, pl. 62. 2 Rol. Abr. 403.

If a Man ſues Execution upon an (*b*) *Elegit* of the Lands of his Debtor, and the Debtor who hath the Inheritance confirms his Eſtate, he may afterwards enlarge it by a Releaſe, for the Confirmation hath created a Privity between them. 31 Aſſ. 13. 2 Rol. Abr. 401.

(*b*) So of a Tenant by Statute Merchant or Staple. Co. Lit. 270. b.

A Releaſe by a Leſſor to his Leſſee at Will, having entered by Force of ſuch Leaſe, is good in reſpect of the Privity between them, and as it would be a vain Thing for the Leſſor to make Livery and Seiſin to one already in Poſſeſſion of the Land by his own Agreement. Co. Lit. 270. Lit Sect. 460. Dyer 269. b. pl. 20.

Owen 28, 29. S. P. and that ſuch Leſſee ſhall have Aid.

But if Tenant at Will makes a Leaſe for Years, and the Leſſee enters, he only is the Diſſeiſor, and a Releaſe or Confirmation to the Tenant at Will afterwards is void, becauſe the Privity is determined. Cro. Eliz. 830. *Shaw* v. *Barber*.

A Releaſe to a Tenant at Sufferance, as where Leſſee for Years holds over, is void, for though there be a Poſſeſſion, yet there is no Privity, which is equally requiſite. Co. Lit. 270. b. Dyer 28. pl. 19. Cro. Eliz. 268. 3 Leon. 152. Brownl. 207. Cro. Jac. 170.

If one enter of his own Wrong and take the Profits, his Words, To hold it at the Owner's Will, cannot qualify the Wrong, for he is a Diſſeiſor, and in ſuch Caſe the Owners Releaſe to him is good; or if the Owner conſented, he is Tenant at Will, and in ſuch Caſe the Releaſe is likewiſe good. Co. Lit 271. a.

The antient Manner of Conveyancing was by Feoffment, but the Manner of making Livery and Seiſin begetting many nice Queſtions, grew troubleſome, which put Lawyers upon new Devices, and introduced the modern Manner of Conveyancing by Leaſe and Releaſe; this Method is ſaid to have been firſt (*c*) invented in King *Charles* the Firſt's Reign, and has its Validity from the Reaſons drawn from the Statute of Uſes §; for, by the Bargain and Sale for a Year, the Bargainee * by Force of the Statute is in Poſſeſſion without Entry, and when the Bargainor releaſes to him in Poſſeſſion, the Leaſe is merged, and the Bargainee hath the Inheritance; for as at Common Law if a Man granted a Leaſe, and the Leſſee entered, this divided the Eſtate, and left a Reverſion in him, and the Poſſeſſion in the Leſſee; but ſtill by the Common Law, the Leſſee (*d*) before Entry could not accept of a Releaſe, having only an *Intereſſe Termini*; and now though the Leſſee does not enter, yet the Statute veſting the Eſtate or Uſe in him for a Year, he is deemed to be in the actual Poſſeſſion, and ſo capable of a Releaſe as much as a Leſſee in Poſſeſſion was at Common Law; but yet this Leſſee cannot have Treſpaſs till an actual Entry.

(*c*) By Sir *Francis Moor*, 2 Mod. 252. * Page 277 § 27 H. 8. c. 10. 2 Salk. 678. pl. 5. 2 Ld. Raym. 798. & *vide* 7 Mod. 74.

(*d*) Lit. Sect. 459. 5 Co. 124. Plow. 423.

Leſſee

Lutw. 570. 7 Mod. 73. Leſſee for Years cannot make a Leaſe for Years within the Statute of Uſes, ſo as by this Means to give the Poſſeſſion, and make his Leſſee capable of a Releaſe of the Reverſion.

Mod. 262. 2 Mod. 249. 2 Vent 35. *Barker* v. *Keate*. In Ejectment upon a ſpecial Verdict the only Queſtion was, whether a Leaſe for a Year upon no other Conſideration than reſerving a Pepper-Corn, if it be demanded, could operate as a Bargain and Sale, and ſo make the Leſſee capable of a Releaſe; and reſolved that it ſhould, the Reſervation making a ſufficient Conſideration to raiſe an Uſe in the ſame Manner as a Bargain and Sale does.

Godb. 299. Hard. 491. Carter 162. A Releaſe to *Ceſtuy que Uſe* is good; ſo to a *Ceſtuy que Truſt*, who being in Poſſeſſion, may at leaſt be conſidered as Tenant at Will.

5. What Eſtate or Intereſt paſſes by the Releaſe: And therein of the Words requiſite to an Enlargement

Lit. Sect 465. Co. Lit. 273. b. Jenk. 200. Jon. 328. Cro. Car. 335. Releaſes, like other Conveyances, regularly require Words of Inheritance; ſo that if the Leſſor releaſe to his Leſſee for Years, without ſaying to him and his Heirs, ſuch Leſſee hath only an Eſtate for his Life.

Co. Lit. 273. b. 2 Vent. 328. So if a Releaſe be made to Tenant by Statute Staple or Merchant or *Elegit*, by him the Reverſion of all his Right in the Land; by this a Freehold paſſes for the Life of the Releaſee, it being the greateſt Eſtate that can paſs without apt Words of Inheritance.

Co. Lit. 275. b. If a Leſſor releaſe to his Leſſee *pur auter vie*, he gives him an Eſtate for his own Life

Comp. Incumb. 373. A Chauntry Prieſt incorporate took a Leaſe to him and his Succeſſors for 100 Years, and afterwards took a Releaſe from the Leſſor to him and his Succeſſors; and it was adjudged, that by the Releaſe he had but an Eſtate for Life, for he had the Leaſe at firſt in his natural Capacity, for that it could not go in Succeſſion; and the Words *his Succeſſors* could not give him an Eſtate of Inheritance in the ſame Capacity he had the Leaſe, for want of the Words *his Heirs*.

Co. Lit. 9. Coke R. on *Fines* 7. But if the Lord releaſes all his Right to the Tenant, the Seignory is extinct without the Word *Heirs*; for this Inſtrument is to diſcharge the Eſtate of the Tenant, and therefore has a neceſſary Relation to the Eſtate which the Lord at firſt created, and conſequently it refers to thoſe Words that in the Original of the Eſtate gave him a Fee-ſimple.

Co. Lit. 9. 292. So in Releaſes that enure by way of *Mitter le Eſtate*, the Word *Heirs* is not requiſite; as where there are two Coparceners, and one of them releaſes to the other, this gives a Fee without the Word *Heirs*, becauſe it hath a neceſſary Relation to the Eſtate whereof the other was ſeiſed.

Co. Lit. 9. 200. *Page 278 So if there be two Jointenants, and one releaſe to the other, this paſſeth a Fee without the Word *Heirs*, becauſe it refers to the whole * Fee, which they jointly took and are poſſeſſed of by Force of the firſt Conveyance; but Tenants in Common have diſtinct Eſtates, and cannot enlarge the Eſtates of each other without proper Words of Inheritance.

And. 45. (a) *Secus*, had the Releaſe been made to the Wife. Dyer 265. a. pl. 34. If Lands be given to Baron and Feme, and a Stranger in Fee, and the Stranger releaſes to the (a) Baron; this gives him the Fee without other Words of Inheritance.

A Re-

A Releaſe by one of a bare Right for a Day or an Hour is as good as if it was made to the other and his Heirs; for the Diſſeiſee cannot releaſe Part of his Eſtate in the Right, becauſe he has no Right to any Eſtate but that whereof he was ſeiſed, therefore he muſt releaſe his Right to that, or none at all. Co. Lit. 274.

(D) Who in reſpect of their Right or Intereſt are capable of releaſing.

A Bare Authority cannot be releaſed; as where a Man by Will directs that his Executors ſhall ſell his Lands; this being a Power only, and no Matter of Intereſt in the Executor, he cannot (*a*) releaſe it to the Heir. Co. Lit. 265. b. Rol. Rep. 197. 3 Bulſ. 31.

(*a*) So if *Ceſtuy que Uſe* had deviſed that his Feoffees ſhould ſell the Land, and they had made a Feoffment over, yet might they have ſold the Uſe. Co. Lit. 265. b.

But though theſe Powers in Strangers cannot be releaſed, yet a Power of Revocation in the Feoffor or Party from whom the Eſtate moved may be releaſed by Deed, or by levying a Fine, which is a Releaſe in Law, for it is in Nature of a Condition, whereby he may reſtore himſelf to his former Eſtate whenever he pleaſes, and conſequently ſuch Power, like other Reſervations, may be releaſed. Co.Lit. 237, 265. Co. 110. 4 Leon. 133.

After one hath found Surety of the Peace, all the King's Subjects have an Intereſt in it, and neither the King nor Party againſt whom it is found can releaſe it, 21 E. 4. 40. 2 Rol. Abr. 401.

In Treſpaſs or *Detinue* by the Villein the Releaſe of the Lord is a good Bar. 18 H. 6. 23. 2 Rol. Abr. 402.

If a Commonalty be diſſeiſed, and after every one releaſes for himſelf it is not good, becauſe it ought to be by their common Seal. 19 H. 6. 64. 2 Rol. Abr. 402.

A Perſon who procures an Outlawry in Debt may releaſe the Party, for the Releaſe is a Satisfaction to him; and the Outlawry in this Caſe being pardoned by Act of Parliament, the Party is abſolutely diſcharged. Noy 5. *Albany* v. *Manny*.

If *A.* covenants with *B.* that *C.* ſhall pay to *D.* 8*l.* yearly, and *D.* takes *J. S.* to Huſband, who releaſes the Payment to *A.* this Releaſe does not diſcharge him, for *J. S.* is a Stranger to the Covenant, and hath no Right in him. 3 Bulſ. 29. Rol. Rep. 196. 2 Rol. Abr. 402. *Quick* v. *Ludburrow*.

If *A.* has Judgment againſt *B.* for Debt or Damages, and after extends the Land of *B.* for this Debt, and then aſſigns over the Land extended to *C.* for all his Eſtate therein, and after *A.* releaſes to *B.* the Judgment; this ſhall avoid the Extent, ſo that *B.* may have an * *Audita Querela* againſt *C.* the Aſſignee, and therein ſhall (*b*) avoid the Extent, becauſe *B.* notwithſtanding the Aſſignment, continues privy to the Judgment, and might after the Aſſignment have acknowledged Satisfaction of the Judgment, and ſo defeat the Eſtate of the Aſſignee; and this Releaſe is all one as if he had acknowledged Satisfaction of the Judgment. * Page 279 2 Rol. Abr. 402. Jon. 238. Cro. Car. 214. *Flower* v. *Elgar*.

(*b*) Q. If there may not be Relief in Equity. *Vide* Vern. 50.

If

21 E. 3. 58. 2 Rol. Abr. 411. (a) 2 Co. 68. If one Jointenant of a Rent in Fee releaſes all his Right, yet this does not paſs the Moiety of his Companion; (a) but in Perſonal Actions one Jointenant may releaſe the Whole, but if the Perſonalty be mixed with the Realty, it is otherwiſe.

Cro. Eliz. 2-3. A Releaſe by the Common Vouchee is no Bar, for he renders nothing, and can be at no Loſs.

Raym 93. Skin. 247. pl. 1. Comb. 8. Salk. 260. pl. 15. So if the Plaintiff in Ejectment, who is a mere nominal Perſon and Truſtee for the Leſſor, releaſe the Action; or if an Action be brought in his Name for the meſne Profits, and he releaſe it, this in either Caſe is no Bar; but from the Power the Courts now exerciſe of regulating all Proceedings in theſe Actions, is ſuch a Contempt for which the Party may be committed.

2 Jon. 102. 2 Lev. 206. *Harper* v. *Bird.* Cro. Car. 503. L. P.—that a Creditor after an Aſſignment of his Debt cannot releaſe the Debtor. 2 Chan. Ca. 169. If a Leſſor after Aſſignment of the Reverſion releaſe to the Leſſee all Covenants and Demands, yet the Aſſignee may have an Action of Covenant for Rent due after the Aſſignment, for it runs with the Reverſion at Common Law, before the *Stat.* 32 *H.* 8. (*cap.* 34.) and paſſes by the Grant of the Reverſion, and therefore the Leſſor could not releaſe it after the Aſſignment.

Cro. Jac. 152. *Smith* v. *Gatewood.* ‡*Vide Gatewood*'s Caſe. 6 Co. 60. where ſuch a Claim is pleaded as a Cuſtom, and adjudged bad in Law, for the Reaſon in the Text, among other Reaſons. If by Preſcription the Inhabitants of antient Meſſuages in a certain Vill are intitled to have Common within the Vill by reaſon of their Commorancy, ſuch Common cannot be releaſed, for though one Inhabitant ſhould releaſe it, a ſucceeding one might claim it. ‡

21 E. 4. 45, 47. 2 Rol. Abr. 401-2. If by the Cuſtom of a Manor the Tenants thereof are to chuſe among themſelves one to collect the Lord's Rents for a Year, and ſo on annually; the Lord may diſcharge or releaſe a Tenant of this Burthen, but then the others ſhall not be further charged than before, for when it comes to his Courſe who is diſcharged, the Lord himſelf muſt collect it.

March 73. Jenk. 305. Cro. Jac. 235. Yelv. 173. 2 Brownl. 215. If two Church-wardens ſue in the Spiritual Court for a Levy towards the Reparation of their Church, and have Sentence to recover, and Coſts aſſeſſed, and after one of them releaſes, yet the other may proceed for the Coſt, *&c* for Church-wardens have nothing but to the Uſe of the Pariſh, and the Corporation conſiſts of both, and one only cannot releaſe or give away the Goods of the Church.

(*b*) 3 Bulſ. 110. Rol. Rep. 246. (*c*) 4 Mod. 305. Comb. 263. (*d*) Holt's Rep. 660. A Servant who (*b*) diſtrains in Right of his Maſter, or one who is (*c*) robbed of his Maſter's Money, cannot, on an Action brought on him on the Statute of *Hue and Cry*, releaſe to the Prejudice of his Maſter; nor can the (*d*) Ordinary releaſe an Adminiſtration Bond.

Cro. Eliz. 808. But a Sheriff may releaſe an Obligation taken by him for the Appearance of a Perſon whom he arreſts.

Lev. 235. *Offley* v. *Ward.* Lit. Rep. 149. L. P. In Debt on a ſingle Bill made to *A.* to the Uſe of him and *B.* the Defendant pleads a Releaſe made to him by *B.* on which the Plaintiff demurs; and without Difficulty it was adjudged for the Plaintiff; for *B.* is no Party to the Deed, and therefore can neither ſue nor releaſe it; but it is an equitable Truſt for him, and ſuable in Chancery if *A.* will not let him have Part of the Money; and the Book of *E.* 4. cited to prove that he might releaſe in ſuch a Caſe, was denied to be Law.

* (E) Of Releases by Executors and Administrators. *Page 280

AN Executor may, before Probate of the Will, releaſe a Debt due to the Teſtator, for he derives his Authority from the Teſtator, and not from the Act of the Ordinary; in like Manner may he pay Debts, and take Releaſes, &c. 5 Co. 28. Off. Exec. 33. Plow. 281.

And it hath been held, that if an Executor releaſes all Actions, this will extend as well to Actions which he hath in his own Right, as to thoſe which he hath as Executor; (a) but yet in ſome Caſes ſuch general Words may, according to the Intention of the Parties, be reſtrained. 39 E. 3. 26. (a) *Vide infra.*

If there be two Executors, and one of them releaſes a Debt due to the Teſtator, this ſhall bind both, for each hath an intire Authority, and Intereſt different from other Jointenants; and hence it is held, that, if one Executor releaſes to his Companion, nothing paſſes thereby, becauſe each was poſſeſſed of the Whole before. *Vide* Title *Executors and Adminiſtrators.*

But if there be two Executors, and one of them refuſes to join in Action, upon which he is ſevered, after ſuch Severance he cannot releaſe the Action. Dyer 319. pl. 15. Cro. Car. 420.

In the Caſe of *Williams* v. *Pen*, it was adjudged in *B. R.* that if there be two Adminiſtrators, and one of them releaſes a Bond due to the Inteſtate, that this ſhall bind his Companion, and be a good Diſcharge to the Obligor; as the Statute 31 *E.* 3. *cap.* 11. gives an Adminiſtrator the ſame Power over Debts due to an Inteſtate as an Executor had, and as an Adminiſtrator by releaſing without Conſideration is equally liable to a *Devaſtavit* with an Executor. Paſ. 11 G. 2. in *B. R. Williams* v. *Pen.* ——In the Caſe of *Hudſon* v. *Hudſon*, M. 1737. in *Canc.* Lord *Hardwicke* was of a contrary Opinion, on the Difference the Law makes between an Executor and an Adminiſtrator, the former coming in not by the Act of the Ordinary, but by the Will of the Teſtator, conſequently his Authority and Intereſt in the Aſſets greater, &c.

An Infant Executor, upon an actual Payment, and full Satisfaction made to him, may releaſe a Debt due to his Teſtator, but cannot without, for that this would be a *Devaſtavit* in him. 5 Co. 27. Co. Lit. 172. And. 177. Moor 146.

As if a Bond be forfeited, and the Infant Executor only receives the principal Sum without the Penalty, and gives a general Releaſe of all the Debt; this Releaſe at Law is no Bar of the Penalty. § Cro. Car. 490. *Kniveton* v. *Latham.*

§ But now, ſince ſtat. 4 Ann. c. 16. whereby the Penalty is ſaved on Payment of Principal and Intereſt, *qu.* if Principal and all Intereſt be paid to ſuch Infant Executor, if his Releaſe will not operate as in the preceding Caſe?

If an Executor releaſes a Debt due to the Teſtator, this ſhall charge him to the Value of the Debt, tho' perhaps he did not receive near ſo much as was due; but if he releaſes an Account, this reſting in Uncertainty, he cannot be charged with more than he actually receives. Hob. 66. Cro. Eliz. 43. And. 138.

If an Executor voluntarily releaſe a Debt, he ſhall not be relieved againſt it in Equity, although a Creditor may. Vern. 455.

It hath been held in Chancery, that if there are two Executors, and they join in a Receipt, and one only receives the Money, that as to Creditors, who are to have the utmoſt Benefit of the Law, each is liable for the Whole tho' one Executor alone might releaſe, and the joining the other was unneceſſary; but as to Legatees, and thoſe claiming Diſtribution, who have no Remedy but in Equity, the Receipt of one Executor Salk. 318. pl. 26. *per* Lord *Harcourt.*

tor ſhall not charge the other, for the joining in the Receipt is only Matter of Form; the ſubſtantial Part is the actual Receiving, and this only is regarded in Conſcience.

---

*Page 281 * (F) How far the Husband's Releaſe ſhall bind the Wife.

17 E. 3. 66. 2 Rol. Abr. 410. BY the Intermarriage the Huſband acquires ſuch an Intereſt in all Debts due to the Wife, that he may releaſe them, and ſuch Releaſe ſhall bind the Wife.

42 E. 3. 18. 2 Rol. Abr. 402. Baron alone may releaſe Waſte done by Leſſee for Life before Coverture, upon a Leaſe made by the Feme.

Salk. 115. pl. 4. Ld. Raym. 73. So all Rights accruing to the Wife during Coverture may be releaſed by the Huſband.

Lucas 63. The Huſband may releaſe the Wife's Right under the Statute of Diſtributions.

Moor 665. Cro. Eliz. 908. Noy 45. If a Huſband and Wife are divorced *a Menſa & Thoro*, and a Legacy is left to her, the Huſband may releaſe it.

Vern. 261. So where a Legacy was given to a Feme Covert who lived ſeparate from her Huſband, and the Executor paid it to the Feme, and took her Receipt for it; yet on a Bill brought by the Huſband againſt the Executor, he was decreed to pay it over again with Intereſt.

Salk. 115. pl. 4. *per Holt* C. J. Ld. Raym. 73. If a Feme Covert ſues a Woman in the Spiritual Court for Adultery with her Huſband, and obtains a Sentence againſt her and Coſts, the Huſband may releaſe thoſe Coſts, for the Marriage continues, and whatever accrues to the Wife during Coverture belongs to the Huſband.

Rol. Rep. 426. Rol. Abr. 343. 3 Bulſ. 264. But if the Huſband and Wife be divorced *a Menſa & Thoro*, and the Wife has her Alimony, and ſues for Defamation or other Injury, and there has Coſts, and the Huſband releaſes them, this ſhall not bar the Wife, for theſe Coſts come in lieu of what ſhe hath ſpent out of her Alimony, which is a ſeparate Maintenance, and not in the Power of her Huſband. †

† The Huſband may aſſign his Wife's Term, or Truſt of a Term, (unleſs from himſelf, for her Benefit) or her Mortgage in Fee, or her *Choſe in Action*, or releaſe her Bond, without receiving any of the Money. *Bates* v. *Dandy*, T. 1741. 2 Atkyns 207.

(G) To whoſe Benefit a Releaſe ſhall enure; and who ſhall be bound thereby though not a Party to the Releaſe.

Co. Lit. 232. Moor 856. 2 Rol. Abr. 410. IF two or more are jointly and ſeverally bound in a Bond, a Releaſe to one diſcharges the others; and in ſuch Caſe the joint Remedy being gone, the Several is ſo likewiſe.

Hob. 10. 2 Sid. 41. 2 Salk. 574.

So

So if there are two Conuſees of a Statute, and one of them releaſes to the Conuſor; this ſhall extinguiſh the Statute as to the other alſo. 2 Rol. Abr. 411.

So if two Executors ſell the Goods of the Teſtator for a certain Sum of Money, and take an Obligation for the Money, the Releaſe of one of them ſhall bar both. 17 E. 3. 66. 2 Rol. Abr. 411.

So where there are two Executors, and one only has the Poſſeſſion of the Goods which are taken away by a Stranger; though he only in whoſe Poſſeſſion the Goods were may bring an Action, yet the Releaſe of his Companion ſhall bar him. Bro. *Releaſe* 26.

* Alſo if two are bound in an Obligation, and the Obligee releaſes to one of them, Proviſo that the other ſhall not take Advantage of it; this Proviſo is void. *Page 282 Lit. Rep. 190.

But if *A.* be bound to *B.* and *C. ſolvend.* the Moiety to *B.* and the other to *C.* this is a ſeveral Obligation, and the Releaſe of one ſhall not prejudice the other. Moor 64.

So where ſeveral enter into ſeveral Covenants in the ſame Deed, a Releaſe to one of the Covenantors will not diſcharge the others. Cro. Eliz. 408, 470. 2 Salk. 574.

So if two are bound to the King, and he releaſes to one of them; this will not diſcharge the other. 5 Co. 56. 2 Rol. Abr. 412.

If *A.* and *B.* are named Obligors jointly and ſeverally, and *A.* only ſeals the Bond, and then the Obligee releaſes to *A.* and after *B.* ſeals the Deed; this Releaſe ſhall enure to the Benefit of *B.* though it was not his Deed at the Time of the Releaſe, for the Releaſe does not defeat the Deed, but is only a Bar by Plea, and both were bound for one and the ſame Debt, which is ſatisfied by the Releaſe. Cro. Eliz. 161.

If divers commit a Treſpaſs, though this be joint or ſeveral at the Election of him to whom the Wrong is done, yet if he releaſes to one of them, all are diſcharged, becauſe his own Deed ſhall be taken moſt ſtrongly againſt himſelf; alſo ſuch Releaſe is a Satisfaction in Law, which is equal to a Satisfaction in Fact; but he who would take Advantage of ſuch Releaſe muſt have the ſame to produce. Co. Lit. 232. Hob. 66. Noy 62. 5 Co. 97. Brownl. 189. Cro. Jac. 444.

If Treſpaſs be brought againſt three, and Judgment is given againſt one, and the Plaintiff enters a *Noli proſequi* againſt the other two, if the *Noli proſequi* had been before Judgment, it had diſcharged the whole Action. So if Judgment had been againſt all three, and the Plaintiff had entered a *Noli proſequi* againſt the two, for Nonſuit or Releaſe, or other Diſcharge of one, diſcharges the reſt. Hob. 70. *Parker* v. *Laurence.*

In Trover againſt two, one pleaded not guilty, and a Verdict againſt him; the other pleaded a Releaſe, and Verdict for him: On Motion for Judgment againſt him who was found guilty it was denied, becauſe the Trover being joint, a Releaſe of all Actions diſcharged both. 4 Mod. 379. *Kiffin* v. *Willis.*

In Replevin by *A.* againſt *B. B.* makes Conuſance in Right of *C.* for *Damage-feaſant* to the Freehold of *C.* which is adjudged againſt *A.* and Judgment that *B.* ſhall have Return irreplegiable with Coſts and Damages; in a *Scire facias* brought by *B.* to have Execution of the Coſts and Damages, if *A.* pleads the Releaſe of *C.* in whoſe Right Conuſance was made of all Demands, this is no Bar, in as much as *C.* was not Party to the Suit, nor liable to any Coſts or Damages, had the Matter been adjudged againſt *B.* and therefore *B.* intitled to the Coſts and Damages, which *C.* could not releaſe. 2 Rol. Abr. 412. *Sibley* v. *Rawlins.* 2 Lutw. S C. cited, and ſaid, that if *C.* had been Party to the original Suit, it would have been otherwiſe.

A. and *B.* took an Obligation from *J. S.* for the Payment to them of a Sum of Money, and this was done by them as Truſtees, and for ſecuring the Payment of Legacies to younger Children; *A.* brought an Action on this Bond, to which *J. S.* pleaded a Releaſe from *B.* but upon *Oyer* it appeared that the Releaſe was of all Actions which *B.* had on his Vent. 35. Lev. 272. 2 Keb. 530. *Stokes* v. *Stokes.*

3 Mod. 279. S. C. cited. own Account; and in Truth *B.* did not know of the taking the Bond, nor was he privy to the Suit; and though it was objected that the Releaſe of one Obligee diſcharged the Bond, and that it muſt be on his own Account, yet it was adjudged that the Releaſe did not bar, for that the Words, *on his own Account*, muſt have been put in for ſome Purpoſe, and could not in this Caſe be for any other, but to diſtinguiſh Demands which *B.* had in his own Right from thoſe he had in Right of or in Truſt for others.

*Page 283 6 Co. 25. a. *Ruddock's* Caſe. Cro. Eliz. 648. Jenk. 263. Palm. 319. Owen. 22. Hutton 40. * Where divers are to recover in the Perſonalty, the Releaſe of one is a Bar to all, but it is not ſo in Point of Diſcharge.

3 Mod. 135. As if there are two Plaintiffs who are barred by an erroneous Judgment, and they afterwards bring a Writ of Error, the Releaſe of one ſhall bar the other, becauſe they are both Actors in a perſonal Thing to charge another, and it ſhall be preſumed a Folly in him to join with another who might releaſe all.§

§ *Qu.* If all Parties againſt whom Judgment is given ought not regularly to join in Error? *Vide* 3 Mod. 134. Carth. 7. 2 Mod. Ca. 305. 1 Rol. Abr. 747. l. 35. Though one be dead if it does not appear. Stra. 233. And ſee Stra. 606. 2 Ld. Raym. 1403. Rep. Temp. Hardw. 135. Wilſ. 88.

3 Mod. 109. But if an Action be brought againſt four, and Judgment againſt them, on which they bring a Writ of Error, and the Defendant in Error pleads the Releaſe of one of them; this is no Bar, for it being brought to diſcharge themſelves of a Judgment, the Releaſe of one cannot bar the other, becauſe they have not a joint Intereſt but a joint Burthen, and by Law are compelled to join in a Writ of Error.

(H) How far a Poſſibility or Contingent Intereſt may be releaſed.

10 Co. 48. a. Cro. Eliz. 552. IT is a general Rule in our Books that a mere Poſſibility cannot be releaſed, and the Reaſon hereof is, that a Releaſe ſuppoſeth a Right in Being, and it was thought to countenance Maintenance to transfer Choſes in Action, Poſſibilities and Contingent Intereſts.

Lit. Sect. 446. Co. Lit. 265. a. 10 Co. 51. Hence it is held, that an Heir at Law cannot releaſe to his Father's Diſſeiſor in the Life-time of the Father, for the Heirſhip of the Heir is a Contingent Thing, for he may die in the Life-time of the Father, or the Father may alien the Lands.

Bridgm. 76. S. P. tho' the Words *Quæ quoviſmode in futuro habere potero* are inſerted in the Releaſe. ——But if the Heir releaſes with Warranty, it bars him when the Right deſcends. 2 Leon. 20. Hob. 130.

And. 133. Co. Lit. 265. Cro. Eliz. 552. 2 Rol. Abr. 405. So if the Conuſee of a Statute releaſes to the Conuſor all his Right to the Land, yet he may afterwards ſue Execution, for he has no Right to the Land but only a Poſſibility.

2 Mod. 281. 2 Lev. 215. So if a Creditor releaſes to his Debtor all the Right and Title which he hath to his Lands, and afterwards gets Judgment againſt him, he may extend a Moiety of the ſame Land, for he had no Right to the Land at the

the Time of the Releaſe, and the Land is not bound but in reſpect to the Perſon.

So if the Plaintiff releaſes all Demands to the Bail in the King's Bench, and afterwards Judgment be given againſt the Principal, Execution may be ſued againſt the Bail, for that at the Time of the Releaſe there was only a Poſſibility of the Bail becoming chargeable. 5 Co. 70. *Hoe's* Caſe. Co. Lit. 265. Moor 469. Cro. Eliz. 579.

Moor 469. Hutt. 17. & *vide* the Caſe of *Harriſon* v. *Huxley*, Moor 852.——[*Sed qu.* if the Releaſe was on Conſideration, and intended to diſcharge them as Bail, if the Court, on Motion, would not ſtay Proceedings againſt them?]

So if *A.* recovers in Treſpaſs againſt *B.* in *B. R.* and *B.* brings a Writ of Error, pending which *A.* releaſes to *B.* all Executions, and after the Judgment is affirmed and new Damages given to *A.* for the Delay upon the Statute of 3 *H.* 7. [*cap.* 10. and *vide* 19 *H.* 7. *cap.* 20.] this Releaſe ſhall not bar *A.* to have Execution of thoſe Damages, becauſe he had not any Right to have Execution, nor to any Duty at the Time the Releaſe was made. 2 Rol. Abr. 404. Cro. Jac. 337. Rol. Rep. 11. *Child* v. *Durant.*

* A Leaſe to the Huſband and Wife for Life, the Remainder to the Survivor of them for twenty-one Years; the Huſband grants it over, and though he ſurvived, yet the Grant was held void becauſe it was contingent. *Page 284 Poph. 5. 10 Co. 51. Hutt. 17. Raym. 146.

If the next Preſentation to a Church be granted to *A.* and *B.* and living the Incumbent, *A.* releaſes all his Eſtate, Title and Intereſt to *B.* this Releaſe is void, it being of a Choſe in Action; *ſecus* had the Releaſe been made after the Avoidance, at which Time the Intereſt would have been veſted in *A.* Cro. Eliz. 173, 600. Owen 85. Leon. 167. 3 Leon. 256. and Dyer 244. 10 Co. 48. Like Point.

From the Reaſons herein it was held, that if at Common Law a Woman before Marriage had accepted of a Jointure in Bar and Satisfaction of Dower, that this would not have bound her, becauſe at the Time ſhe had no Right to Dower. 4 Co. 1. *Vernon's* Caſe.—If a Huſband makes a Leaſe for Life and dies, the Wife may releaſe her Right of Dower to him in Reverſion, though ſhe has no preſent Cauſe of Action againſt him. Co. Lit. 265.

A City Orphan cannot at Law releaſe her Orphanage Part to her Father, for ſhe hath no Right in her during the Life-time of her Father; but it hath been held in Equity, that ſuch Releaſe being for a valuable Conſideration, as upon the Marriage of a Daughter, and a Portion given her by the Father, ſuch Releaſe may operate as an Agreement to waive the Orphanage, and hath accordingly been ſo decreed in Equity. Will. Rep. 527, 638. Will. Rep. Preced. Chan. 545.

If there be a Deviſe of a Term for Years to *A.* for Life, Remainder to *B. B.* may releaſe his Right to *A.* and ſuch Releaſe ſhall extinguiſh his Intereſt, though it was objected that *B.* had only a Poſſibility at the Time of the Releaſe made. 10 Co. 47. *Lampet's* Caſe.

But it was held in the above-mentioned Caſe of *Lampet*, and hath in like Manner been held in other Caſes, that *B.* could not aſſign over his Intereſt to a Stranger in the Life-time of *A.* the ſame being only a Choſe in Action, and a mere Poſſibility, inaſmuch as an Eſtate for Life is in Suppoſition of Law a larger Eſtate than for any Number of Years. 10 Co. 47. 4 Co. 66. Sid. 188. Raym. 146.

But later Reſolutions, eſpecially thoſe which have been in Courts of Equity, have made a great Alteration in this Doctrine. 2 Vern. 563.

As in the Caſe of *Cole* v. *Moore*, where one poſſeſſed of a Term deviſed it to *A.* for Life, Remainder to *B.* and made *A.* Executor; *B.* deviſed Moor 806.

viſed this Remainder to *C.* and died in the Life-time of *A.* and in order to defeat *C.* of his Intereſt, *A.* aſſigned his Term to a third Perſon: And it was decreed by Lord Chancellor *Eleſmere*, that *A.* the Executor and Deviſee, for Life, was a Truſtee for *B.* and ſhould not be at Liberty to deſtroy this Remainder, but that the Executor ſhould preſerve the Leaſe, ſo as it might go according to the Will with the Performance whereof the Executor was intruſted.

Chan. Ca. 4. So in the Caſe of *Goring* v. *Bickerſtaff*, where the Truſt of a Term was deviſed to *A.* for Life, Remainder to *B.* it was agreed by all that *B.* might aſſign over his Truſt, which ſhews that a Truſt of a Term in Remainder may be transferred over by Deed.

Will. Rep. 572. pl. 167. *Wind* v. *Jekyl.* One poſſeſſed of a Term for Years deviſed it to *A.* for Life, Remainder to *B. B.* in the Life-time of *A.* deviſed his Remainder to *J. S.* who deviſed it over; and the Queſtion was, Whether *A.* (the Deviſee for Life) being dead, the Deviſee of *J. S.* ſhould have the Term, or whether it ſhould go to the Adminiſtrator *De bonis non*; and it was decreed for the Deviſee of *J. S.* and the Adminiſtrator *De bonis non* of *B.* was directed to aſſign over the Term to him.

*Page 285 * And in the Caſe of *Theobald* v. *Duffay* in the Houſe of Lords *March* 1729-30, it was *(inter alia)* determined, that a Poſſibility of a Term is aſſignable for a good Conſideration.

5 Co. 70. 2 Mod. 281. It is laid down in *Hoe*'s Caſe, that a Duty uncertain at firſt, which upon a Condition precedent is to be made certain afterwards, is but a Poſſibility, which cannot be releaſed.

Yelv. 215. Brownl. 116. *Bridges* v. *Enion.* As a *Nomine pœnæ* waiting on a Rent which cannot be releaſed till the Rent is behind, as the Non-payment of the Rent makes the *Nomine pœnæ* a Duty.

Yelv. 192. *Neale* v. *Sheffield.* So if a Man covenants to pay 10*l.* on the Birth of a Child, the Covenantor cannot be releaſed of the 10*l.* it reſting merely in Contingency whether ſuch Child will ever be born or not.

Yelv. 215. So if an Award be, that upon the Plaintiff's delivering the Defendant by a certain Day a Load of Hay, the Defendant ſhall pay him 10*l.* in this Caſe the 10*l.* cannot be releaſed before the Day, for it reſts merely in Poſſibility and Contingency whether the Money ſhall ever be paid, for it becomes a Duty on the Delivery of the Hay only, and not before.

2 Salk. 575. pl. 4. 2 Ld. Raym. 786. *Topham* v. *Tallier.* In Debt upon a Bond againſt the Defendant as Adminiſtrator, *&c.* the Defendant pleaded a Releaſe, whereby the Plaintiff, reciting there were ſeveral Controverſies between the Defendant and him about a Legacy and the Right of Adminiſtration, releaſes to the Defendant all his Right, Title, Intereſt, and Demand of, in, and to the Perſonal Eſtate of the Inteſtate; and on Demurrer this was held to be no Plea; and a Difference was taken by Ch. Juſt. *Holt* between a Releaſe of all Demands to the Perſon of the Obligor or Adminiſtrator, and a Releaſe of all Demands to the Perſonal Eſtate of the Obligor or Adminiſtrator, that the laſt will not diſcharge the Bond as the other may, becauſe the Bond does not give any Right or Demand upon the Perſonal Eſtate, *&c.* until Judgment and Execution ſued.

2 Rol. Abr. 407. 8. *Briſcot* v. *Aier.* If *A.* promiſes *B.* in Conſideration that he will ſell to his Son certain Merchandize at ſuch a Price, that if his Son does not pay it at the Feaſt of *St. Michael* next enſuing, he himſelf will pay it; and before *Michaelmas B.* releaſes all Actions and Demands to him who made the Promiſe; this ſhall not releaſe the *Aſſumpſit*, for till *Michaelmas* it cannot be known whether his Son will have paid it or not, and till Default of Payment by him,

him, the other is not bound to pay it, and ſo it is a meer Contingency till *Michaelmas*, which cannot be releaſed. †

†2*l*. If this Promiſe ſhould not be in Writing, according to the ſtat. 29 Car. 2. c. 3.? See 6 Mod. 250. Salk. 27, 8. 2 Ld. Raym. 1087. 2 Wilſ. 94. 3 Burr. 1888, 1889, 1890. where it is laid down as ſettled Law, that where a Debt of a third Perſon is ſtill *ſubſiſting*, and Remedy may be had againſt him thereon, a Promiſe made to pay, *&c.* is clearly within the Statute: Such being the Caſe, the Promiſe mentioned in the Text ſhould certainly have been in Writing; but *note*, the Caſe in the Text was prior to the above-mentioned Statute.

(I) How the operative Words in a Releaſe have been conſtrued: And therein of the Words,

1. Claims and Demands, what are releaſed thereby.

Littleton ſays, that a Releaſe of all Demands is the beſt Releaſe to him to whom it is made; and Lord *Coke* ſays, that the Word *Demand* is the largeſt Word in Law except *Claim*; and that a Releaſe of Demands diſcharges all Sorts of Actions, Rights, and Titles, Conditions before or after Breach, Executions, Appeals, Rents of all Kinds, Covenants, Annuities, Contracts, Recogniſances, Statutes, Commons, *&c.* Lit. Sect. 508. Co. Lit. 291.

* But notwithſtanding the large Import of the Word *Demands*, yet there are ſeveral Inſtances (which *vide infra*) where the Generality of the Words hath been reſtrained to the particular Occaſion for which the Releaſe was made. *Page 286

By a Releaſe of all Demands, all Actions Real, Perſonal, and Mixed, and all Actions of Appeal, are extinct. Lit. Sect. 509. 8 Co. 154.

So a Releaſe of all Demands extends to (*a*) Inheritances, and takes away Rights of Entry, Seiſures, *&c.* Co. Lit. 291.

(*a*) But if the King releaſeth all Demands, yet as to him the Inheritance ſhall not be included. Bro. *Prerogative*, pl. 62. Bridgm. 124.

By a Releaſe of all Demands made to the Tenant of the Land a Common of Paſture ſhall be extinct. Co. Lit. 291.

A Releaſe of all Demands will bar a Demand of a Relief, becauſe the Relief is by Reaſon of the Seigniory to which it belongs. Cro. Jac. 170.

If *A.* being poſſeſſed of Goods loſes them, and they come to the Hands of *B.* who being in Poſſeſſion, *A.* by Deed releaſes to *B.* all Actions and Demands Perſonal which at any Time before *Habuit vel habere potuit* againſt *B.* for any Cauſe, Matter, or Thing whatſoever; this ſhall bar *A.* of the Property of the Goods, ſo that *B.* has the abſolute Right in him by this Releaſe. 2 Rol. Abr. 407. *Jordan* v. *Sanders.*

By a Releaſe of all Demands, all Manner of Executions are gone, for the Recoveror cannot ſue out a *Fieri Facias*, *Capias*, or *Elegit*, without a Demand. Lit. Sect. 508. 2 Rol. Abr. 407.

By a Releaſe of all Demands to the Conuſor of a Statute Merchant before the Day of Payment, the Conuſee ſhall be barred of his Action, becauſe that the Duty is always in Demand; yet if he releaſes all his Right in the Land, it is no Bar. Co. Lit. 291. Bridgm. 124.

So a Bond conditioned to pay Money at a Day to come, is a Debt and Duty preſently, and may be diſcharged by a Releaſe of all Actions and Demands before the Day of Payment. Cro. Jac. 300.

But

Yelv. 214. Cro. Jac. 300. But in an Action of Debt for Non-performance of an Award made for the Payment of Money at a Day to come; there is no preſent Debt nor any Duty before the Day of Payment is come, and therefore it cannot be diſcharged before the Day, by a Releaſe of all Actions and Demands.

10 Co. 51. in *Lampet's* Caſe. So if a Man deviſes a Legacy of 20 *l.* to *J. S.* at the Age of twenty-three, tho' the Legatee, after he attains the Age of twenty-one, and before the Day of Payment, may releaſe it, yet by the Word *Demands* it is not releaſed, but there muſt be ſpecial Words for the Purpoſe.

Hancock v. *Field.* Cro. Jac. 170. 2 Rol. Abr. 407. Noy 123. A Releaſe of all Demands does not diſcharge a Covenant not (*b*) broken at the Time; as where a Leſſor, on Payment of 60 *l.* to him by the Leſſee due on a Judgment, releaſed to him all Demands; and it was adjudged that this did not releaſe a Covenant for Repairs not then broken; but it was held, that a Releaſe of all Covenants would have releaſed the Covenant.

(*b*) For the Difference when broken or not, *vide* Dyer 217. Lit. Rep. 86. Moor 34. 3 Leon. 69. 10 Co. 51. 5 Co. 71. *Hoe's* Caſe. Co. Lit. 292. 8 Co. 153. And. 8, 64.

Witton v. *Bie,* 2 Rol. Abr. 408. Cro. Jac. 486. If Leſſee for Life grants over his Eſtate by Indenture reſerving Rent during the Continuance of the Eſtate, and afterwards releaſes to the Aſſignee all Demands; this ſhall diſcharge the Rent, for he had the Freehold of the Rent in him at the Time.

Bridgm. 123. 2 Rol. Rep. 20. Poph. 136.

2 Rol. Abr. 408. in the Caſe of *Witton* v. *Bie.* So if Leſſee for Years grants over by Indenture all his Eſtate, reſerving a Rent during the Term, and after releaſes to the Aſſignee all Demands; this ſhall releaſe the Rent, for though he cannot have an Action to demand all the Eſtate, yet this is an Eſtate in him of the Rent,

*Page 287

* and aſſignable over; and in an Action of Debt for any Arrearages after he ſhall claim it as a Duty accrued from the ſaid Eſtate; and it ſhall not be ſaid that the Duty ariſes annually upon the taking of the Profits, but this had its Commencement and Creation by the Reſervation and Contract, which was before.

Collins v. *Harding.* 2 Rol. Abr. 408. Moor 544. Cro. Eliz. 606. If there be Leſſee for Years rendring Rent, and the Leſſor grants over the Reverſion, and the Leſſee attorns, and after Leſſee aſſigns over his Eſtate, and after the Aſſignee of the Reverſion releaſes all Demands to the firſt Leſſee, yet this ſhall not releaſe the Rent, for that there is neither Privity of Eſtate or Contract between them after the Aſſignment; but if the Releaſe had been made to the Aſſignee, it had extinguiſhed the Rent.

20 Aſſ. pl. 5. 2 Rol. Abr. 408. If he, who has a Rent-Charge in Fee, releaſes to the Tenant of the Land all Demands from the Beginning of the World till the Making of the Deed of Releaſe; this ſhall diſcharge all the Rent, as well that to come as what is paſt.

Lit. Sect. 510. Co. Lit. 291. It is ſaid by *Littleton* and Lord *Coke*, that by a Releaſe of all Demands a Rent-Service ſhall be releaſed; but this it is ſaid is to be intended of a Rent-Service in groſs as a Seigniory; and therefore in the Caſe of

Lev. 99, 100. Sid. 141. Keb. 499, 510 *Hen* v. *Hanſon.* *Hen* v. *Hanſon*, where in Covenant brought on a Covenant in a Leaſe for Years to pay the Rent reſerved, the Defendant pleaded a Releaſe by the Plaintiff of all Demands at a Day before the Rent in Queſtion became due; the Plaintiff replied, that the Releaſe was in Performance of an Award of all Matters in Controverſy between the Plaintiff and Defendant; and upon Demurrer it was adjudged by *Foſter*, *Mallet*, and *Windham*, that the Rent was not diſcharged by this Releaſe, as it became due by the Perception of the Profits, and was not like to a Rent-Charge, or a Rent-Parcel of a Seigniory; and they held, that this

this Rent being incident to the Reverſion, and Part thereof, was no more releaſed hereby than the Reverſion itſelf was; and that this Conſtruction ſhould the rather prevail, as it was not the Intention of the Party to releaſe this Rent: But *Twiſden contra*, he ſaid, that in Releaſes and Deeds when Words are heaped up, the Party that is to take the Advantage may take the ſtrongeſt Word and in the ſtrongeſt Senſe, and that is the Reaſon they are put in; and as to the Intent, that muſt be gathered from the Words; and Men muſt take Care what Words they Uſe, *Oportet politiam obedire legibus non leges politiæ*; and he ſaid, he could ſee no Difference between this Rent and a Rent in Fee, both are Rent-Services, and neither demandable before they become due, otherwiſe than as in 40 *E.* 3. 47. it is ſaid, there is a continual Demand betwixt Lord and Tenant; and in this Caſe there is a Tenure between the Leſſee and him in Reverſion; and the Reaſon why the Reverſion is not touched by this Releaſe is, becauſe it can work only by way of Extinguiſhment, and not by way of paſſing an Intereſt; but it was adjudged *ut ſupra*.

The Plaintiff declared upon a Leaſe for Years, *Reddendum* 30 *s.* at *Lady-day* and *Michaelmas*, and aſſigns for Breach Non-payment of a Year's Rent due and ending at *Lady-day* 1689, the Defendant pleaded a Releaſe dated the 18th Day of *November* 1688, of all Demands; and upon Demurrer Judgment was given for the Plaintiff; for the growing Rent not due, which is incident to the Reverſion, is not diſcharged, though the firſt Half Year's Rent, which was a Duty demandable, was releaſed; but here the Releaſe being pleaded as a Bar to all, which it is not, the Plea is naught, and Judgment muſt be given for the Plaintiff. 2 Salk. 578. pl. 1. *Stephens* v. *Snow*.

* 2. By a Releaſe of all Actions and Suits. *Page 288

A Releaſe of all Actions diſcharges a Bond to pay Money on a Day to come; for it is *Debitum in præſenti, quamvis ſit ſolvendum in futuro*; and it is a Thing merely in Action, and the Right of Action is in him that releaſes, tho' no Action will lie when the Releaſe is made. Co. Lit. 292.

But a Releaſe of Actions does not diſcharge a Debt before the Day of Payment, for it is neither *Debitum* nor *Solvendum* at the Time of the Releaſe; nor is it merely a Thing in Action, for it is grantable over. Co. Lit. 292.

So if a Man has an Annuity for Term of Years, for Life or in Fee, and he before it be (*a*) behind releaſes all Actions; this ſhall not releaſe the Annuity, for it is not merely in Action, becauſe it may be granted over. Co. Lit. 292. Bull. 178. Cro. Eliz. 897. Moor 133.

(*a*) But ſuch Releaſe ſhall releaſe the Arrearages incurred before. 39 H. 6. 43. 2 Rol. Abr. 404.

If one releaſes *Omnes querelas aut loquelas*; this is as large as a Releaſe of all Actions, and releaſes all Cauſes of Action, though no Action be then depending. Co. Lit. 292.

By a Releaſe of all Manner of Actions, all Actions as well Criminal as Real, Perſonal and Mixed, are releaſed. Co. Lit. 287.

A Releaſe of Actions Real is a good Bar in Actions mixed; as Aſſiſe of *Novel Diſſeiſin*, Waſte, *Quare Impedit*, (*b*) Annuity; and ſo is a Releaſe of Actions Perſonal. Co. Lit. 284.

(*b*) But not after the Grantee has made his Election. Jones 215.

In an Appeal of Robbery or Felony, a Releaſe of all Actions Perſonal will not bar, becauſe an Appeal, in which the Appellee is to have Judgment Co. Lit. 287. 2 Hawk P. C. 196.

ment of Death, is higher than a Perſonal Action; but a Releaſe of all Manner of Actions, or of all Actions Criminal, or of all Actions Mortal, or of all Actions concerning Pleas of the Crown, or of all Appeals, or of all Demands, will be a good Bar of any ſuch Appeal.

Co.Lit. 288. And in an Appeal of *Maihem* a Releaſe of Actions Perſonal may be pleaded, becauſe Damages only are recovered.

Co.Lit. 289. 8 Co. 153. A Releaſe of all Actions is regularly no Bar of an Execution, for Execution is no Action, but begins when the Action ends.

2 Inſt. 40. Yelv. 209. Co.Lit. 288. Alſo a Releaſe of all Actions does not regularly releaſe a Writ of Error, for it is no Action, but a Commiſſion to the Juſtices to examine the Record; but if therein the Plaintiff may recover, or be reſtored to any Thing, it may be releaſed by the Name of Action.

Co.Lit. 290. Comb. 455. But a Releaſe of all Actions is a good Bar to a *Scire Facias*, though it be a judicial Writ, for the Defendant may plead to it, and it is in Nature of a new Original given by the Statute.

2 Rol. Rep. 75. So in Replevin a Releaſe of all Actions is a good Bar, for the Avowant is Defendant, tho' in ſome Reſpects he is Plaintiff.

Latch 110. By a Releaſe of all Suits a Man is barred of a Writ of Error. †

† *Vide* the Diſtinctions *ſupra*.

Co.Lit. 291. 8 Co. 153. ‡ *Vide ſupra*. So by a Releaſe of all Suits a Man is barred of Execution, becauſe it cannot be had without Application to the Court, and Prayer of the Party, which is his Suit. ‡

Co.Lit. 28.b 8 Co. 151. If a Diſſeiſee releaſes to the Diſſeiſor all Actions; this is no Releaſe of his Right of Entry, for when a Man has ſeveral Means to come at his Right, he may releaſe one of them, and yet take Benefit of the other.

Co.Lit. 286. Skin 57. pl. 1. ‖ *V. poſt*. 291. So if a Man by Wrong takes away my Goods; if I releaſe to him all Actions Perſonal, yet by Law I may take the Goods out of his Poſſeſſion. ‖

*Page 289 * If a Man releaſes all Actions, by this he ſhall releaſe as well Actions which he has as Executor, as thoſe in his own Right.

39 E. 3. 26. 2 Rol. Abr. 404. 2 Ld. Raym. 1307. S. C. cited by *Powell*, and ſaid by him to be clearly ſo, unleſs there was an Action of his own for the Releaſe to work upon.

Co.Lit. 292. If a Man releaſes all Quarrels; a Man's Deed being taken moſt ſtrongly againſt himſelf, it is as beneficial as all Actions, for by it all Actions Real, Perſonal, and Mixed, are releaſed.

Co.Lit. 292. So if a Man releaſes *Omnes loquelas*, it is as large as *Omnes actiones*, and extends as well to Actions in Courts of Record as baſe Courts.

Co.Lit. 292. So a Releaſe of *Omnes exactiones* §, is equal to a Releaſe of all Actions.

§ For *Exactio derivatur ab Exigendo*, and *Exigere* ſignifieth to enquire or demand. Co. Lit. 292. a.

(K) Releaſe, in what Caſes reſtrained to the ſpecial Purpoſe for which it was given.

Plow. 289. 19 H. 6. 42. (a) 8 Co. 148. ON the Rule of Law, that every Man's Deed ſhall be taken ſtrongeſt againſt himſelf, and on what is laid down in (a) *Altham's* Caſe, *Generalis Clauſula*, &c. it hath been inſiſted, that general Words in a Releaſe

leaſe are to be taken ſtrongeſt againſt the Releaſor, and are not to be qualified or reſtrained by any ſpecial Recital.

But herein the ſure Rule and Diſtinction ſeems to be, that where there are general Wotds all alone in a Deed of Releaſe, they ſhall be taken moſt ſtrongly againſt the Releaſor; but where there is a particular Recital in a Deed, and then general Words follow, the general Words ſhall be qualified by the particular Recital. And. 64. Hob. 74. Dyer 240. Mod. 99. 3 Mod. 277. Ld. Raym. 663.

Indeed in the Caſe of *Rotheram* v. *Crawley*, where upon a Reference to Arbitration of ſome Controverſies relating to Relief and Heriot claimed by the Lord of his Tenant, a Releaſe was awarded, which was drawn up *of all Reliefs, Duties and Amercements*, and this Releaſe being pleaded to an Action of Debt on an Obligation, it was inſiſted, though the Word *Duty* might in Strictneſs extend to a Bond Debt, that yet it ought not to have this Conſtruction in the preſent Caſe, it being placed between the Words *Relief* and *Amercements*, which ſhewed that the Parties intended Duties of the ſame Nature; but it was adjudged otherwiſe; and that the Word Duty working an Extinguiſhment of the Bond at Law; the Force of the Word was not to be controuled by the Intention of the Party. § Cro. Eliz. 370. Ow. 71. S.C. Raym. 399. S. C. cited.

§ How is it poſſible to reconcile this Reſolution to common Senſe? The Reference was *particular*, not general; and the Referee had not Power to award concerning the Bond Debt, becauſe it was not a Matter referred to him; conſequently, let him uſe what Words he would, his Award could not extend to the Bond in Queſtion.

But in the following Caſes the Intention of the Party has been principally regarded:

As where in Debt upon an Obligation the Defendant pleaded a Releaſe of all Errors, and all Actions, Suits, and Writs of Error whatſoever; and it was adjudged that the Releaſe extended only to Writs of Error, and did not releaſe the Obligation, though the Word *Actions*, had it ſtood ſingly, would have done it. Hetl. 9, 15. *Abree* v. *Page*.

If a Man receives 10 *l.* of another, and by his Dead acknowledges the Receipt thereof, and thereof releaſes, acquits, and diſcharges him, and of all Actions, Suits, Debts, Duties and Demands; by this Releaſe nothing is diſcharged but the 10 *l.* and the Action and Demands thereof, for the laſt Words have Reference to the firſt, and ſo limited by them. 2 Rol. Abr. 409. cited by *Tanfield*, to have been adjudged Trin. 5 Jac. 1. in *B. R.*

3 Mod. 277. Carth. 119. Show. 155. S. C. cited, and doubted of by *Holt* Ch. J. who ſaid, that no ſuch Caſe was to be found. ‡

---

‡ Nor does the Caſe ſeem to be Law, as in all Probability the 10 *l.* was given as a Conſideration for a general Releaſe.

* In the Caſe of *Hen.* v. *Hanſon* it was held, that a Releaſe made in Performance of an Award did not diſcharge a growing Rent, though the Releaſe contained general Words, for this Reaſon (*inter alia*) that it was not the Intention of the Parties. *Page 290 Lev. 99. Sid. 141.

So in the Caſe of *Morris* v. *Wilford*, a Releaſe of the Wife's Cuſtomary Part, with general Words, was held only to extend to the ſpecial Matter recited. 2 Jon. 104. 2 Lev. 214. 2 Show. 46. pl. 32. 3 Keb. 814, 840.

So where the Plaintiff releaſed all Demands on his own proper Account; and it was adjudged by the whole Court, that an Obligation taken by the Plaintiff in his own Name in Truſt for the Children of *J. S.* was not diſcharged thereby. 2 Lev. 272. *Stokes* v. *Stokes*. Vent. 35. S. C. by the Name of *Nokes* v. *Stokes*.

So

2 Mod. 281. 2 Lev. 210. Vent. 314. *Trevil* v. *Ingram.* So where in Covenant to pay an Heriot *poſt mortem J. S.* or 40 *s.* at the Election of the Plaintiff, and ſets forth the Death of *J. S.* and that afterwards he choſe to have the 40 *s.* for which he brought his Action, and aſſigns the Breach in the Non-payment; the Defendant pleaded, that the Plaintiff releaſed to him all Actions and Demands, *&c.* but this Releaſe was made in the Life-time of *J. S.* and there was an Exception in it of Heriots; and upon Demurrer it appearing that neither the Heriot nor 40 *s.* were in Demand at the Time of the Releaſe given, and it appearing plainly by the Exception in the Releaſe not to be the Intention of the Parties to releaſe the Heriots, Judgment was given for the Plaintiff.

3 Mod. 277. 3 Lev. 269. Show. 150. Carth. 119. *Cole* v. *Knight.* *A.* recovered againſt *B.* a Judgment for 600 *l.* and made *J. S.* and *J. D.* his Executors, and died; *B.* made *C.* his Executor, and deviſed a Legacy of 5 *l.* to *J. D.* and died; *J. D.* by Deed acknowledged the Receipt of the 5 *l.* of *C.* and thereby releaſed the ſaid Legacy, and all Actions, Suits and Demands which he had againſt *C.* as Executor to *B.* and after Argument in *B. R.* it was adjudged, that nothing was releaſed but the 5 *l.*

Ld. Raym. 235. *Thorpe* v. *Thorpe.* In *Aſſumpſit* againſt the Defendant for 7 *l.* the Plaintiff declares, that whereas he had mortgaged to the Defendant certain Copyhold Lands redeemable upon Payment of ſuch a Sum of Money, the Defendant, in Conſideration that the Plaintiff would releaſe to the Defendant his Equity of Redemption, aſſumed to pay to the Plaintiff 7 *l.* The Plaintiff avers, that he did releaſe his Equity of Redemption, but that the Defendant has not paid the 7 *l.* The Defendant pleads this Releaſe in Bar of the Action, becauſe, after the Words *Equity of Redemption*, the Scrivener had added, *And all Actions, Duties and Demands:* And on Demurrer the Queſtion in (*a*) *C. B.* was, whether this 7 *l.* was releaſed by thoſe general Words; and adjudged that it was not. †

(*a*) *Vide* the Arguments in this Caſe in *B. R.* as reported. Salk. 171. pl. 3. Lutw. 245. Ld. Raym. 664.

† One may fairly conclude, nothing but the Subtlety of an old Common Lawyer, unacquainted with Principles of Equity, and the Reaſon of Laws, could have framed an Argument in ſuch a Caſe as this and the preceding, *&c.* to have raiſed a Doubt.

2 Rol. Abr. 410. *Vide* Dyer 56, 307. 2 Rol. Rep. 255. Palm. 218. 2 Brownl. 300. Cro. Eliz. 14. 2 Mod. 280. If an Obligation be dated and delivered the 23d of *January* 5 *Jac.* and Obligee make a Releaſe, which is dated 22d of *January* 5 *Jac.* but it is delivered after 23d of *January*, and by this Deed he releaſes to the Obligor all Actions *uſque diem hujus præſentis temporis*; this Releaſe ſhall not diſcharge the Obligation, for (*hujus præſentis temporis*) ſhall be taken the preſent Time when the Deed was dated.

3 Mod. 182. *Dixon* v. *Terry.* *Page 291 In Treſpaſs, Aſſault and Battery, the Defendant pleaded a general Releaſe of all Actions, *&c.* from the Beginning of the World *uſque ad diem datus* of the ſaid Releaſe; and it happened that the Battery was * done upon that very Day in which the Releaſe is dated, ſo that it was held that this Action was not diſcharged, for the Releaſe did not include that Day, and the Defendant ſhould have traverſed all, *&c.* after the Date of the Day of the Releaſe.

(L) What Right or Intereſt ſhall be ſaid to be releaſed; and herein of Miſrecitals and Exceptions in Releaſes.

A Releaſe of a bare Right for a Day or an Hour, &c. is as good as if it was made to the other and his Heirs. Co. Lit. 274.

A Releaſe may be on Condition, but a Condition cannot be releaſed on Condition. Co. Lit. 274.

But a Releaſe on Condition that Releaſee ſhall pay Releaſor ſo much Money, is not good; but if the Releaſe be worded in this Manner, That if the Releaſee pay ſo much at a Day to come, then he releaſes, &c. this is a good Releaſe. Lutw. 638. *per Treby* Ch. Juſt.

If one Man finds the Goods of another, and the Owner releaſes to him who is in Poſſeſſion; this veſts the Property in him, (*a*) but ſuch Releaſe muſt be by Deed. § 2 Rol. Abr. 407. (*a*) Leon. 283. § *Vide ante*, 288.

If one makes a Leaſe for ten Years, Remainder for twenty Years, and he in the Remainder releaſes to the firſt Leſſee, the Releaſee ſhall have thirty Years for his Term, for ten Years ſhall not be drowned, becauſe a Chattel cannot be drowned in a Chattel. Co. Lit. 273.

The Lord *Paramount* cannot releaſe to the Tenant *Paravaile*, ſaving to him Part of the Services, but the Saving in that Caſe is void; but if there be Lord and Tenant by Fealty, and 20*s.* Rent, the Lord may releaſe all his Right in the Seignory, ſaving Fealty and 10*s.* Rent; but the Lord, upon his Releaſe to the Tenant cannot reſerve a new Kind of Service. Co. Lit. 305. b.

A Releaſe of Common in one Acre is an Extinguiſhment of the whole Common. And. 235. Show. 350.

An (*b*) intire Thing cannot be releaſed as to Part; but if a Man be bound to perform two Things, the Obligee may diſcharge the Party of one of them. 3 Bulſt. 232. (*b*) What ſhall be ſaid an intire Thing, *vide* Palm. 247. Owen 21. Moor 413.

A Releaſe of Covenants ſhall releaſe the Bond for Performance of Covenants. So in the Caſe of (*c*) *Hen* v. *Hanſon* it was agreed, that if the Rent was releaſed, the Covenant for Payment of it was releaſed likewiſe. Dyer 356. (*c*) Lev. 99. Sid. 141.

If a Man brings an Appeal of *Maihem*, and after releaſes the Action, the Releaſe ſhall bar him to have an Action of Battery of the ſame Battery. 43 Aſſ. 39. 2 Rol. Abr. 413.

If a Rent Charge iſſues out of three Acres of Land, and he who has the Rent releaſes all his Right in one Acre, the Rent is all extinct, becauſe all iſſues out of every Part, and it cannot be apportioned. 2 Rol. Abr. 414.

When Execution is had of twenty Acres, by a Releaſe of one Acre, the Execution is gone, and is a Diſcharge of Land and Body. And. 266. Owen 21. Hetl. 79.

* A Releaſe of all Advantages of Account, a good Bar to an Action of Debt upon that Account. *Page 292 8 Co. 152.

If I releaſe to *A.* all Actions which *J. S.* has againſt him, the Releaſe to *A.* is good, and the laſt Words ſhall be (*d*) rejected; for a Deed may be qualified and abridged by latter Words, but not totally deſtroyed. Dyer 56. pl. 21. (*d*) If a Releaſe be limited as to one Obligee, Proviſo that the other ſhall not take Advantage of it, the Proviſo is void. Lit. Rep. 191.

A Re-

Ld. Raym. 235. A Releaſe to *A.* and *B.* of all Actions, is a Releaſe of all ſuch ſeveral Actions which the Releaſor has againſt them, as well as all joint Actions.

Cro. Eliz. 726. A Releaſe excepting one Bond, excepts Suits and Actions for that Bond.

Dyer 50, 87. & *vide* Plow. 191, 395. If *A.* reciting that he had recovered Judgment againſt *B.* before the Juſtices in *Derby*, whereas in Truth the Judgment was had in *B. R.* this Miſrecital it is ſaid will make the Releaſe void.

Remainder and Reverſion.

Co. Lit. 49, 143. 2 Co. 51. Moor 344. Vaugh. 269. †*Vide infra* 306. n. A Remainder † is deſcribed to be a Remnant of an Eſtate in Lands or Tenements, expectant on a particular Eſtate created together with the ſame and at the ſame Time, and is ſo expectant on the particular Eſtate, that unleſs it can take Effect when the particular Eſtate determines, it is void.

Co. Lit. 22. Plow. 160. A Reverſion is where the Reſidue of the Eſtate always doth continue in him who made the particular Eſtate, or where the particular Eſtate is derived out of the Eſtate which was granted. §

§ A *Remainder* is ſaid to be created by *Act* of the *Parties*; a *Reverſion* by *Act* of *Law*.

2 Inſt. 501. Vaugh. 269. Every Remainder muſt depend upon a particular and leſs Intereſt than the Fee-ſimple, for the Statute *Quia emptores, &c.* having enacted, that the Fee in all Caſes is to be holden of the Chief Lord, the Tenant after his Alienation has nothing further to expect in the Eſtate either as a Seignory, Reverſion, or Eſcheat.

2 Inſt. 335. 2 Co. 51. a. But upon an Eſtate-tail a Remainder may be limited; for when a Man creates an Eſtate-tail, the Tenant in Tail holds of him in the Reverſion, who holdeth of the Lord Paramount; and this Diverſity depends on the Conſtruction firſt made on the Statute *De Donis*; the Judges holding the Fee conditional in the Donee to be an Eſtate-tail, and the antient Seignory in the Donor to be a Reverſion; and had they not made this Conſtruction, the Statute *Quia emptores, &c.* had ſhut out the Donor for ever.

Ld. Raym. 523. Salk. 232. pl. 11. Com. 62. pl. 41. *Badger* v. *Loyd.* Hence it is held, that if there be Tenant in Tail, Remainder in Tail, and he in the Remainder grants his Eſtate during the Life of the Tenant in Tail, the Grant is void, for his Grantee cannot have any Benefit by it; but if there be Tenant in Tail, Reverſion in Fee, and he in the Reverſion grants his Eſtate during the Life of Tenant in

* in Tail, this is good, for the Grantee ſhall have the Services which the Tenant in Tail ought to perform. *Page 293

If Lands are given to *J. S.* and his Heirs whilſt ſuch a Tree ſtands, there can be no Remainder limited after, yet there is a Poſſibility of Reverter left in the Donor. Ld. Raym. 326. *vide poſtea.*

When a Statute is extended, it turns the Eſtate of the Conuzor into a Reverſion. 2 Vent. 327.

Reverſions and Remainders are Things incorporeal, and can only paſs by Grant; yet a Rent reſerved on a Grant of them is good, as they relate to Land, though the Grantor has no Remedy for it during the Continuance of the particular Eſtate. Co. Lit. 47. Co. 62.

By the Name of Reverſion a Remainder will paſs. Cro. Eliz. 594. Plow. 154.

J. S. having a Remainder in Fee, deviſes all his Remainder to *J. N.* and it was adjudged that the Fee paſſed to *J. N.* Ld. Raym. 187.

But for the better underſtanding this Head, we ſhall conſider,

(A) **Of what Things a Remainder may be made.** 294.

(B) **What Words are ſufficient to create a Remainder.** 296.

(C) **What ſhall be a Reverſion and not a Remainder.** 298.

And herein,

1. Where a Limitation to the Heirs of the Donee, or Heirs of his Body, ſhall veſt in ſuch Heirs by Deſcent or Purchaſe. 298.
2. Where a Limitation to the Heirs, or Heirs of the Body of a Stranger ſhall veſt in ſuch Heirs as a Remainder and by Purchaſe, or by way of Limitation and Deſcent. 301.
3. Where by a ſpecial Deſcription the Remainder ſhall veſt by Purchaſe. 303.

(D) **Of the ſeveral Kinds of Remainders as diſtinguiſhed into Remainders veſted, or in Contingency and Abeyance.** 306.

(E) **What Eſtate is ſufficient to ſupport a Remainder.** 309.

(F) **Of the Continuance of the particular Eſtate, and when the Remainder is to commence.** 311.

(G) **Contingent Remainders, how prevented from riſing or coming** in Eſſe. 312.

(H) **Of Remainders that ariſe on Conditions Precedent or Subſequent.** 317.

1. Of the Difference between a Condition and a Limitation, and in Caſe of the Condition when it precedes the Veſting of the Remainder as a Cauſe thereof,

thereof, and is annexed to the first Estate, and when it is annexed absolutely without any Regard to the Remainder. 318.

2. Between a Deed and a Will, when in both the same Words of Condition are made use of for vesting the Remainder. 319.

3. Between a Limitation over in Case of a Will, and where no Limitation is made over. 323.

*Page 294 * 4. Between Remainders that are to arise upon Conditions agreeable to the Rules of Law, and such as are to arise upon Conditions repugnant and against the Rules of the Law. 324.

5. Between such Words as actually make a Condition, and such as are only descriptive of the Manner when and how the Remainders are to arise. 326.

(I) In what Cases a Remainder or Reversion shall be subject to the Acts or Charges of the particular Tenant. 328.

(K) To what Purposes the Remainder is accounted but as one with the particular Estate, and where they are regarded as several Estates. 330.

(L) Of Cross Remainders, or those arising by Implication and Construction of Law. 332.

(A) Of what Things a Remainder may be made.

AS to Estates of Inheritance, there can be no Doubt but that the Grantor, having a perpetual and durable Interest in the Estate, may share and divide it, or grant as many Remainders over as he thinks proper.

Bro. *Devise* 13. Plow. 521. Dyer 74. 8 Co. 94.

But as to Personal Goods and Chattels, it was formerly held, that they in their own Nature were incapable of any Limitation over, being Things transitory, and by many Accidents subject to be lost, destroyed, or otherwise impaired, and the Exigencies of Trade requiring a frequent Circulation thereof, in which they differ from Lands and Tenements which are permanent, and therefore what is called an *Estate* in Lands, is termed *Property* in Personal Chattels; and hence it was held, that a Grant or Devise of a Personal Thing to one, though but for an Hour or Minute, was a Gift for ever, and an absolute Disposition of the intire Property.

Vide Title *Devise* under Limitations of Terms for Years.

Hence it came to pass, that it was a long Time ere the Courts of Justice could be prevailed on to have any Regard for a Devise over even of a Chattel Real, or a Term for Years after an Estate for Life limited thereon, because the Estate for Life being in the Eye of the Law of greater Regard and Consideration than an Estate for Years, they thought he who had it devised to him for Life, had therein included all that the Deviser had a Power to dispose of; but now such Remainders over are allowed

lowed under the Name of Executory Deviſes, and are eſtabliſhed both in Courts of Law and Equity, provided they tend not to a Perpetuity, ſo as to make Eſtates unalienable.

Alſo a Diſtinction was formerly taken between a Deviſe of a Perſonal Chattel to one for Life, with a Remainder over, and of the Uſe only, that in the firſt Caſe the Deviſee for Life had the abſolute Property, but not ſo in the ſecond, for that the firſt Deviſee had not the Property of the Goods, but only a ſpecial Intereſt in them, ſo that there ſtill remained a Property which might be limited over; but this Diſtinction is now exploded in Conformity to the Civil Law, and the Deviſee in Remainder is allowed in Equity the like Remedy in both Caſes. ‖

Plow. 521. Cro. Car. 346. Rol. Abr. 610. March 106. Owen 33. Chan. Ca. 129. 2 Vern. 245. Will. Rep 1.

pl. 1. 502, 651. pl. 185. ‖ An executory Deviſe of a Term, and the Truſts of a Term, are governed by the ſame Rules. See *Fearne* on Contingent Remainders, 3d Edit. fo. 354, 380.

But a Deviſe of a Term for Years or Perſon l Chattel to one for a Day or an Hour, is a Deviſe of the whole Term or Intereſt, if the Limitation over is void, and it appears at the ſame Time that the whole was intended to be diſpoſed of from the Executors.

Will. Rep. 666. *Vide* Executory Deviſes, under Title *Deviſe*.

* *A.* being poſſeſſed of a Term for ninety-nine Years, deviſes it to *B.* for Life, and after to ſix others ſucceſſively, for their Lives, if the ſaid Term ſhould ſo long continue; and all the ſeven Perſons being dead, and the Term continuing, it was adjudged that it ſhould revert to the Executors of the Teſtator, and that it did not veſt in the Survivor of the Deviſees ſo as to tranſmit it to his Repreſentatives.

*Page 295 Salk. 231. pl. 9. Ld. Raym. 325. *Ayres* v. *Falkland*. See Pollex. 32.

A Farmer deviſed his Stock (which conſiſted of Corn, Hay, Cattle, &c.) to his Wife for Life, and after her Death to the Plaintiff. It was objected, that no Remainder can be limited over of ſuch Chattels as theſe, becauſe the Uſe of them is to ſpend and conſume them; but the Maſter of the Rolls ſaid the Deviſe over was good, but ſaid if any of the Cattle were worn out in uſing, the Defendant was not to be anſwerable for them; and if any were ſold as uſeleſs, the Defendant was only to anſwer the Value of them at the Time of the Sale; and an Account was decreed to be taken accordingly.

Abr. Eq. 361. *Hayle* v. *Burrodale*.

A. gives his Siſter, by Will 10*l.* and directs that ſuch Part of his Perſonal Eſtate, as his Wife ſhould leave of her Subſiſtence, ſhould go to the Siſter; whatever the Wife has not employed in that Way, ſhall go over and be accounted for.

Wil Rep. 651. pl. 185. *Upeswel* v. *Halſey*.

But if a Chattel Real, Money, Goods, or other Perſonal Things, are deviſed to one and the Heirs of his Body, or to one and if he dies without Heirs of his Body, Remainder over, this Remainder is totally void, and the Courts of Equity will not allow of a Bill by the Remainder Man to compel Security, &c. or to have the Money, &c. after the Death of the firſt Deviſee, but it ſhall go to his Executors, or Adminiſtrators; for the firſt Deviſe gives the abſolute Property of a Perſonal Eſtate, as the like Deviſe of a Real Eſtate before the Statute *de donis* gave the abſolute Fee, upon which no Limitation could be made further, and as the Heirs are the Repreſentatives to take the Real Eſtate, ſo are the Executors to take the Perſonal Eſtate; and this is not within the Statute *de donis*, but remains as at Common Law. †

2 Vent. 349. 2 Vern. 606. Salk. 156. pl. 7. Abr. Eq. Title *Deviſe*.

†The Limitation of a perſonal Eſtate to one in Tail, veſts the whole in him. See ſeveral Caſes in *Fearne*, 3d Edit. 345, &c.

If *A.* deviſe that his Goods and Furniture ſhall remain in his Houſe to be enjoyed according to the Limitations of his Will, by thoſe intitled to the Houſe, the firſt that would be Tenant in Tail of the Houſe becomes abſolute Owner of the Goods.

Saunders v. *Saunders*, admitted.

If

Plow. 379. 9 Co. 48, 97. Not only Lands and Tenements, but alſo Rents, Commons, Eſtovers, or any other Intereſt or Profits *in Eſſe*, wherein the Grantor hath the abſolute Property to him and his Heir, may be granted with Remainder over.

9 Co. 48. And. pl. 201. So if one hath the Office of Park-keeper, Foreſter, Gaoler, Sheriff, *&c.* to him and his Heirs, he may grant theſe Offices to one for Life, Remainder to another for Life, *&c.* for *Omne Majus continet in ſe Minus*, and as they are grantable over in Fee, ſo may they be granted in Succeſſion to one for Life, with Remainders over, *&c.*

2 Rol. Abr. 415. 2 Co. 70, 76. 2 Vent. 240. It was formerly doubted, whether there could be a Remainder of a Rent created *de novo*, that is, whether a Man ſeiſed of Lands in Fee, could thereout grant a Rent-Charge to one for Life, or Years, Remainder to another in Fee, or in Tail; and this Doubt aroſe from the Rent's not having any Exiſtence before it was created, and conſequently no Reverſion could be left in the Grantor, out of which the Remainder was to ariſe; but it hath been (*a*) adjudged, and is now ſettled, that ſuch Grant in Remainder is good, the Grantor having the abſolute Intereſt in the Eſtate out of which it is to ariſe, and his Intention gives it Being for the Whole, out of which the leſſer Eſtates are carved. But (*b*) if he grant ſuch Rent for Life, or Years, to one without going further, he cannot after grant the Reverſion thereof to another, becauſe he has no Reverſion in him.

(*a*) 1 Lev. 144. Sid. 285. 2 Salk. 577. pl. 3. Ld. Raym. 679. 2 Lutw. 1225.

(*b*) Moor, pl. 100.

In the Caſe of *The King* v. *Kemp*, it was held, that the King may grant an Eſtate in an Office to commence *in futuro*, or upon a * Contingency, for he hath no Inheritance in the Office, or to the Execution of it, but in point of Intereſt only to grant. And it was ſaid there was a Diverſity between Offices in Fee exiſting, and ſuch as were granted only for Life, which being as a new Thing created, might, as a Rent *de novo*, be granted to commence *in futuro*.

* Page 296

4 Mod. 275, 280. Ld. Raym. 49. Skin. 446. pl. 4. See 2 Salk. 465. pl. 2.

Carth. 252, 350. 2 Salk. 465. pl. 2. Comb. 334. *Rex* v. *Kemp*.

Show. P. C. 5, 11. If one be created Baron, Viſcount, Earl, *&c.* by Patent, and after, in the ſame Patent, the ſame Honour is granted to another in Remainder, yet this operates as a new Grant, and not as a Remainder, for the King had no Reverſion of that Honour in him tho' he had ſtill the ſame Power of appointing one in Succeſſion to take it, as he had of granting it to the firſt.

Lev. 220. Bridg. Rep. 113. A Licence to ſell Wine may be granted to one for Life, Remainder to another for Life; becauſe by ſuch Licence not only an Authority paſſeth, but an Intereſt, by way of Reſtitution to that which was the Subject's Right before it was prohibited by Statute.

(B) What Words are ſufficient to create a Remainder.

Rol. Abr. 416. Plow. 29. Rol. Rep. 319. Dyer 125. THE Word *Remainder* is no Term of Art, nor is it neceſſary to create a Remainder. So that any other Words, ſufficient to ſhew the Intent of the Party's Will, create a Remainder; becauſe ſuch Eſtates take their Denomination of Remainders more from the Nature and Manner of their Exiſtence, after they are limited, than from any previous Quality inherent in the Word *Remainder*. To make them ſuch therefore, if a Man gives Lands to *A.* for Life, and that after his Death the

Land

Land ſhall revert, or deſcend, to *B.* for Life, *&c.* This is a good Remainder, and may be pleaded as ſuch.

So if Lands are given to one and the Heirs Male of his Body, and to him and the Heirs Female of his Body, this Limitation to the Heirs Female is a Remainder; becauſe it is not to take place till the Eſtate to the Heirs Male is ſpent. Co. Lit. 377. a.

So if Lands are given to a Widow, and to the Heirs of the Body of her late Huſband, on her begotten, this is a Remainder to the Heirs of the Body of the Huſband; becauſe it cannot take Effect till after the Widow's Death, who hath an Eſtate for Life. Co. Lit. 26. 200. 2 Mod. 210.

So an Eſtate limited to *A.* for Life, or in Tail, *& poſt deceſſum ejus*, or *pro defectu talis Exitus*, to *B.* and the Heirs of his Body, is good, tho' there be not the Word *Remainder*. So if a Leaſe be made to *A.* for Life, and that after his Death *B.* ſhall have the Profit, this is a good Remainder to *B.* Plow. 159. Moor pl. 54. Dyer 125. Rol. Rep. 319. Cro. Eliz. 10. 742.

So a Leaſe to *A.* for Life, and that after his Death his Children ſhall have it, is a good Remainder. 6 Co. 17. b. Raym. 83.

Nay though an Eſtate be limited expreſsly as a Remainder, yet if it be not ſo in Conſtruction of Law, the Word *Remainder* will have no Force to make it ſuch. As if *A.* ſeiſed of Lands in Fee, he and *B.* levy a Fine to *C.* in Fee, who grants and renders to *B.* in Tail, rendring Rent, and if *B.* died without Iſſue, *Tenementa præd' integre remanebunt* to *A.* and his Heirs; *B.* ſuffers a Common Recovery; *A.* diſtrains for his Rent; and this was adjudged a Reverſion, and as ſuch the Rent paſſed with it to *A.* and was chargeable upon the Land in whoſe Hands ſoever it came, by virtue of the Contract which cannot be deſtroyed by the Recovery, tho' the Reverſion is thereby debarred. Cro. Eliz. 727, 768, 792. Moor pl. 795. Co. Lit. 299. Raym. 142.

* But here it may be proper to take Notice of a Set of Words ſometimes uſed in Leaſes for Years, which are ſo far a Part of the Limitation and Deſcription of the firſt Intereſt, that they cannot again be made uſe of to paſs any further Intereſt in the ſame Land. As if one make a Leaſe to *A.* for eighty Years, if he ſo long live, and if he happen to die within the ſaid Term, *then the Lands for the Reſidue of the ſaid Term, or for ſo many Years as ſhall be then remaining of the ſaid Term, to go over to another*, this Limitation over is void; becauſe the Time, or Term, of eighty Years was not abſolute to *A.* but was determinable upon his Death, and by his Death the whole Term is at an End; as if a Leaſe had been made to him barely for his Life, and then to limit the Reſidue of a Term, when nothing thereof remains, is repugnant and void; but ſome Opinions incline, that a Deviſe in ſuch a Manner would be good, by Reaſon of the Intent of the Party and the equivocal Signification of the Word *Terminus*, which may, though not ſtrictly, ſignify alſo the Time or Space of eighty Years, as well as the Eſtate or Intereſt for eighty Years determinable as aforeſaid. But now if a Leaſe be made to *A.* for eighty Years, if he ſo long live, and if he die within the ſaid Term, *then the Land to go over to another for the Reſidue of the eighty Years*, ‡ this is a good Remainder; becauſe though the Term or Intereſt be determined, yet the Land, and Part of the Years, ſtill remain; thoſe Years may be made the Meaſure of the ſucceeding Intereſt, as any other Number of Years may be. * Page 297 Cro. Eliz. 216. Leon. 218. Co. 153. 3 Leon. 195. 2 Rol. Abr. 415. Plow. 198. Moor 247, 520. pl. 441. And. 259.

‡ *Qu.* If there is a reaſonable Diſtinction between this and the Limitation *ſupra*.

J. S. ſeiſed of Lands in Fee by Indenture demiſes them to *A.* for Life, *Habendum* to the ſaid *A. B. C.* and *D.* his three Sons for their Lives and the Life of the Survivor of them ſucceſſively; after the Death of the latter it was adjudged in this Caſe, firſt, that if the Sons could take, it muſt be by way of Remainder, they not being Parties to the Deed, and then it Hob. 313. Hutt. 87. *Windſmere* v. *Hobart*.

must be as Jointenants, which could not be by Reaſon of the Word *Succeſſive*. Secondly, that they could not take in Succeſſion, for the (*a*) Uncertainty whoſe Eſtate or Intereſt was to commence firſt.

(*a*) But had it been aſcertained by a Clauſe *Succeſſive ſicut nominantur in Charta*, it had been good. Leon. 246. Godb. 220.

Raym. 140. *Corbett* v. *Stone*.

A. by Indenture makes a Leaſe to *B.* for forty Years, if *A.* ſo long live, and after his Death to *C.* (who was no Party to the Deed) for one thouſand Years, and then *A.* levies a Fine and dies, and five Years paſs after his Death, and then the Plaintiff claiming under *C.* enters, *&c.* and by the Arguments and Reaſons of the Caſe, it ſeems clear that this is no Remainder at all to *C.* for firſt, preſently it cannot veſt by Reaſon of the Leſſor's Life interpoſing, and therefore is no Remainder veſted. Secondly, as a Contingent Remainder it cannot be good; becauſe then it ought to have a particular Eſtate to ſupport it, and ought to be in Abeyance, or Contingency, to veſt or not veſt when that determines; but here the firſt Leaſe is no ſuch particular Eſtate; becauſe that reaches not to the Commencement of the Remainder, nor is the Remainder limited with any Regard to the particular Eſtate; becauſe it is not to commence upon the Determination of that, but at a future Time, *viz.* upon the Death of the Leſſor, and there is no Contingency at all in the Caſe, for it is to take Effect at all Events, upon the Death of the Leſſor, be it before or after the End of the Term, and therefore it can be no other than a future *Intereſſe Termini* to begin after the Death of the Party that grants it, which being but for Years it may well do; becauſe it enures by way of Contract, and though the Grantee there was no Party to the Deed, and therefore, as objected, could take nothing, yet it appears that Judgment was given for the Plaintiff; which proves, firſt, that the Grantee had an Intereſt; ſecondly, that * this Intereſt was not barred by the Fine and five Years Non-claim after the Death of the Grantor, not being touched, deveſted or turned to a Right; thirdly, That though the Grantee was no Party to the Indenture, yet he might well take by virtue thereof, if he gets the Indenture to make out his Title, for the Grantor can't derogate from his own Grant, or avoid his own Acts.

*Page 298

(C) What ſhall be a Reverſion, and not a Remainder: And herein,

1. Where a Limitation to the Heirs of the Donor, or Heirs of his Body, ſhall veſt in ſuch Heirs by Deſcent or Purchaſe. §

§ He is ſaid to take by *Deſcent*, who takes by Act and Operation of Law; he by *Purchaſe*, who takes in the firſt Inſtance by his own or another Man's Act.

Co. Lit. 22. Co 127. Rol. Abr. 827. Mod. 98. 237. And. 3.

IT is laid down as a general Rule in our Books, that none can make his own right Heir a Purchaſor ‖ either of a Fee-Simple or Fee-Tail, without departing with the whole Eſtate; and the true Reaſon hereof ſeems to be from the Prejudice which otherwiſe might ariſe to the Lord in reſpect of his Seignory, and his being defeated of the Advantages of Wardſhip, Relief, *&c.* were the Heirs of the Donee permitted to come into the Engagement of the Eſtate in other Manner than was originally intended.

‖ *Vide poſt.* 301.

So that if one levies a Fine to the Uſe of his Wife for Life, the Remainder to the Uſe of his eldeſt Son and the Heirs Male of his Body, and for want of ſuch Iſſue, to the Uſe of his own right Heir, this Limitation to the Uſe of his right Heir is merely void, and he hath a Reverſion and not a Remainder in him. Leon. 182. Moor 284. And. 288. *Fenwick* v. *Mitford.*

In like Manner, if a Man makes a Leaſe for Life, or a Gift in Tail by Deed, Remainder to another for Life or in Tail, Remainder to himſelf and his Heirs, or to his own right Heirs only, this Remainder to himſelf or to his Heirs is void, becauſe the Fee continued ſtill in him, and then he can't give himſelf what he had before, and he can't give to his Heirs as ſuch what the Law gives them by a prior Right to veſt at the ſame Time with his Diſpoſition to them. Dyer 9. pl. 20. Moor 720.

But if a Man makes a Feoffment in Fee to the Uſe of himſelf for Life, Remainder to the Heirs Male of his own Body, this is a good Eſtate-Tail executed in himſelf, for the Law conjoins his Eſtate for Life and the Remainder to the Heirs Male of his Body, to prevent that Remainder's being loſt by Forfeiture or Determination of the particular Eſtate before it can veſt, and the Limitation is good by way of Uſe, becauſe it is *(a)* raiſed out of the Eſtate of the Feoffees, as if they had given it to him in ſuch Manner. Co. Lit. 22. Bendl. 49. Hob. 30.

(a) So if one covenants to ſtand ſeiſed to the Uſe of his Heirs Male on the Body of his ſecond Wife, he takes an Eſtate for Life by Implication, and ſo it is an Eſtate Tail executed in himſelf. *Pybus* v. *Mitford.* Vent. 372. 2 Lev. 75. Raym. 228. Mod. 98, 122, 159. 3 Keb. 229. S. C. adjudged, *et vide* 2 Salk. 679. pl. 7. *Adams* v. *Savage.* 2 Ld. Raym. 854. 6 Mod. 134.

If one makes a Feoffment in Fee to the Uſe of himſelf for Life, or in Tail, Remainder to the Uſe of the Feoffee in Fee, yet the Feoffee hath no Reverſion, but 'tis in Nature of a Remainder, although the Eſtate of the Feoffor is executed by the Statute, and the Feoffee is in by the Common Law, which concurring with the Statute Law ſhall be preferred, ſince that can give him no more than what he has already by the Common Law. Co. 137. Dyer 362. Co. Lit. 22. 2 Saund. 383, 387.

*If a Man makes a Feoffment in Fee to the Uſe of *A.* for Life, or in Tail, Remainder to the Uſe of *B.* for Life, or in Tail, Remainder to the Uſe of himſelf and his Heirs, or to the Uſe of his own right Heirs, yet the Uſe being of the ſame Nature with the Land, comes back to him in the ſame Manner as that would have done, and then having only diſpoſed of Part of the Eſtate, the Uſe returns and brings with it the Land for the Reſidue of the Eſtate undiſpoſed of, as if it had never been out of him, and conſequently ſuch Reſidue ſhall go to the Heirs by Deſcent, and not veſt in them by Purchaſe. *Page 299 Cro. Eliz. 321. Dyer 133. Leon. 182. 2 Co. 91. Moor 284, 744.

So where one made a Feoffment in Fee to the Uſe of himſelf for Years, Remainder to the Uſe of *A.* his Son and Heir apparent, and the Heirs Male of his Body begotten, Remainder to the Uſe of the right Heirs of the Feoffor for ever, and after *A.* died, leaving two Daughters only, and then the Feoffor conveyed the ſame Lands to another of his Sons in Fee; and 'twas adjudged a good Conveyance, and that the Daughters of the eldeſt Son, though they were Heirs at Law, took nothing by Purchaſe, for the eldeſt Son dying without Iſſue Male in the Life-time of the Feoffor, if the laſt Remainder could have taken Effect at all, it ought then to have ſo done, becauſe the Leaſe for Years was not ſufficient to ſupport it till it came *in Eſſe* afterwards, for then there would have wanted a Tenant of the Freehold in the mean Time, and upon the Death of *A.* it could not take Effect, becauſe his Father was then living, and could have no Heir during his Life, and therefore the Remainder was void, and the whole Eſtate reveſted in himſelf, by the reſulting of the Uſe Co. 130. 2 Rol. Abr. 418. Peph. 3. Moor 720. Cro. Eliz. 334.

Uſe in the ſame Manner as if the Limitation had been at Common Law without any ſuch Uſe.

Dyer 237. pl. 31, 199. a. 2 Rol. Abr. 414. Leon. 102. So where the Huſband was ſole ſeiſed in Fee, and a Stranger levied a Fine to the Huſband and Wife, and the Heirs of the Huſband, and they rendered to the Conuzor for Life of the Huſband, Remainder to *D.* for Life, Remainder to the right Heirs of the Huſband, the Huſband died, and then *D.* died; and by the Opinion of the Court of Wards and the three Chiefs, 'twas held to be no Remainder to the Huſband, but his ancient Reverſion, becauſe the Huſband can't limit a Remainder to his right Heirs where the Fee was never out of him, and therefore the Intereſt of the Wife was not gone by her joining in the Grant and Render, but that ſhe ſhould have it during her Life againſt the Heir of the Huſband.

Cro. Jac. 376. Cro. Eliz. 148, 441. Leon. 102. 4 Co. 23. If a Copyholder ſurrenders to the Uſe of his laſt Will, and deviſes to *A.* for Life, Remainder to *B.* in Tail or ſurrenders to the Uſe of himſelf for Life, Remainder to the Uſe of *A.* for Life, Remainder to the Uſe of his Will, in theſe Caſes the Reverſion is ſo in the Copyholder, that he may in his Life ſurrender to the Uſe of any other; ſo that all who come in upon ſuch Surrenders are in by the Copyholder, not by the Lord, for that nothing remains in the Lord, but ſo much as is not diſpoſed of remains in the Copyholder as ſtrongly as if it had been limited to him.

Hob. 30. 10 Co. 41. Vent. 372. If a Man ſeiſed of Lands in Fee by his Will in Writing deviſes them to one for Life or in Tail, Remainder to his own right Heirs, this is void as a Remainder, and the Heir ſhall be in of the old Reverſion by Deſcent, becauſe immediately upon the Death of the Anceſtor the Eſtate deſcends to the right Heir, and ſo prevents his taking by the Diſpoſition of the Will.

Salk. 241. pl. 2. Com. 72. pl. 45. So if a Man deviſes Land to his Heir at Law, paying a Sum of Money or an annual Rent, yet the Heir notwithſtanding ſuch Incumbrance or Charge, takes by Deſcent, and not by Purchaſe.

Clark v. *Smith*, & *vide* Title *Deſcent*.

*Page 300 Salk. 242. pl. 3. 2 Ld. Raym. 829. Com. 123. pl. 86. *Redding* v. *Royſton*. * But where the Eſtate deviſed is altered in Quantity or Quality, there the Deviſee, though Heir at Law, takes by Purchaſe; as where *A.* ſeiſed in Fee of Lands, hath Iſſue *B.* and *C.* his Daughters, *B.* hath Iſſue *D.* and dies. *A.* deviſes his Lands to *D.* in Fee. *D.* dies without Iſſue, his Heir of the Part of his Father ſhall take the whole by Purchaſe, and not any Part by Deſcent. †

† Where the Anceſtor takes only an *equitable* or *truſt* Eſtate of Freehold, and the ſubſequent Limitation to the Heirs, &c. carries the *legal* Eſtate, theſe two Eſtates, it ſeems, being of ſuch different Qualities, *i. e.* one being an *equitable* and the other a *legal* Eſtate, will not unite and incorporate together into one Eſtate, ſo as to veſt the ſubſequent Limitation in the Anceſtor, as (in general) would have been the Caſe if they had been both of one Quality, that is, both legal, or both equitable; but the ſubſequent Limitation to the Heirs, &c. will remain diſtinct from the Freehold, and operate as a Contingent Remainder. Fearne 34. 3d Edit. *Vide* the next Caſe *infra*.

4 Mod. 380. Carth. 272. Ld. Raym. 33. *Upping* v. *Coſſins, et vide* Preced. Chan. 435. S. C. cited. *A.* in Conſideration of a Marriage intended between him and *B.* and of a Marriage Portion, made a Feoffment in Fee to the Uſe of himſelf and his Heirs till the Marriage, and after to *B.* for Life, then to Truſtees and their Heirs during the Life of *A.* to ſupport contingent Remainders, then to the firſt, ſecond, and other Sons of his Body in Tail Male, then to the Heirs Male he ſhould have by any other Wife, and for want of ſuch Iſſue to the Heirs of the Body of *A.* with Remainder to his own right Heirs; the Marriage takes Effect, and they have Iſſue only a Daughter, then *A.* levies a Fine to the Uſe of himſelf for Life, Remainder

mainder to his Wife for Life, Remainder to *C.* in Fee with Warranty; and the Queſtion was, What Eſtate was veſted in *A.* by the firſt Deed, *viz.* Whether the Heirs of the Body ſhould take by Purchaſe or Deſcent? For if by Purchaſe, then the Fine levied afterwards was no Bar to them; and the Court was of Opinion, that they muſt take by Purchaſe, becauſe where the Anceſtor has no Eſtate for Life, as in this Caſe he has not, they can't be Words of Limitation; and here the Eſtate is expreſsly limited to Truſtees and their Heirs during his Life; and though a Man can't make his own right Heirs Purchaſors by the Name of Heirs, either in a Conveyance by Way of Uſe, or by his laſt Will, yet he may make them ſo of an Eſtate-Tail, which is a new created Eſtate, different from what the Law makes.

A Settlement was made by *A.* to the Uſe of himſelf for fifty-nine Years, if he ſhould ſo long live, Remainder to Truſtees and their Heirs during his Life to ſupport contingent Remainders, Remainder to *B.* his Son for ninety-nine Years, if he ſhould ſo long live, Remainder to Truſtees and their Heirs during his Life to ſupport contingent Remainders, Remainder to the firſt and other Sons of *B.* in Tail Male ſucceſſively, with other Remainders over, Remainder to the right Heirs of *A.* then *A.* by Will deviſes all his Lands in Poſſeſſion, Reverſion or Remainder to Truſtees and their Heirs, in Truſt by Sale or Mortgage to raiſe Money for Payment of his Debts and Legacies; and if this Limitation to his own right Heirs veſted the Reverſion in Fee in himſelf, ſo as to be ſubject to his Diſpoſition, or if the Heirs were to take by Purchaſe was the Queſtion; all the intermediate Remainders being determined. And it was argued upon the Reaſon of the above Caſe of *Tipping* and *Coſſins*, that the Heirs muſt take by Purchaſe, becauſe he had only an Eſtate for Years, and the Freehold during his Life was expreſsly limited to Truſtees and their Heirs, and therefore againſt his own expreſs Limitation he ſhould have no reſulting Uſe or Eſtate for Life; but on the other Side it was argued, that the Reaſon of the reſulting Eſtate for Life was, becauſe it might poſſibly happen that all the intermediate Eſtates might determine before the Death of *A.* as by his and the Truſtees joining in a Feoffment, *&c* which would be a Forfeiture of their Eſtates, *&c.* and therefore of Neceſſity he muſt have a reſulting Uſe for his Life: And my Lord Chancellor was clear of this Opinion, and ſaid it was his old Reverſion in him and deviſeable by Will: But Note, this was a Remainder limited to his own right Heirs.

Eq. Rep. 20. Preced. Chan. 338. *Eure* v. *Howard.*

* 2. Where a Limitation to the Heirs, or Heirs of the Body of a Stranger ſhall veſt in ſuch Heirs as a Remainder and by Purchaſe, or by way of Limitation and Deſcent.

*Page 301

Here likewiſe the general Rule laid down is, That wherever the Anceſtor takes an Eſtate for Life, and after in the ſame Conveyance a Remainder is limited mediately or immediately to his right Heirs, or to the Heirs Male or Heirs Female of his Body, that in ſuch Caſe the right Heirs or Heirs Male or Female, *&c.* ſhall not be Purchaſors, † but ſhall take by Deſcent; and the Reaſon hereof alſo ariſes from the Prejudice that might enſue to the Lord or to the Donor by the Loſs of Wardſhip, Marriage, *&c.* if ſuch Heirs ſhould be adjudged Purchaſors, becauſe they then claiming nothing from their Anceſtor by hereditary Succeſſion,

Co. 93. *Skelly*'s Caſe. Moor 136. And. 69. and the S.P. cited in numberleſs Caſes.

† *Vide ante* 298. and ſee Fearne 141. 1 Atk. 411.

would

would not be liable to the Terms and Conditions annexed to the hereditary Succeſſion only. §

§ There may, perhaps, be ſome few Caſes, where the ſuperadded Words of Limitation may be allowed to controul the preceding Words, *Heirs*, *Heirs Male*, *&c.* when ſuch ſuperadded Words limit an Eſtate of a different Nature to ſuch *Heirs*, *Heirs Male*, *&c.* from that which the Anceſtor would take, if the preceding Words, *Heirs Male*, *&c.* in thoſe Caſes were taken as Words of Limitation. Fearne 141. 3d Edit. which *vide*, and 1 Co. 956. 1 Atk. 413.

2 Rol. Abr. 417. Rol. Rep. 317. Raym. 163.

Therefore if a Leaſe be made to *A.* for Life, Remainder to the Heirs Male or Heirs Female of his Body, or to his right Heirs, in this Caſe the Remainder is executed preſently in *A.* and he is ſeiſed in Fee or in Tail, according to the reſpective Limitation.

Lit. Sect. 578. Co. 104. 2 Rol. Abr. 415.

So if one makes a Leaſe to *A.* for Life, or a Feoffment in Fee to the Uſe of *A.* for Life; Remainder to *B.* for Life or in Tail; Remainder to the right Heirs of *A.* or to the Heirs Male or Female of the Body of *A.* in this Caſe the Heirs or Heirs Male or Female of *A.* ſhall not be Purchaſors, but ſhall take the Remainder by Deſcent from *A.* for it was ſo executed as a Remainder in *A.* that he might give or forfeit as ſuch in his Life-time.

Cro. Eliz. 355. *Pethouſe* v. *Crane.*

Tenant for Life, Remainder in Tail, Remainder to the right Heirs of Tenant for Life; the Tenant for Life acknowledges a Statute and dies, he in Remainder dies without Iſſue; and the Queſtion was, If the right Heir of the Tenant for Life ſhould be charged by this Statute, and the Lands in his Hand liable thereto; and adjudged that they ſhould, for that they came to him by Deſcent from the Tenant for Life, who had them as a Remainder veſted in him, and might either grant or charge. †

† See the ſtat. 3 & 4 W. & M. c. 14. which makes all Diſpoſitions of Lands, *&c.* by any ſeiſed in Fee in Poſſeſſion, Reverſion or Remainder, as to Creditors only, void, unleſs made for Payment of a real Debt, or for Portions of younger Children, in Purſuance of an Agreement before Marriage.

Ld. Raym. 326. Salk. 254. pl. 4. Lutw 719. *Bates* v. *Bates*

In Dower it was found by ſpecial Verdict, that the Huſband of the Demandant was ſeiſed of the Lands, *&c.* for his Life, Remainder to *A.* and *B.* Truſtees for ninety-nine Years, Remainder to the Heirs of the Body of the Huſband; and the Queſtion was, Whether this was ſuch an Eſtate-Tail executed in the Huſband, whereof his Wife ſhould be endowed; and adjudged that it was, and that the intervening Eſtate to the Truſtees being only for Years ought not to be regarded.

2 Leon. 7.

A Leaſe is made to *A.* for Life, Remainder to the right Heirs of *B.* and after *B.* purchaſes the Eſtate of *A.* yet the Fee is not executed in *B.* but the Remainder to his right Heirs continues diſtinct; for if *A.* dies firſt, the Remainder will be void, and if *B.* dies firſt, yet there will be an Occupancy during the Life of *A.* and the Remainder immediately upon *B.*'s Death veſts as a Remainder in his right Heirs.

Lev. 36. Raym. 36. Sid. 83. Keb. 76. *Stephens* v. *Brittridge.*

A. in Conſideration of a Marriage intended between him and *B.* covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to Wife for Life, Remainder to the Heirs Male of their Bodies, Remainder to *C.* in Tail, the Marriage takes effect, the Huſband and Wife join in levying a Fine; and 'twas adjudged, that the Eſtates for Life to the Huſband and Wife ſtood ſo diſtinct, that they were not merged or confounded in the Eſtate-Tail, being limited all in one and the ſame Conveyance, and that the Fine levied by them was not any Diſcontinuance either of the Eſtate-Tail or Remainders; for if the Eſtate-Tail ſhould be executed in the Huſband and Wife, then the Wife would have an Eſtate in Poſſeſſion, whereas * by the Conveyance ſhe was only to have a Remainder; alſo the Huſband would have only a Moiety, whereas he was to have

* Page 302

the

the Whole during his Life; but yet the Remainder in Tail veſts in the Huſband and Wife as a Remainder; ſo that the Heirs of their Bodies ſhall take it by Deſcent, and not by Purchaſe. ‡

‡ It ſeems the Eſtate-Tail was not executed in them in Poſſeſſion, but only veſted in them as a Remainder, becauſe the Limitation to their Heirs, being a joint Limitation to them, did not correſpond with the Quality of their Eſtates for Life, which were diſtinct and ſucceſſive, and conſequently they had ſeveral Eſtates for Life, with a joint Remainder in Tail. Ferne 29. 3d Edit.

A. ſeiſed of Lands in Fee by Indenture covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to *Edward* his eldeſt Son for Life, Remainder to the firſt Son of *Edward* in Tail Male, Remainder to the ſecond, third and fourth Sons of *Edward* in Tail Male, and ſo to all and every other the Heirs Male of the Body of *Edward* reſpectively and ſucceſſively, and to the Heirs Male of their Bodies according to their Seniority of Birth; Remainder to the Leſſor of the Plaintiff for Life, and a Proviſo, that if *Edward* dies without Iſſue Male, that he ſhall have Power to charge the Lands with Daughters Portions not exceeding 100 *l.* a-piece; the Covenantor dies, and *Edward* ſuffers a Common Recovery, and dies without Iſſue Male; and the only Queſtion was, If *Edward* took an Eſtate-Tail ſubſequent to the Limitation to his four Sons in Tail, or if he took only an Eſtate for Life, with a like Remainder to all his other Sons in Tale Male ſucceſſively, as was limited to the four firſt; and it was adjudged, that he took but an Eſtate for Life, and that all his other Sons ſhould take by Purchaſe; firſt, Becauſe otherwiſe the Words, *and to the Heirs Male of their Bodies*, would be uſeleſs; ſecondly, The Words *and ſo, &c.* prove the ſame Intent, which being turned into *Latin* are *eodem modo*; thirdly, *Severally and ſucceſſively, according to their Seniority*, are alſo a further Proof of ſuch Intent; fourthly, The Power to provide Portions for Daughters would be unneceſſary if *Edward* took an Eſtate-Tail, becauſe then by a Common Recovery he might bar it, and charge the Lands as he thought fit. †

2 Jon. 114. 2 Lev. 223. Raym. 278. *Liſle* v. *Gray*.

† Judgment was given for the Plaintiff: Upon which a Writ of Error was brought in the Exchequer Chamber, where, it ſeems, the Judgment was affirmed, as is obſerved by Judge *Tracey*, 1 Peere Williams 90. who, it appears, had ſearched the Record, the Reports differing in that Matter. Fearne 105. 3d Edit.

A. deviſes Lands to *B.* for Life, and after his Death to the next Heir Male of *B.* and the Heirs of the Body of ſuch next Heir Male; and it was adjudged a good Remainder in Contingency to the next Heir Male of *B.* being in the ſingular Number, and ſo was only a Deſcription or Deſignation of the Perſon who ſhould take the Remainder after the Death of *B.* and not any Limitation of his Eſtate.

Co. 66. 2 And. 37. Cro. Eliz. 453. *Archer*'s Caſe cited. Vent. 216. 3 Lev. 433.

and in ſeveral other Caſes, which *vide* under Title *Deviſe*. §

§ See Fearne 102, 241. 3d Edit.

If one deviſes to *A.* for Life, Remainder to *B.* and the Heirs of his Body, Remainder to *C.* and his Wife for their Lives, and after their Death to their Children, they then having Children, *C.* and his Wife take only an Eſtate for Life, with Remainders to their Children for Life, and no Eſtate-Tail; but had there been no Children, the Deviſe being immediate, the Children could not take in Remainder, and therefore it muſt be an Intail in the Huſband and Wife.

6 Co. 17. *Wild*'s Caſe.

If Lands are given to a Woman and the Heirs of the Body of her Huſband who is then dead, it is ſaid that the Wife and the Iſſue of the Huſband

2 Rol. Abr. 416. 6 Co. 17.

Husband are Jointenants for Life, with Remainder to the Issue, in Tail; for since they are named to take in Possession as the Wife, and if they should only take an Estate for Life, the Donor would have again the Land, though there were still Heirs of the Body of the Husband in Being, which by the Words and Intent of the Gift he ought not to have, since he has given it to the Heirs of the Body of the Husband; and whoever answers that Description is comprized within the Words of the Gift.

Lands were settled to the Use of the Husband and Wife for their joint Lives, and after the Death of either of them, to the Heirs of the Body of the Wife by the Husband to be begotten, and for Default of such Issue, the Wife surviving the Husband, to the Use of the Wife for Life, and after her Death to the Heirs of her Body begotten; the Husband dies leaving Issue by the Wife, and she marries again and suffers a common Recovery; and the principal Question was, whether this was an Estate-Tail executed in the Wife, or that the Remainder was contingent; and it was argued, that the Remainder depending on their joint Lives, and being limited to the Heirs of the Body of one of them, so that it may be frustrate, if the Wife survives, must needs be contingent, because by the Death of the Husband the joint Estate for Life is determined, and yet the Remainder to the Heirs of the Body of the Wife by the Husband can't take Effect, for *non est hæres viventis*. But *per Cur.* clearly, and with some Displeasure at the Argument, the Words *Heirs, &c.* are not Words of Purchase, but of Limitation to the Wife, and the Estate vests in her presently, and is not in Contingency; as if an Estate be limited to a Woman *durante viduitate*, Remainder to her Heirs or the Heirs of her Body, this is a Fee-simple or Fee-tail executed in her presently; and though she afterwards marries, yet that shall not destroy the Estate that was well vested and settled in her before, and here the Remainder closes with the particular Estate to all Purposes but dividing the Jointenancy, and is no more than an Estate to the Husband and Wife, and the Heirs of the Body of the Wife.

*Page 303 *
Sid. 247. Raym. 126. Keb. 888. *Merrell* v. *Rumsey*, & *vide* Perk. Sect. 337. 5 Co. 9. 2 Rol. Abr. 418.

Hil. 13 G. 2. in *B. R.* *Colson* v. *Colson*. *A.* devised Lands to *B.* for Life, Remainder to Trustees to preserve contingent Remainders during the Life of *B.* Remainder to the *Heirs of the Body* of *B.* lawfully begotten and *Verney* doubting whether this was an Estate for Life in *B.* or Tail, sent it as a Case to *B. R.* and notwithstanding the Testator's plain Intention to pass an Estate for Life, yet the Court held, that where the Ancestor takes an Estate for Life, and in the same Instrument a Limitation is made to his Heirs, or to the Heirs of his Body, the Heir can't be a Purchasor, and that therefore this was a plain Estate-Tail. ‡

‡ See 2 Stra. 1125. 2 Atk. 246. Fearne 3d Edit. 87, 121.

See more hereof under Title *DEVISE*.

3. Where by a special Description the Remainder shall vest by Purchase.

Co. Lit. 24, 25. Hob. 31. Co. 102. Dyer 374. 2 Rol Abr. 416. † If a Lease be made to *A.* for Life or in Tail, Remainder to the Heirs Male of the Body of *B.* if *B.* hath Issue two Sons, and the eldest

† See Ld. *Cowper*'s Argument in 2 Vern. 734. and *vide* the Case of *Newcomen* and *Barkham*. 2 Vern. 729. *infra* 305. & *vide* Fearne 146, 7. n. 3d Edit.

dies

dies leaving a Daughter, and then *B.* dies, living *A.* yet the youngeſt Son ſhall not take this Remainder, for he who takes by Purchaſe and original Veſting, muſt anſwer the Deſcription exactly, which here the youngeſt Son does not, for he ought to be Heir as well as Male, and this he is not, for the Daughter of the eldeſt Son is Heir, and ſhe can't take becauſe ſhe wants Part of the Deſcription too, not being Male, and therefore neither of them can take, but the Remainder ſhall be void; ſo if ſuch Leaſe or Gift in Tail be made to *A.* Remainder to the Heirs Female of the Body of *B.* and he hath Iſſue a Son and a Daughter, and dies, living *A.* yet the Remainder ſhall be void for the Reaſon before-mentioned; otherwiſe it is if a Gift be made to one and the Heirs Male or Heirs Female of his Body, *&c.* for there *per formam doni* they ſhall take by Deſcent though another be Heir, for there the whole Eſtate-Tail is in the Anceſtor, but in the other Caſes the Anceſtor takes nothing.

A. having Iſſue two Sons and two Daughters, by Will deviſes Land to his younger Son in Tail, and for want of ſuch Iſſue, to the Heirs of the Body of his eldeſt Son, and if he die without Iſſue, then to his Daughters in Fee, and dies; the younger Son dies without Iſſue, living the eldeſt who has Iſſue; and if this Iſſue ſhould take the Remainder was the Queſtion; and adjudged that he ſhould not, though it was urged that this being in the Caſe of a Will, the Intent of the Teſtator ſhould prevail. 2 Leon. 70. *Challoner* v. *Bowier.* *Page 304

But where one deviſed Lands to *A.* and his Heirs, during the Life of *B.* and after the Death of *B.* to the Heirs Male of the Body of the ſaid *B.* now living; and it was adjudged in *B. R.* and affirmed in Parliament againſt a Judgment in the Exchequer Chamber, that *C.* who was the Son and Heir apparent of *B.* at the Time of the Deviſe, ſhould take this Remainder by Purchaſe, as ſufficiently deſcribed and intended by the Will, and that it was not a Contingent Remainder to be void on the Determination of the particular Eſtate before the Death of *B.* and it was held that the Words *now living* ſhould refer to the Heirs Male, and not to *B.* himſelf, though that was the next Antecedent; becauſe the Deviſor took Notice before that he was living, and then to refer thoſe Words to him would be a vain Tautology, and *C.* was then Heir apparent, and Heir in common Parlance. Vent. 334. 2 Vent. 311. Raym. 330. 2 Jon. 99. 2 Lev. 232. *James* v. *Richardſon*, or *Burchett* v. *Durdant.* Pollex. 457. ——[*Vide* Fearne 115, 144. 3d Edit.]

A. by his Will in Writing deviſes all his Lands to *B.* and *C.* and the Survivor of them, for the Term of twenty-one Years for the Payment of his Debts and Legacies, and after Payment the Term to ceaſe, and after the End or ſooner Determination of that Eſtate, he deviſes the Premiſſes to the firſt Son of his Body, and to the Heirs Male of the Body of ſuch firſt Son lawfully iſſuing, and for Default of ſuch Iſſue to *B.* for ninety nine Years, if he ſo long live, without Impeachment of Waſte, Remainder to the firſt and other Sons of *B.* and the Heirs Male of their Bodies ſucceſſively, Remainder to *C.* for ninety-nine Years, if he ſo long live, Remainder to his firſt and other Sons in Tail Male ſucceſſively, Remainder to the Heirs Male of my Aunt Mrs. *Elizabeth Long*, Wife of *Richard Long* Clerk, lawfully begotten, with Remainder to his own right Heirs, and by his Will gave 150*l.* Annuity to *Dorothy Beaumont* his Siſter the Plaintiff in Error, for Life, and 500*l.* to her Children, and to his Aunt *Elizabeth Long* 100*l.* and to her Children 500*l.* and dies without Iſſue. *B.* and *C.* entered by virtue of the Deviſe for twenty-one Years, and afterwards both died without Iſſue; and *John Beaumont* and *Dorothy* his Wife entered in Right of *Dorothy* as Heir at Law to the Teſtator, the Term for twenty-one Years being determined, and the Debts and Legacies paid; and *Thomas Long*, eldeſt Son of *Elizabeth* (ſhe having, at the Time of making the ſaid Will, three Sons, M. 1713. *in Domo Procerum*, *Beaumont* v. *Long*, 1 P. Wms. 229. S. C.—— [1 Eq. Abr. 214. Fearne 145. 3d Edit.]

Sons, *viz.* the ſaid *Thomas*, and two others) entered and brought an Ejectment; and in the Exchequer Judgment was given by Chief Baron *Ward*, *Price* and *Lovell*, againſt Baron *Bury*, for the Plaintiff *Thomas Long*; but in *Trinity* Term 1713, this Judgment was reverſed in Error in the Exchequer Chamber; and now upon Error brought in the Houſe of Lords it was argued, that this Reverſal ſhould be affirmed. Firſt, becauſe *Dorothy* being Heir at Law to the Teſtator, her Right, as ſuch, was to be favoured; and all Deviſes to diſinherit an Heir at Law were to be taken ſtrictly. Secondly, that to make this Deviſe good to *Thomas Long* it muſt be conſtrued either a Contingent Remainder, or the Words *Heirs Male* be taken as a *Deſcriptio Perſonæ* to veſt in him. As a Contingent Remainder it cannot be good for want of a Freehold to ſupport it; all the preceding Eſtates being only for Years; beſides if it were good as a Contingent Remainder in its Creation, yet *Elizabeth Long*, the Mother, being living when the particular Eſtates determined, it cannot veſt, becauſe *non eſt Hæres viventis*; as *Deſcriptio Perſonæ* it cannot veſt, for that ought to be ſuch a Deſcription as is *Vice Nominis*, which the Word *Heir Male* (being a legal Term, and not accompanied with any other Words to determine the Senſe otherwiſe, as Heir apparent, or Heir now living, *&c.*) cannot amount to, and the Word *begotten* doth not determine the Senſe otherwiſe; nor does any * Intent appear to confine the Deviſe to the Iſſue Male of *Elizabeth Long*, then much leſs to *Thomas Long* only as the Perſon deſcribed in this Deviſe; but notwithſtanding theſe Reaſons it was adjudged, that the firſt Judgment ſhould ſtand, and the Judgment of Reverſal be reverſed, though ten of the Judges were of Opinion that the Deviſe was void, and only the three Judges (*Lovel* being dead) before mentioned held it good.§

*Page 305

§The Court held, in this Caſe, the Word *Heir* was uſed for *Heir apparent:* That the Teſtator had taken Notice that his Aunt, *E. L.* was living, and that ſhe had three Sons; he could not therefore mean that the eldeſt Son ſhould take ſtrictly as Heir, but as Heir apparent he might. Beſides, he took Notice of his own Heir, and gave her an Annuity out of the Lands, which ſhewed his Intention that ſhe ſhould not have all the Lands; and the Limitation to his own right Heirs was expreſly in *Default of Iſſue Male of the Body* of his Aunt, *E. L.* ſo that it was plain that he intended the apparent Heir Male of *E. L.* ſhould take before his own Heir general, and that his own Heir ſhould not take whilſt there was any Iſſue of *E. L.* Mr. *Fearne* obſerves, that in this Caſe the Anceſtor did not take the legal Freehold. Pa. 147. 3d Edit.

Ld. Raym. 185. Preced. Ch. 468. *Baker* v. *Wall.*

J. S. having Iſſue two Sons *A.* and *B.* deviſes in the Words following; "I give to my eldeſt Son *A.* all that my Farm called *Dumſey*, to him and "his Heirs Male for ever, if a Female, my next Heir ſhall allow and pay "to her 200*l.* in Money, or twelve Pounds a Year out of the Rents and "Profits of *Dumſey*, and ſhall have all the Reſt to himſelf; I mean my "next Heir, to him and his Heirs Male for ever. Upon the Death of the Teſtator *A.* entered and died, leaving Iſſue a Daughter; and it was adjudged, that the Lands ſhould go to the ſecond Son *B.* and not to the Daughter of the eldeſt, though ſhe was Heir General.

2 Vern. 729. *Newcomen* v. *Barkham* Preced. Ch. 461. S. C.

I. S. deviſed to Truſtees in Truſt, after Debts and Legacies paid, to convey to *A.* his Couſin and the Heirs Male of his Body; and for want of ſuch Heirs Male, then to the Heirs Male of the Body of *B.* his great Grandfather; and for want of ſuch Heirs Male, to his own right Heirs for ever, and gave to his Siſter 2000*l.* to be put out at Intereſt during her Life, ſhe to receive the Intereſt, and after her Death to her Children, and died, and ſoon after *A.* died without Iſſue; and *C.* being Heir Male of *B.* the Teſtator's great Grandfather but not Heir General, there being a Daughter of an elder Brother, the Queſtion was between him and the Teſtator's Siſter and Heir at Law, who had the 2000*l.* deviſed to her, whether the Deviſe was void or not; and my Lord Chancellor held the Deviſe good, and that *C.* ſhould take as a Perſon ſufficiently deſcribed and intended by the Teſtator.

But

But when one ſeiſed in Fee deviſed his Lands to his Grandaughter (being his Heir at Law) for her Life, Remainder to his own right Heirs Male for ever, and died, leaving his Grandaughter his Heir at Law, and alſo leaving a deceaſed Brother's Son, who was the next of Kin in the Male Line; and it was held by Lord *Macclesfield*, that the Nephew could not take, that the Words *Heirs Male* muſt be intended Heirs Male of the Body, and could never extend to an Heir Male of any collateral Line; and it not being ſaid in the Will Heir Male of his Body or of his Name, the Grandaughter, who was his Heir at Law, might have an Heir Male, though not of his Name; and he ſaid that this Caſe differed from that of *Brown* and *Barkham* §§ that being merely a Truſt; alſo that in that Caſe the Remainder was limited to the Heirs Male of the Body of Sir *Robert Barkham* the Grandfather; whereas here the Deviſe was to the Heirs Male, without ſaying of any Body.

2 Will. Rep. 1. pl. 1. *Dawes* v. *Ferrers*.

§§ The Caſe of *Newcomen* and *Barkham* *ſupra*.

---

* (D) Of the ſeveral Kinds of Remainders, as diſtinguiſhed into Remainders veſted, or in Contingency and Abeyance.

* Page 306

IF an Eſtate be limited, either at Common Law, or by way of Uſe, to one for Life, or in Tail, Remainder to the right Heirs of *J. S.* who is then dead, this is a good Remainder, and † veſts preſently in the Perſon who is Heir at Law to *J. S.* by Purchaſe; and though a Daughter be then Heir at Law, and after a Son is born, yet ſhall the Daughter retain the Land againſt him; for ſhe being Heir and coming within the Deſcription at the Time when the Remainder was limited, it then veſted and ſettled in her immediately as a Remainder by Purchaſe, and ſhall not by any Accident after be defeated ||

2 Rol. Abr. 415. Co. 95, 103. Plow. 56.

† In the former Edition of this Abridgment a Note was given as taken from *Dormer* v. *Forteſcue*, dividing Contingent Remainders into three Sorts. The Definition of the ſecond very ſhortly and improperly given, as taken Notice of by Mr. *Fearne*, pa. 153. the third Edition.——As I think his Definition and Diviſions the beſt extant on the Subject, I ſhall give the Author's own Words. "A Contingent Remainder is a Remainder limited ſo as to depend on an Event or Condition "which may never happen or be performed, or which may not happen or be performed till after the "Determination of the preceding Eſtate; for if the preceding Eſtate determine before ſuch Event or "Condition happens, the Remainder will never take Effect.——Under this Definition we may pro-"perly diſtinguiſh four Sorts of Contingent Remainders.—*Firſt*, where the Determination of the "preceding Eſtate is itſelf dubious and contingent.—*Secondly*, where the Contingency on which the "Remainder is to take Effect is independent of the Determination of the preceding Eſtate.—*Thirdly*, "where the Condition upon which the Remainder is limited is certain in Event, but the Determination "of the particular Eſtate may happen before it.—*Fourthly*, where the Perſon to whom the Remain-"der is limited is not yet aſcertained, or not yet in being."——Third Edition, pa. 3, 4.

|| *Vide* the ſtat. 10 & 11 W 3. c. 16.

But if *J. S.* be living at the Time of the Remainder limited to his right Heirs, this puts ſuch Remainder in Abeyance or Contingency, that is, in no Perſon but *in Nubibus* till the Contingency happens, for in the Feoffor or Donor it is not, becauſe he has limited it out of him, and all Remainders muſt paſs out of him at the Time of the Limitation, though they do not preſently veſt in the Perſon intended; and in the right Heirs of *J. S.* it cannot be, becauſe he cannot have Heirs during his Life; ſo there is no Perſon *in Rerum natura* within the Deſcription, to take it; therefore it is in the mean Time in Abeyance or Expectancy, to veſt or not veſt, as the Caſe happens; for if *J. S.* dies during the particular Eſtate, then the Remainder preſently takes place in his Heirs;

Co. 135. Co. Lit. 378. a. 2 Co. 51. 2 Rol. Abr. 415. Plow. 28, 556. Poph. 74. Moor 720. 3 Co. 20. 10 Co. 50. Raym. 145. Pollex 56.

but if the particular Eſtate determines by Death or otherwiſe in the Life of *J. S.* then ſuch Remainder is become totally void, and can never veſt, but the Eſtate ſettles again in the Feoffor or Donor, as if no ſuch Limitation in Remainder had been; and he becomes Tenant to the *Præcipe* and is obliged to do the Services; and though *J. S.* die ſoon after, yet his Heir can have no Benefit by it, not being capable of taking the Remainder when it fell.

Co. Lit. 3. Co. 66. 2 Co. 51. Hob. 33. Moor 104. Dyer 337. 2Leon. 218. Rol. Rep. 254. §*Vide* Black. Com. 2 V. 170. It's an improbable or too remote a Poſſibility.

But if there be no ſuch *J. S.* at the Time of the Limitation, though he be after born, and dies during the particular Eſtate; yet his Heirs ſhall never have the Remainder. So if a Remainder be limited to *A.* Son of *B.* in Tail, *&c.* or to *E.* Wife of *D.* where in Truth there is no ſuch *A.* or *E.* though *B.* has a Son after called *A.* or *E.* marries one *E.* yet they can never § take the Remainder; becauſe if there be ſuch Perſons as the Words of the Gift import, there the Remainder ought to veſt in them preſently, and they will never after be made capable of taking it; but if there be no ſuch Perſons then *in eſſe*, none who come within that Deſcription after can lay claim to it, becauſe the Limitation was preſent to ſuch Perſons; but a Remainder limited *Primogenito Filio*, or *Proximo hæredi Maſculo* of *A.* or *Proquinquioribus Hæredibus de ſanguine Puerorum*, or *Seniori Puero* of *A.* or to the right Heirs of *A.* there being then ſuch *A.* in *Eſſe*, or to the Wife that *A.* ſhall marry; theſe are good Remainders, and ſhall veſt when ſuch Perſons come *in eſſe* as are within the Deſcription; becauſe here appears no preſent Regard for any Perſon in particular, and therefore if they anſwer the * Deſcription at any Time before the particular Eſtate determines, it is Time enough; and ſo there is a Diverſity between a Remainder limited to one by Name in particular, and ſuch Remainder limited by Deſcription, or Circumlocution, or between a general Name and a ſpecial Name. ‖

*Page 307

‖ A Limitation of a Remainder to a Baſtard before it is born, is not good: For though the Law allows the Poſſibility of having Baſtards, it preſumes it to be a very remote and improbable Contingency. Black. Com. 2 V. 170. cites Cro. Eliz. 509.

10 Co. 85.

A. makes a Leaſe to *B.* for Life of *B.* and after the Death of *A.* to remain to *B.* and his Heirs; this Remainder is Contingent, and cannot veſt preſently, for if *A.* ſurvives *B.* it is void; becauſe otherwiſe the Operation of Livery would be interrupted during the Life of *A.* for he can't give himſelf any Eſtate, his Livery operating to paſs Eſtates from him, not to give any to him who had the Whole before; and therefore during his Life the Operation of the Livery muſt ceaſe, and by Conſequence no Remainder can take Effect in virtue of that Livery, which *pro tempore* being at an End, all that depended thereon ceaſes too, and can never after be revived; for the Livery muſt carry out all the Eſtates at once from the Feoffor, and if he comes again into the Poſſeſſion before they can all take Effect, this breaks the Force of the Livery, and brings back again to him all that ſuch Livery had taken out from him, and then they can never take Effect but by a new Livery; and this is the Reaſon of the common Caſe, that one can't give Lands to another to begin after his Death, becauſe being to make Livery preſently, if that can't operate preſently, it can never operate at all, for it is a Contradiction to give Lands to one by a ſolemn Livery, which is an Act executed and works preſently, and yet by Words to reſtrain that Operation to a future Time; but in the principal Caſe, where *A.* dies firſt, there no Interruption is of the Livery, for *B.* had an Eſtate for Life by virtue thereof; and before that determines, the ſame Livery, which carried the Remainder in Abeyance, for the Uncertainty of its taking Effect, does upon *A.*'s Death direct and ſettle, or bring down the Remainder to *B.* and his Heirs.

If

If a Leaſe be made to *A. B.* and *C.* for their Lives, and if *B.* ſurvives *C.* then to remain to *B.* and his Heirs, this Remainder is in Abeyance, becauſe though the Perſon be certain, yet ſince it depends on *C.*'s dying before him, till that be known the Remainder can't veſt. So if a Leaſe be made to *A.* for Life, and after the Death of *B.* who is a Stranger, to remain to *C.* in Fee, or to *A.* in Fee, theſe Remainders are in Abeyance or Contingency, and depend on *B.*'s dying before *C.* or *A.* for if he ſurvives them, the Remainder can't take Effect. 3 Co. 20. 10 Co. 85. Co. Lit. 378.

If a Leaſe be made to *A.* for Life, Remainder to the Abbot of *D.* and his Succeſſors, though the Abbot be then dead, ſo as there is then no Abbot at all, yet the Remainder ſhall be good if an Abbot be made before the Death of *A.* So of a Remainder to a Mayor and Commonalty, Dean and Chapter, Prior and Convent, *&c.* though there be then no Mayor, or Dean or Prior. So of a Remainder to the Biſhop of *D.* Parſon of *D.* or other ſole Corporation and his Succeſſors; theſe Remainders not being limited to them by Name ſpecially, but to them generally, and ſo whoever comes within the Deſcription before the Determination of the particular Eſtate, is capable of taking by virtue thereof, are good Remainders in Abeyance, *&c.* but if there be no ſuch Corporations at the Time of the Limitation, then the Remainders are totally void; and none created after, tho' by the ſame Name, can take theſe Remainders, tho' a Patent be then paſſing to make ſuch Corporation. Co Lit. 264. Hob. 33. 2 Co. 51. 10 Co. 31. Moor 104. Rol. Rep. 254. 2 Bulſ. 275.

If a Man makes a Leaſe to *A.* for Life, and that after the Death of *A.* and one Day after, the Land ſhall remain to *B.* for Life, *&c.* this is a void Remainder, becauſe not to take Effect immediately upon the Determination of the firſt Eſtate, and ſo during that Time there would be an Interruption of the Livery, and no Tenant of the Freehold, either to do the Services, or anſwer to Strangers Precipes. Plow. 23. Raym. 144

* If a Man ſurrenders Copyhold, or makes a Feoffment in Fee of Freehold Lands to the Uſe of his Wife for Life, Remainder to the Heirs of the Body of the Surrenderor and his Wife, this is a contingent Remainder not executed in the Wife, becauſe he who will take by it muſt make himſelf Heir of both their Bodies, which can't be before the Death of both; and then if the Wife, who has the particular Eſtate, dies firſt, the Remainder is become void, becauſe it can't veſt when the particular Eſtate determines. So if ſuch Feoffment or Surrender had been to the Uſe of the Wife and a Stranger for Life, Remainder to the Heirs of the Huſband and Wife, this Remainder alſo is contingent; for though the Wife dies, yet it ſhall not veſt till the Death of the Huſband, and if he ſurvives his Wife and the Stranger, the Remainder is become void. *Page 308 Rol. Rep. 238, 317, 438. 2 Rol. Abr. 416. Dyer 99. Leon. 102.

If one makes a Leaſe to *A.* for Life, Remainder to him who firſt comes to St. *Paul*'s Church, *&c.* this is a good Remainder in Abeyance or Contingency, but can veſt in none till he qualifies himſelf to take it by coming to St. *Paul*'s Church; nor can any one grant away, though he ſhould happen after to come there firſt. Poph. 5. Moor 104. Perk. Sect. 56. Dav. 35.

One levies a Fine to the Uſe of himſelf for Life, and after his Death to the Uſe of his two Daughters till his Son *B.* ſhould return from beyond Sea, and ſhould come to the Age of twenty-one Years or die, and after ſuch Return and Age of twenty-one Years, or Death, which ſhould firſt happen, to the Uſe of the ſaid *B.* and the Heirs of his Body begotten; *B.* returns from beyond Sea; and it was adjudged, that this was a good Remainder, and ſhould veſt in him immediately upon his Return, though he was not then twenty-one; for the laſt Disjunctive *Or* is to be applied to the whole Sentence, and makes it disjunctive in all, and though his coming from beyond Sea, or to twenty-one Years, are uncertain, yet his Death is certain; and therefore this Remainder does not depend altogether upon Uncertainties; and in this Caſe it ſeems the Heirs of his Body Cro. Eliz. 269. Leon. 243. Co. Lit. 225.

Body ſhall not take by Purchaſe, though his Death had happened firſt, and ſo the Remainder could not veſt in himſelf, for the Limitation being to him and the Heirs of his Body, whoever takes by virtue thereof, muſt take as from him, and conſequently will be in by (*a*) Deſcent, and not by Purchaſe.

(*a*) 1 Co. 99. *Shelley's* Caſe.

So if one deviſes Lands to *A.* for Life, *ſi tam diu ſola vixerit*, and after her Death or Marriage, Remainder over to another, this is a good Remainder, becauſe it is certain one of the two Contingencies will happen; but if one gives Lands to *A.* till *B.* comes to twenty-one Years of Age, and when *B.* comes to ſuch Age, then to remain over, this Remainder is contingent, and uncertain whether it will ever veſt, for if *B.* dies before ſuch Age, the Remainder is become void. So where Land is given to Woman ſo long as ſhe ſhall remain ſole, or to *A.* till *B.* comes from *Rome* to *England*, and after her Marriage, or *B.*'s coming to *England*, then to remain to *C.* in Fee, theſe Remainders are contingent, and uncertain whether they ſhall ever veſt or not, for if the Woman never marries, nor *B.* comes to *England*, theſe Remainders will not veſt, but are become void. So if Lands are deviſed to one for Life, and if the Deviſee be diſturbed, that then the Land ſhall remain over to another in Fee, this creates no Remainder till ſuch Diſturbance, and if that never happens, the Remainder fails likewiſe; for theſe Remainders are not to ariſe but upon ſuch Acts done, and therefore if they fail ſo does the Remainder.

2 Leon. 82. 3 Leon. 182. 3 Co. 20. Dyer 142.

Poph. 97. 10 Co. 85.

One levies a Fine to the Uſe of *A.* and the Heirs Male of his Body, till he or the Heirs Male of his Body attempt to alien or ſell, and then to the Uſe of *B.* &c. *A.* dies without Iſſue, and without any Attempt, † &c. *B.* will have no Eſtate, for his Remainder was not to begin but upon ſuch Attempt precedent, and that not happening, the Remainder never takes Place.

† See *infra* 309, the Concluſion of the third Paragraph, and 324, 5.

*Page 309

Plow. 23. 3 Co. 20. Raym 144. Co. Lit. 378.

* A Leaſe is made to *A.* for Life, Remainder to *B.* for Life, and if *B.* dies before *A.* that then the Land ſhall remain to *C.* for Life, this is a good Remainder, if the Contingency happens, otherwiſe not; and in the mean Time the Eſtate continues in the Leſſor, and is not in Abeyance, being expreſly limited to go over, if ſuch Contingency happens, therefore till it does happen nothing is deveſted out of the Leſſor.

Raym. 427. 3 Leon. 182. 3 Lev. 125.

One deviſes Lands to his Wife during her natural Life, if ſhe does not marry, but if ſhe marries, then preſently after my Son *A.* to enter and enjoy, to him and the Heirs Male of his Body; and 'twas adjudged, firſt, That by this Will the Wife had an Eſtate for her Widowhood only; ſecondly, That this was a Remainder veſted in *A.* preſently to take Effect in Poſſeſſion upon the Death or Marriage of the Wife, which ſhould firſt happen, and not a contingent Remainder to take Effect only in caſe the Wife married.

Cro. Jac. 696. Jon. 57. Raym. 429.

One deviſes Lands in this Manner; My Will is to intail all my Lands to my Nephew *A.* and the Heirs Male of his Body, and, for Default of ſuch Iſſue, to his Brother and the Heirs Male of his Body, &c. *Habendum* to them ſeverally, and to the Heirs Male of their Bodies, to the only Intent and true Meaning of this my Will, and ſo long as they and every of them do perform and keep the true Meaning thereof touching the intailing all my ſaid Lands in Manner following; and therefore I give all my ſaid Lands to *A.* and the Heirs Male of his Body begotten, until he or they make any Acts to alter or diſcontinue the Eſtate-Tail, and then to *B.* and the Heirs Male of his Body, with other Remainders over, and dies, *A.* enters; *B.* dies leaving Iſſue *C.* and then *A.* levies a Fine; and it was objected that *C.* could not enter, becauſe the Remainder deviſed to his Father was contingent, and not to ariſe but upon *A.*'s Alteration

teration of the Eſtate, and not before or otherwiſe, and then *B.* dying before that Contingency happened, the Remainder could not veſt; but it was adjudged that the Remainder to *B.* was not contingent, but an immediate Deviſe, and that otherwiſe the Intent of the Deviſor, which was to give to every one in Remainder ſucceſſively, would be deſtroyed, tho' they held the Limitation over upon his Alienation did not ſo defeat the Operation of the Fine, as to prevent the Diſcontinuance wrought thereby, and give him in Remainder immediate Title of Entry thereby, for that ſuch Clauſe tended to a Perpetuity, and was condemned in Law upon the Reaſon of other Caſes there cited.

[In the Caſe of *Smith*, on the Demiſe of *Dormer*, v. *Packhurſt & al'.* (commonly called by the Name of *Dormer* and *Forteſcue*) there was a Limitation in Remainder (after ſeveral preceding Eſtates for Life and in Tail) to the Uſe of *A. for ninety-nine Years, if he ſhould ſo long live*, and from and after *the Death of* A. *or other ſooner Determination of the Eſtate limited to him for ninety-nine Years*, to the Uſe of Truſtees and their Heirs, during the Life of the ſaid *A.* upon Truſt to preſerve contingent Eſtates, *&c.* and for that Purpoſe to make Entries and bring Actions, *&c.* but to permit the ſaid *A.* to receive the Rents and Profits, *&c.* during the Term of his Life; and after the End or other ſooner Determination of the ſaid Term, to the Uſe of the firſt and other Sons of *A.* ſucceſſively in Tail Male, with divers Remainders over. By the Expiration of all the preceding Eſtates, *A.* came into Poſſeſſion of the Eſtate limited to him for ninety-nine Years; and having a Son, he, together with that Son, when he came of Age, levied a Fine of the Lands to make a Tenant to the *Præcipe*, and ſuffered a Recovery of the ſame, in which the Son was vouched. The Son died without Iſſue, and afterwards *A.* died without leaving any other Son; the next ſurviving Remainder-man made his actual Entry within five Years, and the Queſtion was, Whether the Recovery had barred his Remainder?——This Point depended entirely on another Queſtion, Whether the Freehold was in the Truſtees during the Life of *A.* or not? For if it was, the Recovery was not well ſuffered for want of a good Tenant to the *Præcipe*, and conſequently did not bar the Remainder; but if the Truſtees had not the Freehold, then it was in the Son, and of courſe he was capable of making a good Tenant to the *Præcipe*, and the Recovery in that Caſe was well ſuffered; for the Court held that the Fine by Leſſee for Years, *(A.)* or the Reverſioner, (the Son) could only operate by way of Eſtoppel, to bar the Parties claiming under ſuch Leſſee or Reverſioner; but did not acquire the Freehold, as a Feoffment would have done.——To prove that the Freehold was not in the Truſtees, it was inſiſted, *Firſt*, That the Remainder to the Truſtees was void in its Creation, becauſe to commence after *A.*'s Death, and then hold during his Life, which was repugnant, and could never take Effect at all. *Secondly*, If not void in its Creation, it was a Contingent Remainder, becauſe it was uncertain whether it ever would take Effect, as the Term of ninety-nine Years might not determine in *A.*'s Life-time. *Thirdly*, That if it was neither void not contingent, yet it did not amount to a legal Eſtate, but was only a Right of Entry.——But the Court reſolved that the Remainder was not void in its Creation, its Commencement not being reſtrained to the Death of *A.* but limited from the Death of *A. or other ſooner Determination of the Eſtate for ninety-nine Years*, and therefore might take Effect by Surrender, Forfeiture, or Effluxion of Time, in *A.*'s Life-time. *Secondly*, That it was not a Contingent Remainder, being limited to Perſons *in Eſſe*, without any Condition precedent to be performed, it did not depend on the Death of *A.* but on ſuch other Events, (*viz.* Forfeiture,

feiture, Surrender, &c.) as might determine the particular Eſtate from the Nature of the Eſtate itſelf. *Thirdly*, That it was not a mere Right of Entry, but a legal Eſtate; for a Grantor cannot reſerve a Right of Entry to a Stranger, nor can a Right of Entry ſubſiſt without an Eſtate. Therefore the Truſtees had the Freehold for the Life of *A.* And, upon the whole, the Court held that the Fine and Recovery did not bar the Remainder. *Vide Vin. Abr.* 18 Vol. Fol. 418. 3 *Atkyns* 135. and *Fearne*'s Eſſay 153, &c.]

(E) What Eſtate is ſufficient to ſupport a Remainder.

AS every Remainder muſt depend upon a particular Eſtate, ſuch particular Eſtate muſt be ſufficient to ſupport the Remainder, and can't by the general Rule of Law be leſs than an Eſtate for Life; ſo that if one makes a Leaſe for (*a*) Years, either at Common Law or by Way of Uſe to *A.* Remainder to the right Heirs of *J. S.* who is * living, this Remainder is void, becauſe till the Death of *J. S.* there is no Power to take the Freehold, and that can't be in Abeyance. †

*Page 310

Co. 134. *Chudleigh*'s Caſe.

3 Co. 20. 4 Leon. 21. 4 Mod. 256. Poph. 4, 82. Co. Lit. 217. 4 Mod. 256. Salk. 226. pl. 4. Ld. Raym. 3. Skin. 408. pl. 3. (*a*) Leaſes for Years were anciently of ſo little Value, that no Leaſe could be made for more than forty Years. Co. Lit. 45. b. Wil. Rep. 574.

† Unleſs the Freehold paſſes out of the Grantor at the Time when the Remainder is created, ſuch Freehold Remainder is void; it cannot paſs out of him without veſting ſomewhere; and in the Caſe of a Contingent Remainder it muſt veſt in the particular Tenant, elſe it can veſt no where: Unleſs, therefore, the Eſtate of ſuch particular Tenant be of a Freehold Nature, the Freehold cannot veſt in him, and conſequently the Remainder is void. Black Com. 2 V. 171.

Moor 488. pl. 686. 3 Co. 20. Raym. 144.

So if one makes a Leaſe to *A.* for twenty-one Years, if he or if *B.* ſhall ſo long live, and after the Death of *B.* or after the Death of *A.* to the firſt Son of the Body of *B.* in Tail, and ſo to the ſecond, &c. in Tail, Remainder to *C.* in Fee; all theſe Remainders are void, becauſe the firſt Eſtate being but for Years; and the Remainder not to take Effect immediately after thoſe Years, but at a future Time, after the Death of *A.* or *B.* which may be long after, and ſo during that Time there would be an Interruption of the Livery, and no Tenant of the Freehold, therefore theſe Remainders are void; and though it happen that *A.* or *B.* die within the Term, yet till their Death the Freehold would be carried into Abeyance, and could not veſt in thoſe in Remainder for the Incertainty of the Death of *A.* or *B.* within the Term; and therefore the happening of that after, can't ſave the Remainder which was void before; but if ſuch Leaſe had been made, and then it had been limited, that after the Determination of that Eſtate or after the Expiration of the ſaid Term, to *C.* for Life, or in Tail, &c. this had been a good Remainder executed preſently, as if a Leaſe for Years had been abſolutely to one, Remainder to another for Life, &c. for here was no Interruption of the Livery, or Want of a Tenant of the Freehold.

Plow 83. Vaugh. 46.

A Remainder can't depend on an Eſtate at (*b*) Will, ſo that if ſuch Eſtate be made with Remainder, the Remainder is void; the Reaſon whereof ſeems to be, becauſe by the Limitation over the Will is inſtantly

8 Co. 75.— (*b*) But an Eſtate at Will may be limited to commence after the Death of another. Sid. 347.

deter-

determined, and then the Remainder can't be good for want of a particular Eſtate whereon to depend; and in Poſſeſſion it can't be good, becauſe it was limited as a Remainder. ‖

‖ An Eſtate at Will is of a Nature ſo ſlender and precarious, that it is not looked upon as a Portion of the Inheritance; and a Portion muſt firſt be taken out of it, in order to conſtitute a Remainder. Beſides, if it be a Freehold Remainder, Livery of Seiſin muſt be given at the Time of its Creation; and the Entry of the Grantor, to do this, determines the Eſtate at Will in the very Inſtant in which it is made; or if it be a Chattel Intereſt, though perhaps it might operate as a *future Contract*, if the Tenant for Years be a Party to the Deed of Creation, yet it is void by way of *Remainder:* For it is a ſeparate independent Contract, diſtinct from the precedent Eſtate at Will; and every Remainder muſt be Part of one and the ſame Eſtate, out of which the preceding particular Eſtate is taken. And hence it is generally true, that if the particular Eſtate is void in its Creation, or by any Means is defeated afterwards, the Remainder ſupported thereby ſhall be defeated alſo.——Black. Com. 2 V. 166, 7. Cites for the ſeveral Poſitions. 8 Rep. 75. Dyer 18. Raym. 151. Co. Lit. 298.

If one make a Leaſe to *A.* for Life, Remainder to him for Years, or to *A.* for his own Life, Remainder to him for the Life of *B.* theſe are good Remainders, and both Eſtates are veſted in *A.* for though he can have no Benefit of the Remainders in his own Perſon, yet he may give, grant, deviſe or aſſign either Eſtate, and a greater Eſtate may ſupport a leſs, as in theſe Caſes, but not *e converſo*; therefore if one make a Leaſe to *A.* for Years, Remainder to him for Life, the Leaſe for Years is drowned. Co. Lit. 54. Dyer 310. Cro. Eliz. 491. 3 Leon. 22.

A Remainder may be limited, upon a Gift in Frank Marriage, either to the Donees themſelves, or to a Stranger. Co. Lit. 21 b. Godb. 19, 20.

If *A.* on the Marriage of his Son, *&c.* covenants to ſtand ſeiſed to the Uſe of the Son for Life, or for ninety-nine Years, if he ſo long live, Remainder to two Strangers during the Life of the Son, upon Truſt to ſupport contingent Remainders, with Remainder to the firſt and other Sons in Tail, *&c.* this Remainder to the two Strangers is void, becauſe there is no Conſideration, and then by Conſequence there is no Eſtate to ſupport the contingent Remainders to the Sons. 2 Lev. 52, 54. 3 Keb. 110.

If one makes a Leaſe to *A.* for the Life of *B.* Remainder to *C.* in Fee, *A.* dies; now till an (*a*) Occupant enters, there is no particular Eſtate, and yet the Remainder to *C.* continues good †, becauſe it veſted in *C.* preſently by the firſt Limitation, and the Want of a Tenant to the firſt Eſtate ſhall not vitiate the Eſtate to the ſecond, which was well veſted. Co. Lit. 298.

(*a*) If Rent be granted to *A.* for the Life of *B.* Remainder over, if *A.* dies, he in Remainder ſhall have the Rent preſently, becauſe the Eſtate for Life in the Rent determined by the Death of *A.* and there can be no Occupant of a Rent. Moor 664. Yelv. 9. Vaugh. 200.

† But now ſince the Statutes 29 Car. 2. c. 3. and 14 Geo. 2. c. 20. no ſuch Vacancy of the particular Eſtate can happen.

If one grant a Rent to the right Heirs of *J. S.* who is then living, Remainder over, this whole Grant is void, for *J. S.* can't have Heirs * during his Life, and ſo there is no Perſon to take the particular Eſtate, and without that there can be no Remainder, and therefore that is likewiſe void. So if a Leaſe be made to *J. S.* for Life, where there is no ſuch Perſon, Remainder over, the Whole is void for the ſame Reaſon. So if a Leaſe be made to a Monk or other Perſon, who has no Capacity by Law to take, for Life or Years, Remainder over, both are void; but in all theſe Caſes, if ſuch Eſtates were deviſed by Will, he in the Remainder ſhould take preſently. So if the firſt Deviſee refuſes, or dies in the Life-time of the Deviſor, the Remainder ſhall veſt in Poſſeſſion preſently, becauſe that in a Will the Intent of the Deviſor is principally to be regarded; ſo that if the particular Eſtate fails, the Deviſe over

* Page 311

2 Rol. Abr. 415. Moor 519. Rol. Rep. 138. Leon. 195. Dyer 122. Plow. 344. Raym. 163.

ſhall be conſtrued as a new original Deviſe to ſupport the Intent of the Teſtator.

Perk. Sect. 566. Leon. 197. Dyer 309. 2 Mod. 210.

If one gives Lands to *A.* in Tail, Remainder to himſelf for Life or Years, Remainder to *B.* in Fee, this Remainder to himſelf is void, becauſe none can give Lands to himſelf, and yet the Remainder to *B.* is good, becauſe there is a particular Eſtate to ſupport it. So if the firſt Remainder were to a Monk or other incapable Perſon, Remainder over, this laſt Remainder is good, and ſhall take Effect in Poſſeſſion upon the Determination of the particular Eſtate, without any Regard to the meſne Remainder, which was void.

Will. Rep. 36. pl. 104. in the Caſe of *Carrick* v. *Errington*, *per* Lord Chancellor.

If by Leaſe and Releaſe Lands are limited to the Uſe of a Proteſtant for Life, Remainder to *B.* a Papiſt for Life, Remainder to *C.* a Proteſtant, and *A.* dies, in ſuch Caſe the Remainder to *B.* the Papiſt being void, the next Remainder to *C.* ſhall take Effect preſently in the ſame Manner as if a Remainder were limited to a Monk for Life, or to one who refuſes to take, or if ſuch Remainder-Man were dead, and there never had been ſuch a Limitation.

Vent. 189. 2 Lev. 35. Ld. Raym. 314.

A Right of Action can't ſupport a contingent Remainder, but there muſt be a particular Eſtate actually in Being, or a preſent Right of Entry; but a future Right of Entry is not ſufficient.

(F) Of the Continuance of the particular Eſtate, and when the Remainder is to commence.

Plow. 25. Raym. 144. [*Vide* 1 Rep. 66.]

IF a Man makes a Leaſe to *A.* for Life, and that after the Death of *A* and one (*a*) Day after the Land ſhall remain to *B.* for Life, *&c.* this is a void Remainder, becauſe not to take Effect *(b)* immediately upon the Determination of the firſt Eſtate, and ſo during that Time there would be an Interruption of the Livery, and no Tenant of the Freehold, either to do the Services or anſwer to Strangers Precipes.

(*a*) That the Law is nice to an Inſtant, Ld. Raym. 316. §

(*b*) That if the contingent Remainder can't take Effect when the particular Eſtate determines, be it by Surrender, Merger, Feoffment, or otherwiſe, it can never after ariſe. 2 Saund. 380. in the Caſe of *Purefoy* v. *Rogers*.

---

§ See *infra*, 312. (G.)

4 Mod. 259. 3 Lev. 408. Salk. 227. pl. 6. Carth. 309. *Reve* v. *Long*.

A. ſeiſed in Fee deviſes his Lands to *B.* eldeſt Son of his Brother *C.* for Life, Remainder to the firſt Son of *B.* in Tail, and ſo to all his other Sons in the ſame Manner ſucceſſively, Remainder to *D.* ſecond Son of *C.* for Life, Remainder to his firſt and other Sons in Tail ſucceſſively, and dies; *B.* enters and dies, leaving his Wife *enſient* with a Son, then *D.* enters as in his Remainder, and ſix Months after the Son is born; and all this Matter being found ſpecially, 'twas adjudged in *C. B.* for *D.* againſt the Son; firſt, Becauſe this being a contingent

*Page 312 * Remainder to the Son, and he not being born at the Time when the particular Eſtate determined, this became void; ſecondly, *D.* being the next in Remainder, and having entered before the Birth of the Son was in by Purchaſe, and therefore ſhall not loſe his Eſtate by a Son born after; and this Judgment was affirmed in *B. R.* for they held it plainly

plainly to be a contingent Remainder, and not an executory Deviſe or a ſpringing Remainder, for that would introduce a Perpetuity not to be barred by a common Recovery, becauſe 'twould be the ſame to all the other Sons; but here it being a contingent Remainder, and not happening in Time, 'tis gone for ever; and they relied on *Archer*'s Caſe; but upon a Writ of Error brought into Parliament, the Judgment was reverſed by almoſt all the Lords, becauſe being in a Will, they thought that by the Meaning and Equity thereof they ought not to diſinherit the Heir for ſuch a Nicety, and that a Will was otherwiſe to be expounded than a Deed; and therefore they conſtrued it an executory Deviſe or ſpringing Remainder to the firſt and other Sons, and that the Freehold ſhould veſt in *D.* till the Son was born; but all the Judges were much diſſatisfied with it, and did not change their Opinions, but blamed the Judge who permitted it to be found ſpecially where the Law was ſo certain and clear.

Note, That now by the 10 & 11 W. 3 cap. 16. *Proviſion is made, that after-born Sons and Daughters, to whom Remainders are limited in Contingency, ſhall take in the ſame Manner as if they had been born in the Father's Life-time, though no Eſtate be limited to Truſtees to preſerve and ſupport ſuch contingent Remainders, which Act was made by Reaſon of this Caſe, and of the Strictneſs of the Law herein.*

(G) Contingent Remainders, how prevented from riſing or coming in Eſſe.

HEREIN, as has been before obſerved, the general Rule is, that if the contingent Remainder can't veſt either during the particular Eſtate, or at the Inſtant † of the Determination thereof, ſuch Remainder is for ever deſtroyed; the Reaſon whereof ſeems to be, to prevent the Inconvenience and Danger that might otherwiſe enſue to Purchaſors by allowing ſuch Remainder to take Place wherever they happened; for if but the Latitude of a Day were given to their veſting after the particular Eſtate ended, they might as well ariſe one hundred Years after; the Reaſon of ſuch Allowance being the ſame; and ſince by the Limitation they ought to veſt when the particular Eſtate determines, if they can't ſo do, they ſhall never after take Effect, be they limited either at Common Law or by Way of Uſe.

Co. 134, 138. Poph. 82. † *Vide* Plowd. 25. 1 Rep. 66.

As in *Archer*'s Caſe, a Deviſe of Lands to *A.* for Life, and after to the next Heir Male of *A.* and the Heirs Male of the Body of ſuch next Heir; *A.* having Iſſue *B.* his Son, makes a Feoffment in Fee to *C.* upon whom *B.* enters; and it was adjudged, firſt, That this was good as a contingent Remainder; ‡ ſecondly, That by this Feoffment of *A* who was but Tenant for Life, the contingent Remainder was deſtroyed, for every Remainder ought to veſt either during the particular Eſtate, or at leaſt *eo inſtanti* that the particular Eſtate determines; and here by the Feoffment the Eſtate for Life of *A.* was determined by Forfeiture; and ſince the Remainder could not then take Effect, for *non eſt hæres viventis*, it can never after ariſe.

Co. 66. Cro. Eliz. 453. Hob. 338. & *vide* 2 Leon. 219. Moor 104. 2 Sid. 67.

‡ A Remainder veſting in him by Purchaſe, becauſe the Word *Heir* was in the ſingular Number, preceded and diſtinguiſhed by the Word *next*, and followed by the Words of Limitation grafted on it. Fearne 102, 103. 3d Edit.

So

*Page 313 2 Leon. 178. * So where one made a Feoffment in Fee to the Uſe of himſelf for Life, and after to the Uſe of his firſt Son and his Heirs; the Father and Feoffees, before any Iſſue, infeoff *I. S.* and his Heirs for a valuable Conſideration without Notice, and then the Father dies leaving Iſſue a Son who enters; and by the better Opinion the contingent Uſe to the Son was deſtroyed; becauſe by the Feoffment the particular Eſtate was determined, and the Son not being *in Eſſe* to take Advantage of the Forfeiture and Wrong done to his Remainder, ſhall never after ſet it up againſt the Purchaſer; and the Feoffees, by their joining in the Feoffment, have excluded themſelves of any Entry to revive the Remainder, if that were neceſſary, as (*a*) a Releaſe by them after the Feoffment of the Father would likewiſe have done.

(*a*) 2 Rol. Abr. 797.

Co. 120. Poph. 70. *Chudleigh's* Caſe.—— [See various Obſervations on and Arguments drawn from *Chudleigh's* Caſe, in Fearne 158, 217, 225, 248. 3d Edit.] *A.* had Iſſue *B.* and *C.* his Sons, and makes a Feoffment in Fee to the Uſe of himſelf for Life, and after to the Uſe of the Feoffees and their Heirs during the Life of *B.* Remainder to the Uſe of the firſt, ſecond, and other Sons of *B.* in Tail Male, Remainder to the Uſe of *C.* and the Heirs of his Body, Remainder to his own right Heirs, and dies; the Feoffees infeoff *B.* in Fee, without Conſideration, and with Notice of the firſt Uſes, and after *B.* hath Iſſue a Son, and if he was barred by the Feoffment of the Feoffees, was the Queſtion; and adjudged, upon Solemn Argument in the Exchequer Chamber, that he was barred; for the Feoffment of the Feoffees diveſted all the Eſtates and future Uſes, and though *B.* had Notice this was not material, the Eſtate out of which the Uſes were to ariſe being diveſted and gone; and the new Eſtate given by the ſecond Feoffment ſhall not be ſubject to the Uſes limited by the firſt Feoffment; and there being no Son of *B.* to enter when the particular Eſtate determined, as in this Caſe it did by the Feoffment, which was a Forfeiture thereof, he ſhall never enter after; for the Statute 27 *H.* 8. (*cap* 10.) executes no Uſes but when the Eſtate continues in the Feoffees to ſerve them, and not when that is diveſted, and the Uſe itſelf turned to a Right. Alſo it was held in the ſame Caſe, that if there had been no Alteration of the Poſſeſſion, but that *B.* had died before the Birth of his Son, he ſhould never after have the Eſtate, the Remainder to *C.* being then executed, and the Son of *B.* born out of due Time †; and they agreed that the Preſerving ſuch contingent Uſes would create Perpetuities, and tend to the Deſtruction of Families, who, upon no Occaſion whatever, could diſpoſe of their Eſtates.

† *Vide* ſtat. 10 & 11 W. 3. c. 16. *ante* 312.

Rol. Abr. 119. *Uvedal* v. *Uvedal.* *A.* Tenant for Life, Remainder to his firſt, ſecond, and other Sons in Tail Male ſucceſſively, Remainder to *B.* for Life, and ſo to his firſt, ſecond and other Sons in Tail Male, then *B.* having Iſſue a Son, and *A.* no Son, *A.* cuts Timber Trees; the Son of *B.* who is then Tenant in Tail ſhall have them, for the Property thereof is in him by Reaſon of his Inheritance, and the Remainder to the firſt and other Sons of *A.* is no Impediment, being but a Poſſibility, which may never happen, and is of no Regard till it does happen, but may be deſtroyed by Feoffment, *&c.* ‖

‖ It is proper to obſerve, that Chancery will not admit of Waſte by Colluſion between Tenant for Life and the Perſon intitled to the firſt veſted Eſtate of Inheritance, to the Prejudice of Sons not *in Eſſe*. See the Caſe of *Garth* and Sir *John Hind Cotton*. 1 Vezey 524, 546.

Cro. Car. 152. *Biggot* v. *Smith.* 3 Mod. 309. S. C. cited. Ld. Raym. 316. S. C. cited. One made a Feoffment in Fee to the Uſe of himſelf and his Wife, and to the Heirs of the Survivor of them, and after the Huſband makes a Feoffment in Fee, and dies; the Wife enters, and infeoffs a Stanger, and dies; and the Queſtion was, Whether by the Wife's Entry the Fee ſhould veſt in her, being the Survivor, ſo as her Iſſue might enjoy it; and it was adjudged, that the Huſband's Feoffment had deſtroyed this future contingent Uſe of the Fee; for whatever cannot accrue at the Time

of

of the Death of the Party who firſt dies, cannot afterwards, by any Act, be revived; and though in this Caſe the Wife had a joint Eſtate for Life, with her Huſband, yet, during the Coverture, ſhe was bound by his Feoffment, and ſo could not prevent the Deſtruction of the contingent Fee, which was not to take Effect till the Death of one of them. § Vent. 189.

§ In this Caſe the particular Eſtate was not ſubſiſting at the Huſband's Death, when the Fee ſhould have veſted, for his ſecond Feoffment had deſtroyed it during the Coverture; and though the Wife's Right of Entry took Effect at the Inſtant the Remainder ſhould have veſted, yet it was inſufficient, for it ſhould have been then actually exiſting. Fearne 216. 3d Edit.

* So where one hath Iſſue two Sons *B.* and *C.* and makes a Feoffment in Fee to the Uſe of himſelf for Life, Remainder to the Uſe of *C.* for Life, Remainder to the firſt Son of *C.* who ſhould have Iſſue of his Body, and to his Heirs for ever; and, for Default of ſuch Iſſue, to the Uſe of the firſt Daughter of *C.* who ſhould have Iſſue of her Body, and to her Heirs for ever, and ſo to the ſecond, *&c.* Remainder to the right Heirs of *C.* for ever; and dies; *C.* enters, and hath Iſſue a Son, who dies without Iſſue; then after *C.* levies a Fine with Proclamation, and *B.* enters as for a Forfeiture of his Eſtate for Life; but it was adjudged againſt *B.* for the Fee veſted preſently in *C.* and the other Limitations were but contingent, and ſo barred and deſtroyed by the Fine, there being then none *in Eſſe* to take them, and then the Fee was immediate to his Eſtate for Life, and ſo the Fine good, and no Forfeiture. *Page 314 Cro. Car. 364. *Boreton* v. *Nicholls.*

If one makes a Feoffment in Fee, or Covenant to ſtand ſeiſed to the Uſe of himſelf for Life, and after to the Uſe of his firſt Son in Tail Male, *&c.* and, before the Birth of any Son, makes a Feoffment in Fee, this deſtroys the contingent Remainder to the Son, ſo that it can never after ariſe. Cro. Jac. 168. *Bell's* Caſe. cited.

One made a Feoffment in Fee to the Uſe of himſelf for Life, Remainder to the Uſe of his Wife for Life, Remainder to *A.* his eldeſt Son for Life, Remainder to the eldeſt Iſſue of *A.* which ſhould be at the Time of his Death, Remainder to *C.* in Fee; *A.* hath Iſſue *B.* his eldeſt Son; the Feoffor dies; his Wife releaſes to *A.* for Years, and he makes a Feoffment in Fee to *D.* to whom *C.* levies a Fine; the Wife dies, then *A.* dies, and it was adjudged, that, by this Feoffment, the Remainder to the eldeſt Son of *A.* which ſhould be at the Time of his Death, was deſtroyed, though he had then a Son actually born; becauſe it was contingent and uncertain whether that Son would continue to be his eldeſt at the Time of his Death; for he might die, and another be his eldeſt; and therefore the Remainder could not veſt in him in his Father's Life, and by Conſequence being in Contingency was deſtroyed by the Feoffment, which determined the particular Eſtate before the Remainder could take place; but note, if the Wife had entered, this had revived the contingent Remainder, for her Right of Entry was ſufficient for that Purpoſe; or if ſhe had ſurvived *A.* then, though ſhe had died before Entry, yet might the Feoffees, after her Death, enter and revive the contingent Remainder. Cro. Eliz. 630. Moor pl. 726. *Smith* v. *Belay.* Lit. Rep. 291. Like Caſe. 2 Rol. Abr. 794.

A. makes a Leaſe for Life by Indenture, with Livery, to *B.* and if it fortune *B.* to marry any Wife, who ſhall ſurvive him, then the Land ſhall remain to ſuch Wife for her Life; *Proviſo* if *B.* does not in Writing, or laſt Will, declare his Mind that ſhe ſhall have it, then it ſhall not remain to her; *B.* before Marriage makes a Feoffment to *C.* to whom *A.* levies a Fine, and ſuffers a Recovery, and after *B.* marries, and makes a Declaration, that his Wife ſhall have the Remainder, *&c.* then he and his Wife levy a Fine to *C.* and after he makes another like Declaration and dies; and his Wife enters, and by Certificate of two Judges to the Chancellor, her Remainder was deſtroyed by the Feoffment, becauſe Moor pl. 750. *Powle* v. *Veer.*

becauſe the Freehold was thereby determined before the Remainder could take Effect; alſo the Poſſibility of the Wife was incluſively given away in the Fine, and then the Declaration was to no Purpoſe; and ſo it ſeems it would have been if he had made ſuch Declaration, and after had made the Feoffment, for that Declaration had only made the Remainder abſolute to the Wife who ſhould ſurvive him, which being contingent, and uncertain who that would be, would be barred and deſtroyed by the Feoffment.

If one makes a Gift in Tail to *A.* Remainder to the right Heirs of *J. S.* and *A.* makes a Feoffment in Fee, and then *J. S.* dies, and after *A.* dies without Iſſue, yet the right Heirs of *J. S.* ſhall never have the Remainder, for by the Feoffment of *A.* the Eſtate-Tail, and all Remainders, were diſcontinued and veſted in the Feoffee, and there was

*Page 315 Co. 135. & vide 2 Rol. Abr. 796. 2 Sid. 64, 129. Vent. 188.

* not any particular Eſtate in Fact, or in Right, to ſupport the Remainder when it ſhould happen; and upon the Death of *J. S.* this Remainder was as capable of veſting as a Remainder, as ever it could be after, his right Heir being then certainly known; but ſince by the Feoffment of *A.* the whole Eſtate-Tail, and the Right of it, as to himſelf, was determined, and yet the Remainder could not then take Effect, it ſhall never afterwards; otherwiſe it would be, if *A.* had only been diſſeiſed, for then the Right of the Eſtate-Tail had preſerved the Right of the Remainder; and ſo it ſeems the Law is upon a Feoffment to the Uſe of Tenant in Tail, Remainder to the right Heirs of *J. S.*

2 Saund. 380. 2 Lev. 39. 3 Keb 11. *Pureſoy* v. *Rogers.* 4 Mod. 284. 3 Mod. 310. S. C. cited. and in ſeveral other Books.

A. Tenant for Life, Remainder to her firſt and other Sons in Tail Male ſucceſſively; *A.* takes a Huſband, and, before the Birth of any Son, the Reverſioner in Fee grants and conveys his Reverſion to the Huſband and Wife by Fine, and then *A.* hath Iſſue a Son, and dies; and *per Cur.* though if *A.* had ſurvived her Huſband, ſhe might have avoided and waved the Eſtate taken by the Fine, yet the contingent Remainder to the Son is utterly deſtroyed, there being then none *in Eſſe* when the particular Eſtate determined, for the Huſband and Wife take by Entireties, and therefore the Eſtate for Life of the Wife was merged before the Contingency happened, and the Poſſibility which the Wife had, of avoiding the Inheritance, given by the Fine, and thereby reviving her Eſtate for Life, will not preſerve it; for if the contingent Remainder cannot take Effect when the particular Eſtate determines, be it by Surrender, Merger, Feoffment, or otherwiſe, it can never after ariſe.

Show. P. C. 151.

If Tenant for Life, with contingent Remainders to his firſt and other Sons, before the Birth of any Son, make a Feoffment in Fee, with Condition of Re-entry, the contingent Remainders ſhall never ariſe, though the Condition be broken, and a Re entry made before the Birth of any Son; becauſe the Feoffment, though upon Condition, was a Forfeiture and Determination of the particular Eſtate, and the Remainder not being capable of taking place is gone for ever, for the Recovery does not purge the Forfeiture.

Ld. Raym. 313. Carth. 211. Show. P. C. 150. 3 Lev. 284. 2 Salk. 427. pl. 2. 576, 618. Comyn. 45. pl. 40. 3 Salk. 300. pl. 10. 2 Vent. 198.

A. Tenant for Life, Remainder to his firſt and other Sons in Tail Male ſucceſſively, Remainder to *B.* in Tail, Remainder over; *A.* before the Birth of any Son ſurrenders to *B.* and then a Son was born; and in this Caſe it was held that by the Surrender the contingent Remainder was gone and deſtroyed; but the principal Queſtion in this Caſe was, if the Surrender was effectual, becauſe *B.* knew nothing of it till five Years after the Birth of the Son, and then he agreed to it; and this in *C. B.* and *B. R.* was adjudged to be no ſuch Surrender as ſhould deſtroy the contingent Remainder; but the Judgment, as to this Point, was reverſed in the Houſe of Lords, againſt the Senſe of all the Judges except two; but in this Caſe it afterwards appearing, that at the Time of

the

the Surrender *A.* was *non compos*, this was held a void Surrender, and not only voidable: and therefore no Eſtate paſſed by it, and then by Conſequence the contingent Remainders were not touched. 3 Mod. 301. Comb. 438. *Thompſon* v. *Leech.*

A. Tenant for Life, Remainder to his firſt Son in Tail, Remainder to *B.* for Life, Remainder to his firſt Son in Tail; *A.* having a Son accepts a Fine from *B.* and then makes a Feoffment in Fee, and then *B.* has Iſſue a Son born, the Remainder to him is not deſtroyed; for the Acceptance of the Fine diſplaced nothing; and though the Feoffment diſplaced all the Eſtates, yet the Right left in the firſt Son of *A.* ſhall ſupport the Right of the contingent Remainders; for though the Feoffment of *A.* was a Forfeiture of his Eſtate for Life, yet his Son, who was next in Remainder, and had a Right thereto, was not bound to take Advantage thereof, but might ſtay till the Death of *A.* and as he might then have entered, ſo, if he dies, whereby the Remainder and Right of Entry goes over to another, they may likewiſe enter, after the Death of *A.* or before, as they think fit; and it is there ſaid, the * Way to preſerve ſuch contingent Remainders is to limit the Uſe to the Huſband for Life, or more modernly to him for Years, then to the Uſe of the Feoffees for the Life of the Huſband, and then to limit the contingent Remainders; or if it were to the Huſband for Life, Remainder to Truſtees and their Heirs during the Life of the Huſband, Remainder to the Heirs or Heirs Male of the Body of the Huſband, yet is not the Fee or Fee-tail executed in the Huſband otherwiſe than as a Remainder (*a*), by Reaſon of the interpoſing Limitation to the Truſtees, and therefore in ſuch Caſe the Wife of the Huſband ſhall not be endowed. Vent. 188. 2 Lev. 35. 2 Keb. 872. *Lloyd* v. *Brooking.* *Page 316 (*a*) 3 Lev. 437. *Duncombe* v. *Duncombe*, S. P. 1 Saund. 151 ‡. and 2 Vern. 755. *Elie* v. *Oſborne*. 2 P. Wms. 610. *Manſel* v. *Manſel*. *Temp.* Talb. 252.

---

‡ See the Caſe of *Hooker* v. *Hooker*, Rep. *Temp.* Hardw. 13.

Father and Son are, the Father conveys Land to the Uſe of himſelf for Life, Remainder to the Uſe of the Son for Life, Remainder to the firſt and other Sons of the Son in Tail Male ſucceſſively, Remainder to the Heirs of the Body of the Father, or to his right Heirs, and dies before the Birth of any Son of his Son; and if by the Deſcent of the Fee or Tail upon the Son, the contingent Remainders were deſtroyed, was the Queſtion; and *argued* that they were not, becauſe the Inheritance came to the Son by Deſcent, which was an Act in Law, and not by his own Act; and therefore the Law which does no Wrong ſhall not deſtroy theſe contingent Remainders, but that upon the Birth of the Sons the Eſtate ſhall open again to let in the Remainders; but 'twas *adjudged* that the contingent Remainders were deſtroyed by the (*b*) Deſcent of the Inheritance upon the Son; and they relied on the Caſe of (*c*) *Wood* v. *Ingerſoles*, and held that this Caſe differed from the Caſes cited, where the Eſtates were united at firſt upon making the Conveyance, which if they ſhould not afterwards open, ſo as to let in the Remainders, the Conveyance would deſtroy itſelf; but here this Deſcent has an Act ſubſequent to the Conveyance, and made an Alteration in the Eſtates limited thereby, and therefore had deſtroyed the contingent Remainders. § Vent. 306. 2 Jon. 76. 3 Keb. 731, 820. *Hartpool* v. *Kent.* (*b*) For this *vide* Co. Lit. 28. a. 11 Co. 80. Lev. 11. Raym. 28. Sid. 47. *Plunkett* v. *Holmes.* 2 Lev. 202. 2 Jon. 79. *Forteſcue* v. *Abbot.* (*c*) Cro. Jac. 260.

§ As to the Caſe of *Hartpool* and *Kent*, ſee the Caſe of *Hooker* v. *Hooker*, Rep. *Temp.* Hardw. 13.— With reſpect to *Wood* and *Ingerſoles*, it is not properly reported in Cro. Jac. *vide* Fearne 264. 3d Edit.

A. and

Vent. 345. 2 Jon. 136. Raym. 413. *Harriſon* v. *Belſey.*

A. and *B.* Jointenants for their Lives, Remainder to the firſt Son of *A.* in Tail, and ſo to the ſecond, *&c.* Remainder to the right Heirs of *B.* Before any Iſſue *A.* releaſes to *B.* and his Heirs, and after hath Iſſue a Son; and if by this Releaſe, before the Birth of a Son, the contingent Remainders were deſtroyed, was the Queſtion; and argued, upon the Diverſity in the above Caſe, that this Uniting of the Eſtate for Life with the Remainder in Fee, being by Conveyance and Act ſubſequent to the Limitation of the contingent Remainders, and before they came in Being, had deſtroyed them; for now the Eſtate for Life upon which they depended is gone, and the whole Fee executed in *B.* and therefore they can never after ariſe; but by three Juſtices, *diſſentiente Dolben*, 'twas *adjudged* that theſe contingent Remainders were not deſtroyed; for to ſome Purpoſes the whole Fee was executed in *B.* immediately upon the firſt Conveyance, and this Releaſe of *A.* gave him no greater Eſtate, nor in any other Degree than he had before; for after ſuch Releaſe he is in of the whole Eſtate by the Leſſor, as he was before, and as he would have been if it had come to him by Survivorſhip; and his Eſtate being at firſt given, ſubject to theſe contingent Remainders, muſt open to let them in when they happen, as it would have done, had no ſuch Releaſe been made; and though they were limited immediately after the Eſtate for Life to *A.* and *B.* yet till they came *in Eſſe* they did not prevent the Cloſing of the Fee in *B.* and therefore did not depend abſolutely upon the Eſtate for Life, and have now no other Impediment to hinder their Riſing than they had at firſt.

*Page 317

Rol. Rep. 238, 317, 438. *Lane* v. *Pannell.*

A Copyholder in Fee ſurrenders to the Uſe of his Wife and of *B.* for their Lives, Remainder to the Uſe of the Heirs of the Body of the Surrenderor and his Wife; *B.* and the Wife are admitted accordingly, after *B.* ſurrenders his Part to the Uſe of the Huſband, and then the Huſband ſurrenders the Whole to the Uſe of *C.* and his Heirs, who is admitted accordingly; then the Wife dies, leaving Iſſue, who brings Ejectment for the Moiety of the Wife; and adjudged not maintainable; for when *B.* ſurrenders his Moiety to the Uſe of the Huſband, this makes a Severance of the Jointure; and when the Huſband after ſurrenders the Whole to *C.* he by this hath an Eſtate for the Life of *B.* in the one Moiety, and for the Life of the Wife in the other Moiety; and though if ſhe had ſurvived her Huſband ſhe might have defeated the Surrender of her own Moiety, yet now ſhe dying firſt, the Eſtate of *C.* as to that Moiety is determined; and ſince he who would claim it muſt make himſelf Heir of both their Bodies, which during the Life of the Huſband he can't do, and yet the particular Eſtate as to that Moiety is determined; therefore the Remainder as to that Moiety which was contingent is deſtroyed, and the Huſband's Death can never ſet it up again; but for the other Moiety, if the Huſband dies, living *B.* it will take place, elſe not, being contingent, and not capable of veſting during the Life of the Huſband; and as to the Huſband's Surrender to the Uſe of *C.* and his Heirs, this was no ſuch Forfeiture or Determination of the Eſtate for Life as to give an Entry to thoſe in Remainder, for then that had deſtroyed the contingent Remainder of the Whole; and though the Wife had ſurvived and defeated ſuch Surrender as to her own Moiety, yet it appears before that, that would not have revived the contingent Remainder, being not capable of veſting when the particular Eſtate ended; but ſuch Surrender of the Huſband works only by Way of Grant for what he might lawfully paſs, and not ſo ſtrongly as Livery of Seiſin.

(H) Of Remainders that ariſe on Conditions precedent or ſubſequent.

IT is laid down as a Rule of Law in a Variety of Books, That a Remainder can't be limited to begin upon a Condition annexed to the firſt Eſtate, but that for Breach of the Condition the Feoffor or Leſſor muſt enter, and by that Entry, the firſt Eſtate being determined, the Remainder is deſtroyed, becauſe it can't take Effect at the Inſtant of the Determination of the particular Eſtate; for the Remainder paſſing out of the Feoffor or Leſſor at the ſame Time that the particular Eſtate is created, and being to take Effect in virtue of the firſt Livery, when the Feoffor or Leſſor re-enters for the Condition broken, that deſtroys the Force of the firſt Livery, being an Act of equal Notoriety therewith, and then the Remainder which was to take Effect thereby can never ariſe, becauſe there wants the Solemnity required by Law for that Purpoſe. Co. Lit. 378. Co. 86. Plow. 25, 29. Rol. Abr. 474. Perk. Sect. 831.

If there be Tenant for Life with a contingent Remainder, Tenant for Life makes a Feoffment in Fee, upon Condition, if the Contingency happens before the Condition is broken, the Contingency is deſtroyed; but if the Tenant for Life enters for the Condition broken before the Contingency happens, the contingent Remainder ſhall be revived, * and the Contingency, if it happens, may veſt; but if before the Contingency happens the Reverſioner enters upon the Tenant for Life for the Forfeiture, the contingent Remainder is deſtroyed. Ld. Raym. 314. *per Holt* Ch. J. *Page 318

But for the better Explanation hereof it may be neceſſary to conſider the following Diſtinctions.

1. Between a Condition and a Limitation, and in Caſe of the Condition when it precedes the Veſting of the Remainder as the Cauſe thereof, and is annexed to the firſt Eſtate; and when it is annexed abſolutely without any Regard to the Remainder.

A Condition is properly ſuch, as goes in Abridgment and Reſtraint of the Eſtate firſt given, upon ſomething to be done or not done by the Perſon who takes the Eſtate, or by him who makes the Eſtate, or to happen during the Continuance of the Eſtate. (*a*) A Limitation is ſuch as limits and circumſcribes the Eſtate to continue ſo long only, and no longer, than till ſuch a Thing happens, or till ſuch a Thing done or not done by the Perſon who takes the Eſtate, or any other; ſo that upon the Happening, Performance or Non-performance thereof, the Eſtate *ipſo facto* determines and expires as certainly as if it had been made for Life or Years; and upon ſuch an Eſtate a Remainder may be limited, as well as after an Eſtate for Life or Years. Co. Lit. 201, 214. 10 Co. 42. Plow. 27. (*a*) Moor 292. Co. Lit. 214. Poph. 99. Plow. 413. Cro. Eliz. 414. 10 Co. 41.

If a Man makes a Leaſe for Life or Years of Lands, or grants an Advowſon, Common Rent *in Eſſe*, &c. to one for Life or Years, upon Condition that if the Leſſee or Grantee do not pay ſuch a Sum of Money, that then his Eſtate ſhall ceaſe, and that it ſhall remain to *B.* for Life, Years, or in Fee, this Remainder is void for theſe Reaſons; firſt, Becauſe it does not veſt as a Remainder preſently but is to ariſe upon Breach of the Condition only; ſecondly, Upon Breach of the Condition it can't veſt, becauſe none can take Advantage of the Breach thereof, but only Perk. Sect. 830. Co. Lit. 214.

only the Party from whom the Condition moves and his Heirs; thirdly, when they have taken Advantage thereof by Entry or Claim, the particular Eſtate is thereby determined, and the Leſſor or Grantor in of his firſt Eſtate, as it were *ab initio*, by Title paramount the Eſtate given or granted; and then if the Remainder can't veſt at the Inſtant of the Determination of the particular Eſtate, it can never after take Effect, and by Conſequence is defeated and gone.

Cro. Eliz. 360. *Cogan* v. *Cogan.*

As where *A.* ſeiſed of Lands in Fee, let them to *B.* for Life, Remainder to *C.* for Life, provided that if *A.* hath Iſſue a Son during his Life, who ſhould live to the Age of five Years, that then the Eſtate limited to *C.* ſhould ceaſe, and that it ſhould remain to ſuch Son in Tail; *A.* hath Iſſue a Son, who lives to the ſaid Age, and if the Remainder limited to *C.* ſhould ceaſe, and the Remainder to the Son be good, was the Queſtion; and *per totam curiam* it was *adjudged*, that the Remainder to the Son was void; wherein it appears *firſt*, That this was properly a Condition, becauſe upon the happening thereof it was to ſhorten and abridge the Eſtate before given; *ſecondly*, This Caſe proves the Law to be the ſame in Caſe of Things which lie in Grant, as of thoſe which lie in Livery; for here it was not the particular Eſtate that was to ceaſe upon the Condition, but the Remainder, and that lies in Grant; *thirdly*, Though the Condition here was not annexed to the firſt Eſtate, yet it was annexed to the Eſtate immediately preceding the Remainder to the Son; and ſo to this Purpoſe is the ſame as if it had been for Life, upon ſuch Condition to ceaſe and remain over; *fourthly*, It appears that the Remainder was not to begin but upon the Condition performed, and ſo the Condition preceded the Veſting the Remainder; **fifthly*, This Caſe proves that none ſhall take Advantage of a Condition but the Leſſor and his Heirs, and therefore the Remainder to the Son who was a Stranger could not ariſe thereby; *ſixthly*, That this Remainder being limited to begin upon a Condition precedent, whereof none can take Advantage but the Leſſor and his Heirs, is for ever defeated and deſtroyed, becauſe it can't take Effect according to the Terms limited for veſting thereof.†

*Page 319

†See Fearne 191. 3d Edit.

Perk. Sect. 831. Co. Lit. 214, 338. Co. 40. Rol. Abr. 472. Cro. Eliz. 727, 792. Dyer 127. Doct. & Stud. l. 2. c. 21.

But now if one makes a Leaſe for Life or Years, upon Condition to pay ſo much at a Day certain, or reſerving Rent, and for Default of Payment a Re-entry, Remainder after the Death of the Leſſee, or after the Years, to *B.* for Life or in Fee; or if one makes a Leaſe to *A.* for Life, Remainder to *B.* in Fee, rendering Rent, with Clauſe of Re-entry for Default of Payment by the Tenant for Life, and to retain during his Life; in theſe Caſes the Remainder veſts preſently in *B.* and has no Dependance on the Condition for its taking Effect; but if the Condition ſhould be broken, or the Rent arrear, *B.* can't enter, being a Stranger; and if the Leſſor ſhould enter, he would be in of his firſt Eſtate by Title Paramount the Remainder, and then the particular Eſtate being determined before the Remainder could take Effect, the Remainder would thereby be deſtroyed; but this would be unreaſonable that he ſhould deſtroy the Remainder which was well veſted by his own Grant; and ſince every Man's Grant ſhall be conſtrued ſtrongeſt againſt himſelf, and this muſt be to ſupport and make good the Eſtate he has parted with; therefore by ſuch Remainder over the Condition is deſtroyed, and the Power of Re-entry gone, and then the firſt Eſtate is abſolute, with the Remainder over; and the Leſſor has no Remedy for the Money or the Rent, but in a Court of Equity §.

§See Fearne 192. 3. 3d Edit.

2. Diſ-

2. Diſtinction between a Deed and a Will, when in both the ſame Words of Condition are made uſe of for veſting the Remainder.

Here we muſt obſerve, that though in Caſe of a Deed either the Condition deſtroys the Remainder, or the Remainder the Condition, as appears before, yet in a Will it is otherwiſe.

As where one ſeiſed of Lands in Fee, deviſeable by Cuſtom, by Will deviſed them to *J. S.* a Clerk, upon Condition that he ſhould be a Chaplain, and ſing for the Soul of the Deviſor all his Life, and that after his Death the Land ſhould remain to *J. D.* Mayor of *S.* and his Succeſſors, to find a Chaplain perpetually to ſing for the Soul of the Deviſor, and dies. *J. S.* being of the Age of twenty-four Years enters, and holds the Land for ſix Years, and is not a Chaplain; the Heir of the Deviſor ouſts him; then *J. S.* brings an Aſſiſe, and upon the pleading thereto by the Heir, and all his Matter found, the Aſſiſe went for the Plaintiff; whence my Lord *Coke* infers, *that this was no Limitation*, becauſe then the Eſtate of *J. S.* would have been *ipſo facto* determined, and the Eſtate caſt upon *J. D.* and then *J. S.* could not have recovered; *ſecondly*, That this being a Condition, *J. D.* in Remainder could not enter for Breach thereof; and *thirdly*, Since it was adjudged likewiſe againſt the Heir that he could not enter for the Condition broken, therefore the Condition by the Limitation of the Remainder over muſt be deſtroyed. But *Perkins* in citing of this Caſe holds, that for Breach of the Condition the Heir might enter, and yet that the Remainder ſhould not be defeated thereby, but that after the Death of *J. S.* it ſhould well take Effect; and with him agrees *Dyer* in a like Caſe, and takes the Diverſity between a *Remainder* by Deed with *Livery*, and a *Remainder* * by *Will*; for in Caſe of the Deed, the Entry for the Condition broken *defeats the Livery*, and by Conſequence *the Remainder* which depends thereon; but in Caſe of a *Will* the *Remainder is good*, though the particular Eſtate never was good, or be defeated before the Remainder can take Effect, which muſt be as *an executory Deviſe*, not as a *Remainder*; for then it ought to veſt when the particular Eſtate ends, and without Queſtion as *an executory Deviſe* ſuch Limitation over *is good*; and therefore, where *Plowden* in citing this Caſe holds it to be a *Limitation*, and not a *Condition*, becauſe then by the Entry of the Heir the Remainder over would be defeated, this Reaſon holds not, when by conſtruing it *an executory Deviſe* it may be made good, and yet the Condition be preſerved.

29 Aſſ. pl. 17. Perk. Sect. 563. Plow. 412. Dyer 127. 10 Co. 40. Rol. Abr. 407, 474.

* Page 320

So where *A.* ſeiſed of Lands in Fee, having Iſſue three Sons, *B. C.* and *D.* deviſes the Lands to his Wife for Life, *ſub conditione quod ipſa educabit pueros teſtatoris in eruditione et bonis moribus*, the Remainder to *D.* his Son in Tail, and dies; the Wife enters and breaks the Condition, and if *B.* as Heir ſhould enter for the Condition broken, or if *D.* ſhould enter as by Limitation, or if the Condition was deſtroyed by the Limitation over, were the Queſtions; *et per totam Curiam*, as my Lord *Coke* cites it, 'twas held to be no Limitation, becauſe there are expreſs Words of Condition; and if it be a Condition, then the Heir by his Entry for Breach thereof would defeat the Remainder likewiſe, which is not reaſonable; therefore it was held, that by the Limitation over the Condition was deſtroyed; but in *Dyer*, which ſeems to be the ſame Caſe, 'twas held *the Condition was not deſtroyed*, but that for Breach thereof the Heir ſhould enter, and hold during the Life of the Wife, and yet that after her Death *D.* ſhould have the Land, which muſt be by Way of *executory Deviſe*.

10 Co. 41. Dyer 127. Rol. Abr. 472.

But

Vide Title *Conditions*, Letter (H). 2 Mod. 26.

But however the Law might have ſtood when Deviſes of Lands were not very frequent, it is now ſettled, that in Caſe of a Will the *Deviſee in Remainder ſhall enter for Breach of the Condition annexed to the firſt Eſtate*, be it deviſed to a Stranger, or to the Heir himſelf; and this Conſtruction was introduced to ſupport the Intent of the Teſtator, which otherwiſe in many Caſes would be totally fruſtrated, and his Will ſet aſide; and to make Way for ſuch Conſtruction they held, that by Non-payment of the Sum, or Non-performance of the Thing directed to be done, *the Eſtate of the firſt Deviſee determined immediately without Entry or Claim*, and then *the Remainder ſucceeded as if there had been no Condition* at all; and ſo they changed the Condition into a Limitation, which determines the Eſtate to the firſt, and caſts the Poſſeſſion on the ſecond by way of *immediate Remainder*. Another Reaſon of this Conſtruction might be, that ſeeing by the Limitation over, the Land was given from the Heir at Law, and a new Heir made, it was now more reaſonable that this *Hæres factus* ſhould take Advantage of the Condition, who was to have the Benefit of the Land, than the *Hæres natus*, who, by ſuch Limitation over, was excluded and ſhut out from inheriting the Land; and ſince none can enter for Breach of the Condition but the Heir, and now by giving him the Land the Deviſee is become Heir thereof, therefore they conſtrued ſuch *Hæres factus* to be the *Heir who ſhould enter for Breach of the Condition*; and this was ſtill more reaſonable, when the firſt Deviſee was himſelf Heir at Law, and was to perform the Condition; for otherwiſe, whether he performed it or not, the Remainder could never take place, ſince none could take Advantage of the Breach thereof but he himſelf who was to perform it; and by Conſequence the Remainder, which was to ariſe upon the Breach of ſuch Condition, would be prevented and deſtroyed, and the Intent of the Teſtator eluded.§

§ In other Words, it is now agreed, that wherever in a Deviſe a Condition is annexed to a preceding Eſtate, that Condition ſhall operate as a Limitation, circumſcribing the Continuance and Meaſure of the firſt Eſtate; and that upon the Breach or Performance of it (as the Caſe may be) the firſt Eſtate ſhall *ipſo facto* determine and expire, without Entry or Claim; and the Limitation over ſhall thereupon actually commence in Poſſeſſion, and the Perſon claiming under it, whether Heir or Stranger, ſhall have immediate Right to the Eſtate. Thus indeed is the Teſtator's Intention effectuated, by ſubſtantiating the Remainder, though limited to a Stranger; and enforcing the Performance of the Condition by the Determination of the particular Eſtate upon the Breach of it, notwithſtanding that particular Eſtate be limited to the Heir himſelf. Fearne 194, 5. 3d Edit. *Vide* Plow. 408. *Scholaſtica*'s Caſe, & *infra* 321.

*Page 321 *Wellock* v. *Hamond*, 3 Co. 20. Cro. Eliz. 204. 2 Leon. 114. cited. Cro. Jac. 592. Rol. Rep. 219. and in ſeveral modern Books.

* Therefore where a Copyholder in Fee of Lands, deſcendible in *Borough Engliſh*, having three Sons and a Daughter, ſurrendered his Land to the Uſe of his Will; and after by Will deviſed his Land to his eldeſt Son in Fee, (for ſo it was conſtrued) paying to each of his Brothers and his Siſter 40*l.* within two Years after his Death and dies; the eldeſt Son is admitted, and does not pay the Money within the two Years; the youngeſt Son enters, and it was adjudged, that his Entry was lawful; for though in a Will the Word *Paying* amounts to a Condition, yet if it ſhould be conſtrued a Condition, in this Caſe it would deſcend on the eldeſt Son himſelf, who was to perform it, and alſo take Advantage of the Breach thereof; and then whether he performed it or not, would be all one, ſince either Way he was to have the Land; and ſo the youngeſt Children would be not only without Remedy for their Portions, but there would likewiſe be no Penalty upon the eldeſt to inforce the Payment thereof; which would fruſtrate the Intent of the Teſtator; therefore they conſtrued the Deviſe to the eldeſt Son paying, *&c.* to be a Limitation to him till he made Default of Payment only, and no longer; and then by ſuch Default, his Eſtate ceaſing, the Nature of the Land revives and lets in the youngeſt Son, who was Heir by the Cuſtom, ſince there was no Limitation over.

So

So where one ſeiſed of Lands in Fee, having Iſſue two Sons and a Daughter, deviſed to his youngeſt Son and Daughter 20 *l.* a-piece, to be paid by his eldeſt Son; and deviſed his Lands to his eldeſt Son and his Heirs, upon Condition, that if he did not pay the ſaid Sums, that then the Land ſhould remain to his youngeſt Son and Daughter, and their Heirs, and dies; the eldeſt Son enters, and does not pay the Money; and it was adjudged that the youngeſt Son and Daughter ſhould have the Land; for *firſt*, This Deviſe to the eldeſt Son and Heir, being no more than what the Law gave him, without ſuch Deviſe, was void; *ſecondly*, if this ſhould be a Condition, it would be defeated by the Deſcent on the eldeſt Son, who was to perform it; therefore, *thirdly*, It was held to be a Deviſe to the eldeſt Son only, or no longer than, till he failed to pay the ſaid Sums; and then to the youngeſt Son and Daughter, which gives them the Land by way of *Limitation*, upon his failing to pay the ſaid Sums; but *Vaugh.* in citing this Caſe holds, the Deviſe to the eldeſt Son being void, that then it was no more than if he had deviſed, that if his eldeſt Son did not pay ſuch Sums, that then the Land ſhould be to the Legatees; which makes *a good future executory Deviſe*, and the Land in the mean Time deſcends to the Heir at Law, as if no Deviſe had been made thereof. This Conſtruction is well warranted by the Caſe, and anſwers the Purpoſe for which it was cited by *Vaugh.* but the other Conſtruction, in making it *an actual Limitation*, is more natural and agreeable to the Words and Intent of the Will,

Hainſworth v. Pretty, Cro. Eliz. 319, 833. Moor pl. 891. Rol. Abr. 411. Vaugh. 271. 2 Mod. 26.

One deviſes Lands to *A.* his Wife, upon Condition that ſhe does not marry; and if ſhe marry or die, that then the Land ſhall remain to *B.* in Tail; and if *B.* died without Iſſue in the Life of *A.* that then the Land ſhould remain to *A.* to diſpoſe thereof at her Pleaſure; and if *B.* ſurvive *A.* and after dies without Iſſue, that then the Land ſhould be divided betwixt the Siſters of the Deviſor, and dies; *B.* dies without Iſſue, in the Life of *A.* and it was adjudged, that *A.* had a Fee by the Words *to diſpoſe thereof at her Pleaſure*; and that the Remainder to the Siſters was upon a Contingent, which never happened, *viz.* *B.*'s ſurviving *A.* but *B.* dying before *A.* the Deviſe of the Fee to *A.* was abſolute: and though it was doubted if a Remainder might be limited to begin upon a Condition precedent, annexed to the firſt Eſtate, as in this Caſe it was, yet, being in a Will, it was held to be a new executory Deviſe of the Reverſion, if the Eſtate had been defeated by the precedent Condition, and not as a Remainder; or at leaſt the Condition ſhould be conſtrued to amount to a Limitation till ſhe married; * and ſo the Remainder would be made good thereby upon ſuch determinable particular Eſtate.

Leon. 283. *Jennor v. Hardie.*

*Page 322

One deviſes Lands deviſeable to *A.* for Life, upon Condition that if his Heir, to whom the Reverſion deſcends, diſturb *A.* or the Executors of the Deviſor of their Adminiſtration, that then the Land ſhould remain to the Daughter of the Deviſor and her Heirs, and dies; *A.* dies; the Daughter brings a Formedon in Remainder againſt the Son and Heir of the Deviſor, and alledges, that he diſturbed *A.* and the Executors alſo; and Iſſue was joined upon it, which proves that the Limitation to the Daughter was good as an Executory Deviſe, to take Effect upon ſuch Diſturbance; and the Fee in the mean Time deſcended to the Heir; and the Book adds, that this could not be a Condition, becauſe then by the Deſcent to the eldeſt Son, who was to perform it, it would be deſtroyed.

Plow. 27. 414.

A. having Iſſue three Sons and two Daughters, and the eldeſt Daughter having Iſſue *B.* and the youngeſt Iſſue *C.* *A.* by his Will deviſes Lands to his Wife for Life; and after her Death to my Grandchild *B.* and the Heirs of her Body; provided always, and upon Condition, that ſhe

Fry v. Porter, or *Williams v. Fry*. Vent. 199. 2 Lev. 21.

Mod. 86, 300. 3 Keb 756, 787. she marry with the Conſent of *D. E.* and *F.* or the major Part of them; and in caſe ſhe marries without ſuch Conſent, or dies without Iſſue, then I bequeath the ſaid Premiſſes to *C.* and dies; *B.* marries *G.* without Conſent of any of the Perſons named for that Purpoſe, and thereupon *C.* enters upon her; and it was held clearly to be a Limitation to her till ſhe married without ſuch Conſent, and not a Condition; for then it would deſcend to the Heir at Law, and he for Breach thereof might enter and defeat the Limitation over; therefore it was conſtrued to be a Limitation, and that the Marriage, without ſuch Conſent, determined her Eſtate-Tail and caſt the Poſſeſſion upon *C.* by way of immediate Remainder.

2 Mod. 7. *Shuttleworth* v. *Barber.* One deviſes Lands to *A.* his Heir at Law, and deviſes other Lands to *B.* in Fee, and if *A.* moleſt *B.* by Suit or otherwiſe, he ſhall loſe what is deviſed to him, and it ſhall go to *B.* and dies; *A.* enters into the Lands deviſed to *B.* and claims them; and it was held *firſt*, That this was a ſufficient Breach to give Title to *B. ſecondly*, That if this ſhould be a Condition, it would, by the Deſcent thereof to *A.* who was to perform it, and alſo to enter for the Breach thereof, be merged and defeated; therefore it was held to be a *Limitation* which determined the Eſtate of *A.* and caſt the Poſſeſſion upon *B.* without Entry.

Dyer 314. pl. 96. This Conſtruction hath likewiſe prevailed in Conveyances to Uſes.

As where one levied a Fine to the Uſe of *A.* and *B.* his Wife for their Lives, and the Life of the longer Liver of them; Remainder after their Deaths for ſix Months, to the Uſe of the Executors of *A.* and after the ſix Months ended, then to the Uſe of *C.* and *D.* his Wife, and the Heirs of their two Bodies; and for Default of ſuch Iſſue, to the Uſe of *A.* and his Heirs; provided that if it happen the ſaid *A.* at any Time after have Iſſue of his Body, or any Wife of the ſaid *A.* at the Time of his Deceaſe, to be *enſient* with any Iſſue begotten by the ſaid *A.* that then after ſuch Iſſue had, and after 500 Marks paid, or tendered to *G.* and refuſed, within ſix Months next after the Birth of ſuch Iſſue, that then the Uſe of the ſaid Lands, immediately after the Deceaſe of the ſaid *A.* and *B.* and the ſaid ſix Months, ſhall be to the ſaid *A.* and the Heirs of his Body, and for Default of ſuch Iſſue, to the right Heirs of *A.* then *B.* dies, and *A.* takes another Wife; and by *Plow.* and *Dyer*, till Iſſue and the ſix Months paſt, *A.* hath not any longer Eſtate than he had before; but *Quære* if by the firſt Limitation *A.* hath not the Fee till Iſſue; and then upon Payment, or Tender and Refuſal of the 500 Marks, and the ſix Months paſt, the Uſe limited to *C.* and *D.* in Tail, with Remainders to *A.* in Fee, does not ceaſe, and ſettle in *A.* in Tail with Remainder to him in Fee as by Limitation? For * where *A.* and *B.* joined in a Fine to the Uſe of *A.* in Fee, if *B.* did not pay to *A.* 10*l.* before ſuch a Day, and if he did, then to the Uſe of *A.* for Life, Remainder to *B.* in Fee; in this Caſe it was held, that if *B.* did not pay the 10*l* before the Day, that *A.* ſhould have the Fee abſolutely; which proves that he had it before *ſub modo*, or ſubject to be determined upon ſuch Payment, and a Uſe may well be limited to ceaſe in one, and to go over to another; and the Statute of 27 *H.* 8. (*c.* 10.) carries the Poſſeſſion after it; and in the firſt Caſe the Uſe being expreſly limited to *A.* in Fee, muſt, as it ſeems, veſt in him till the Contingency happens, which determines that Uſe, and gives him another inſtead of it, to which the Statute carries the Poſſeſſion accordingly; but *Quære.*

*Page 323 Rol. Abr. 415. pl. 12. 469. Vent. 201. *Spring* v. *Ceſar.* Jon. 390. [*Vide* Dyer 314. pl. 96. Moor 90. pl. 243. & Ley 54.]

Plow. 34. One levies a Fine, the Conuſee grants and renders the Lands to the Conuſor in Tail, upon Condition that he and the Heirs of his Body ſhould bear the Standard of the Conuſee when he went to Battle, and if they failed, that it ſhould remain to a Stranger in Fee; this was held a good Remainder, to begin upon ſuch Condition; but *Quære* of this Caſe, unleſs

leſs it be intended by way of Limitation of Uſe. which may ceaſe in one, and be limited to another.

Upon a Writ of Error out of *Ireland* the Caſe was this; *A.* ſeiſed of Lands in Fee, and having Iſſue only one Daughter, named *B.* by Leaſe and Releaſe conveys his Lands to the Uſe of himſelf for Life, and after his Death to the Uſe of *B.* in Tail, provided that ſhe married with the Conſent of the Truſtees, or the major Part of them, ſome Perſon of the Family and Name of *Fitzgerald*, or who ſhould take upon him that Name immediately after the Marriage; but if not, then the Truſtees to raiſe a Portion out of the ſaid Lands for *B.* and the Lands to remain to *C.* *A.* dies, and *B.* marries one who neither was nor took upon him the Name of *Fitzgerald*; and the only Point on which Judgment was there given, was the Want of Notice in *B.* of the Settlement, without which, being Heir at Law, and ſo having a Title by Deſcent, ſhe was not bound *ex officio* to take Notice of the Condition; but this fully proves the Point in Queſtion, that if ſhe had had ſufficient Notice of the Condition, her breaking of it had determined her Eſtate, and caſt the Poſſeſſion upon *C.* who was next in Remainder. 3 Mod. 28. *Malone* v. *Fitzgerald.*

3. Diſtinction between a Limitation over in Caſe of a Will, and where no Limitation is made over.

A. ſeiſed of Lands, and having Iſſue two Daughters only, deviſed Lands to the eldeſt and her Heirs, and that ſhe pay to her youngeſt Siſter yearly 30 *l.* and *per Cur.* this was a Condition, for otherwiſe the youngeſt Siſter would have no Remedy for the Rent; and being a Condition, it deſcended upon both the Daughters as Heirs, and for Breach thereof the youngeſt might enter into a Moiety of the Land with her Siſter; for there being no Limitation over to the youngeſt for Default of Payment, if ſhe had not been equally Heir with her Siſter, ſhe would have been without Remedy. Cro. Eliz. 146. *Crickmere* v. *Paterſon.*

So where a Copyholder in Fee of Lands in *Borough Engliſh*, having Iſſue three Sons, *A.* *B.* and *C.* ſurrendered his Land to the Uſe of his Will, and after deviſed them to *B.* in Fee, upon Condition that he ſhould pay to his four Siſters 20 *l.* a-piece at their full Age, and dies; *A.* the eldeſt Son hath Iſſue two Daughters, and dies; *B.* is admitted, and does not pay the 20 *l.* a-piece; *C.* the yougeſt Son enters; and it was objected that this was a Limitation to *B.* till he failed to pay, *&c.* and ſo ſhould go to the youngeſt Son, who was inheritable by the Cuſtom; but it was adjudged to be a Condition, and that for Breach thereof the Daughters of *A.* the eldeſt Son ſhould enter; but it ſeems * that after ſuch Entry the Heir by Cuſtom ſhall enter upon them; but *Quære* if the Deviſe had been to the eldeſt Son upon ſuch Condition, this had been a Limitation, which upon Non-payment would have carried the Land to the youngeſt Son who was Heir by Cuſtom; for otherwiſe, if it ſhould be a Condition by the Deſcent to the eldeſt Son, 'twould be merged and defeated; but *Quære* if the Land had been deſcendible to the eldeſt Son as other Inheritances at Common Law are, and ſuch conditional Deviſe had been made thereof to the eldeſt Son without any Limitation over for Default of Payment, *Quære* if in ſuch Caſe the Legatees had any other Remedy than by Bill in Equity for their Legacies, for the Land not being given to them, it will be hard to maintain, that for Breach of the Condition the Land ſhould go over to them; therefore in ſuch Caſe it ſhould ſeem they have no Remedy but in Chancery, where the eldeſt Son will be looked upon as a Truſtee for the Payment of ſo much Money to them. Cro. Jac. 56. *Curtis* v. *Wolverſton.* Poph. 11. *Page 324

4. Diſtinction between Remainders that are to ariſe upon Conditions agreeable to the Rules of Law, and ſuch as are to ariſe upon Conditions repugnant and againſt the Rules of Law.

Co. 83. Mo. pl. 831, 869. 6 Co. 40. 9 Co. 127. Cro. Eliz. 378. Cro. Jac. 698. 10 Co. 36.

If one by his Will, by Covenant to ſtand ſeiſed, Feoffment to Uſes or other Conveyance whatſoever, gives or conveys Lands to or to the Uſe of *A.* his eldeſt Son and the Heirs Male of his Body, Remainder to or to the Uſe of *B.* his ſecond Son and the Heirs Male of his Body, and ſo to the third and other Sons in like Manner; and after adds a Proviſo, that if *B.* or his Iſſue, or any other of his Sons in Remainder, ſhall attempt to alien, *&c.* or ſhall alien, *&c.* by which any Eſtate ſhall be barred, *&c.* that then immediately after ſuch Attempt and before any Act executed, or immediately after ſuch Alienation, the Uſe and Eſtate of him ſo attempting or alienating, *&c.* ſhall ceaſe as if he were naturally dead, and that then it ſhall remain immediately to ſuch Perſons to whom it ought to come by the Intent of the Indenture or Will, or to him in the next Remainder, *&c.* in this Caſe the Remainders are actually veſted as Remainders in all the Sons; but as to their taking Effect in Poſſeſſion upon Breach of the Condition, or ſooner, or otherwiſe than they would have done if there had been no Condition at all, the Proviſo or Condition is totally repugnant and againſt Law; for be it either a Condition or a Limitation, it can't carry over the Eſtate to him in Remainder upon Breach thereof; for if it be a Condition, then the Donor and his Heirs only can take Advantage of the Breach thereof, not thoſe in Remainder who are Strangers; and if the Donor or his Heirs enter for Breach of the Condition, they thereby defeat not only the preſent Eſtate, but all Remainders dependant thereupon; if it be a Limitation till they alien only, yet it is repugnant, that when by the Alienation the Eſtate is actually ſettled and veſted in the Alienee, that the ſame Alienation ſhould at the ſame Time veſt and ſettle the Eſtate in another; and for the Words *attempting*, *endeavouring*, *or going about to alien*, they are of too uncertain a Signification to receive any Countenance, and what ſhall be ſaid a ſufficient Attempt, and what not, is hard to determine; beſides that, all ſuch Clauſes tend to Perpetuities, to fix Eſtates in Families unalienable, that they can upon no Exigencies nor Emergencies whatſoever diſpoſe thereof, to provide for Payment of their Debts, their Wives or younger Children; and alſo they deſtroy and enervate the Force of Fines and common Recoveries, the great and common Aſſurances, whereby Men hold their Eſtates, and therefore with juſt Reaſon all ſuch Clauſes are exploded and diſallowed.

*Page 325 Cro. Jac. 61. 10 Co. 86. Moor 772. *Lovett* v *Goddard.*

* One deviſes Lands to his Son *A.* and the Heirs Male of his Body, provided that if *A.* or any Iſſue Male of his Body, alien, give or grant the Premiſſes to any Perſon for above twenty Years, *&c.* that then the ſaid Premiſſes, *for Default of ſuch Iſſue Male* of the Body of *A.* immediately upon every ſuch Alienation, Gift or Grant, ſhall remain and come to my Son *B.* and the Heirs Male of his Body, *&c.* and dies; *A.* enters and makes a Leaſe for a thouſand Years, and dies without Iſſue Male, leaving *C.* his Daughter and Heir; *B.* enters upon her, *C.* reenters; and 'twas held *firſt*, That the Remainder to *B.* was not to take Effect but upon Alienation and Death without Iſſue Male, and not upon the Death of *A.* without Iſſue Male only; *ſecondly*, That the Remainder being limited to take Effect upon ſuch Alienation ſhould never ariſe, becauſe by the Alienation the Land is given to another, and then it is repugnant

repugnant to make the Alienation to one ſufficient to carry the Land to another.

One deviſes Lands to *A.* in Tail, upon Condition that he ſhall not alien, and that *if he dies without Iſſue* it ſhall remain to *B.* in Fee; after *A.* aliens, yet *B.* can't enter for the Condition broken, but the Heir at Common Law, becauſe this is not a Limitation, but a Condition, by *Coke* and *Warburton* †; but *Quære* if *A.* after dies without Iſſue, if *B.* may not enter; for though the Heir enter for the Condition broken, and hold till the Eſtate-Tail determined, yet the Remainder to *B.* ſeems good by way of executory Deviſe, to raiſe out of the Reverſion veſted in the Heir by his Entry for Breach of the Condition, and not as an immediate Remainder, becauſe it is not to take Effect till the Death of *A.* without Iſſue, and yet the Eſtate-Tail of *A.* by Breach of the Condition may determine long before.

Rol. Abr. 412. *Skirn* v. Lady *Bond.*

† See the Caſes *ſupra.*

One deviſes Lands to *A.* and the Heirs Male of his Body, provided if he does attempt to alien, that then immediately his Eſtate ſhall ceaſe, and *B.* ſhall enter; after *A.* makes a Feoffment in Fee, and thereupon *B.* enters; and it was adjudged in the Grand Seſſions againſt *B.* whereupon he brought a Writ of Error; and *firſt* it was agreed, That Tenant in Tail could not be reſtrained from Alienation by Fine or Recovery; *ſecondly*, That a bare Attempt would be no Breach; but then it was argued, that he might be reſtrained from aliening by Feoffment, or other Act which would amount to a Tort, and make a Diſcontinuance, and that this Proviſo imports as much; and therefore the Feoffment was a Breach, for that was an Attempt, and more; and that therefore it ſhould determine the Eſtate-Tail *quaſi* by Limitation, which would give an immediate Title of Entry to *B.* by executory Deviſe, and that the Current of Authorities, ſince 10 *Co.* 40. are, that a Condition in a Will ſhall be taken as a Limitation; but the whole Court held the Condition void, becauſe *non conſtat* what ſhall be adjudged an Attempt, and how it ſhould be tried; and ſo the Judgment was affirmed.

Vent. 321. 3 Keb. 787. *Piers* v. *Wynn.* & *vide* Plow. 408. Moor 543.

But where one having two Sons, deviſed *Blackacre* to his eldeſt in Tail, and *Whiteacre* to his youngeſt Son in Tail, *proviſo ſemper* that if any of his Children alien or demiſe any of his Lands to them deviſed before they come to the Age of thirty Years, then the next Brother ſhall enter; the eldeſt enters, and lets *Blackacre* before his Age of thirty Years; and this was held a good Limitation till they aliened, and that upon Alienation it ſhould go to the other; but this Caſe differs from the preceding Caſes, for here was no total Reſtraint of Alienation, but only till they arrived to ſuch an Age as they might be preſumed to have full Diſcretion, and to know well what they did, which was but a reaſonable Reſtraint; but in that Caſe where the younger Brother entered into *Blackacre* by virtue of the Limitation, and aliened it before his Age of thirty, it was held that the eldeſt Brother could not enter into it again, * becauſe by the Entry of the younger Brother that Part was diſcharged of the Limitation for ever.

2 Leon. 38. Mo. 271. *Spittle* v. *Davis.*

* Page 326

Upon a Marriage-Settlement *A.* is made Tenant for Life, Remainder to the Heirs of his Body by his Wife *Jane*; and in the ſame Deed *A.* covenants not to ſuffer a Recovery, but that the Lands ſhall be enjoyed according to theſe Limitations; *A.* notwithſtanding his Covenant ſuffers a Recovery, and deviſes the Lands; and it was held in Chancery, that *A.* being Tenant in Tail, and as ſuch having Power to ſuffer a Recovery, the Lands deviſed ſhall not be affected, but that the Covenant was good, and ſhould therefore bind his Aſſets.

Will. Rep. 104 pl. 24. 2 Vern. 635. *Collins* v. *Plummer.*

5. Diſtinction between ſuch Words as actually make a Condition, and ſuch as are only deſcriptive of the Time and Manner when and how the Remainders are to ariſe.

Plow. 23 to 29. Co Lit. 378. As where one made a Leaſe to *A.* for Life, Remainder to *B.* for Life; and if it happen *B.* dies before *A.* then the Lands to remain to *C.* for Life; *B.* dies in the Life of *A.* and then *A.* dies, and if the Remainder to *C.* was good, was the Queſtion; and 'twas argued that it was not, becauſe it was appointed to begin during the particular Eſtate, where it ought to be limited to take Effect after the particuler Eſtate ended; and therefore a Leaſe for Life to *A.* Remainder to *B.* for Life, and if *A.* dies, that then it ſhall remain to *C.* in Fee, this Remainder is void, becauſe then it would ſubvert the Remainder to *B.* and therefore is repugnant to the Eſtate firſt limited to *B.* So a Leaſe to two for their Lives, Remainder after the Death of the firſt of them to *C.* in Fee, is void, becauſe it would deſeat the Survivorſhip given by the firſt Words; ſo here, ſecondly, it was argued, That this Remainder was void, being to begin upon a Condition, whereof none ſhould take Advantage but the Leſſor and his Heirs; thirdly, That this Remainder, being to begin upon a Condition precedent, did not paſs out of the Leſſor at the Time of the Livery, as all Remainders ought, and therefore alſo was void. But on the other Side it was argued and *adjudged*, that *firſt*, Here was no Repugnancy, for it was not intended that if *B.* died, living *A.* that then *C.* ſhould have the Land immediately, but that then it ſhould remain to *C.* as a Remainder, *viz.* after the Death of *A.* and as *B.* would have had it if he had lived; *ſecondly*, That this was not a Condition, but a Limitation when the Remainder ſhould begin; for if it were a Condition, it would go in Reſtraint of the Thing given upon ſomething to be done or not done by the particular Tenant, which here it does not; therefore if one makes a Leaſe to *A.* for Life, upon Condition that if *B.* marries the Daughter of the Leſſor during the Eſtate for Life, that then it ſhall remain to *B.* this is no Condition to defeat or abridge the Eſtate of *A.* but is only a Limitation when and how the Remainder to *B.* is to take Effect. So if a Leaſe were made to *A.* for Life, upon Condition that if *B.* pay to the Leſſor 20 *l.* that then after the Death of *A.* the Land ſhould remain to *B.* this is good, becauſe it does not go in Abridgment of the firſt Eſtate; but if it was, that then immediately upon ſuch Payment the Land ſhould remain to *B.* this would be void, becauſe this would go in Deſtruction of the firſt Eſtate, without any Thing to be done or not done by him, and of ſuch Condition the Leſſor and his Heirs only can take Advantage, not a Stranger, and therefore the Remainder to ariſe thereby is void. So if a Leaſe be made to two for their Lives, upon Condition that if one of them died within ſeven Years, that then after the Death of the other the Land ſhould remain to a Stranger in Fee, this is a good Remainder, being not to begin upon a Condition, but upon a Limitation or *Modus* ap-
Page 327 pointed by the Leſſor; and they all agreed, that a Remainder to begin upon an impoſſible or illegal Limitation or Condition would be void; as upon a Condition that if *A.* the firſt Leſſee alien, or if *B.* kills a Man, that then it ſhould remain to him, theſe Remainders ſhall never ariſe. So the Caſe of *Pleſington*, who made a Leaſe for Years upon Condition that if he aliened the Reverſion, that then the Leſſee ſhould have it to him and his Heirs; this Limitation was void, becauſe repugnant, that when he aliened the Reverſion to one, the ſame Alienation ſhould carry the Land to another; alſo the better Opinion ſeems that the Remainder paſſed out

of

of the Leſſor preſently, and is carried into Abeyance, to be executed when the Contingency happens.

A. had Iſſue two Sons *B.* and *C.* and *B.* had Iſſue a Son *D.* and *C.* had Iſſue a Daughter *E.* then *A.* by Will deviſes Lands to his Son *B.* for Life, and after his Death to his Grandſon *D.* and the Heirs Male of his Body; and if he die without Iſſue Male, then to his Grandaughter *E.* in Tail, and charged it with ſome Payments; then comes this *Proviſo*, Provided that if my Son *C.* ſhould have a Son by his now Wife, then all my Lands ſhall go to ſuch Son and his Heirs, he paying as *E.* ſhould have done; afterwards a Son was born; and the Queſtion was, Whether the Eſtate limited to *B.* the eldeſt Son, was thereby defeated? But *per Cur.* this *Proviſo* did only extend to the Caſe of *E.*'s being intitled, and had no Influence on the firſt Eſtate limited to the eldeſt Son. 2 Mod. 293. *Evered* v. *Hone.*

A. by his Will deviſed Lands to *B.* his ſecond Son, and if he depart this World, not having Iſſue, then I will that my Land ſhall remain over to another, and died; *B.* had Iſſue *C.* and died; then *C.* died without Iſſue; it was urged that the Remainder could not take Effect, becauſe it was limited to take place on a Condition Precedent, which in this Caſe had not happened; for *B.* left Iſſue, and ſo did not depart the World not having Iſſue, as the Words of the Will are; yet *per Cur.* it was adjudged, That though literally he could not be ſaid to depart the World not having Iſſue; yet, ſince that Iſſue died without Iſſue, by the Intent of the Will, and the Conſtruction of Law, he was dead without Iſſue whenever the Iſſue failed; as in a Formedon in Remainder or Reverter, though the Donee hath Iſſue, yet, if after the Eſtate-Tail determines for want of Iſſue the Writ ſuppoſes that the Donee died without Iſſue; a *fortiori* in Caſe of a Will ſuch Conſtruction ſhall be made to ſupport the Intent of the Teſtator. ‡ Leon. 285. 3 Leon. 106. Cro. Eliz. 26. *Lee* v. *Vincent.*

‡ See Fearne 167-9. 3d Edition.

So where *A.* upon Marriage conveyed Lands to the Uſe of himſelf for Life, Remainder to his firſt and other Sons in Tail Male ſucceſſively; and if he dies without Iſſue Male, then to the Uſe of the Daughters for one hundred Years, for raiſing 1500 *l.* for their Portions; *A.* had Iſſue a Son and a Daughter, and died; and after the Son died without Iſſue; and if the Daughter ſhould have the Term was the Queſtion; and it was argued, that ſhe ſhould not; becauſe *A.* did not die without Iſſue Male, for he left a Son, though ſuch a Son after died without Iſſue; and it could not be intended that whenever the Iſſue Male failed that the Daughters ſhould have their Portions, for that might be 100 Years after when all the Daughters were dead; and ſuch Intention would make it ill in its Creation. But it was anſwered and adjudged, that *quandocunque* the Iſſue Male failed, the Huſband in this Caſe may be ſaid to be dead without Iſſue Male; and the Expectation of ſuch a Term in Remainder is for their Advantage in Marriage; and ſuch a Term may be as well created to ariſe upon Failure of Iſſue Male, as a Power to ſell upon Failure of Iſſue Male; which hath been adjudged to be good. Lev. 35. Vent. 229. Sid. 102. *Goodyer* v. *Clerk.*

*Page 328 (I) In what Caſes a Remainder or Reverſion ſhall be ſubject to the Acts or Charges of the particular Tenant.

Co. 62. Poph. 6. Moor 154. 2 Co. 52. 6 Co. 42. Plow. 350.

A. Tenant in Tail, Remainder to *B.* in Tail, *B.* grants a Rent-Charge, *A.* ſuffers a common Recovery, and dies without Iſſue; the Grantee of the Rent-Charge diſtrains the Alienee of *A.* and the Diſtreſs was held unlawful. *Firſt*, becauſe the Alienee comes in under the Tenant in Tail in Poſſeſſion, whoſe Eſtate was not ſubject to the Charges of him in the Remainder; for if the Tenant in Tail in Poſſeſſion had made only a Feoffment in Fee, or a Leaſe for Years firſt, and then after a Feoffment in Fee, and died without Iſſue; yet, till the Feoffment avoided, the Leaſes or Charges of him in the Remainder ſhould not take place either againſt the Leſſee or Feoffee of the Tenant in Tail. *Secondly*, the Reaſon that theſe Leaſes or Charges out of ſuch Remainder are good, is for the Poſſibility of the Remainders coming into Poſſeſſion; for of itſelf it is a Thing not manurable or viſible, and conſequently not liable to any Diſtreſs; and therefore if it be deſtroyed before it comes into Poſſeſſion, the Charges granted thereout muſt fall too, as the Shadow fails with the Subſtance. *Thirdly*, another Reaſon is, that he who claims only out of ſuch Remainder after an Eſtate cannot falſify the Recovery had againſt the Tenant in Tail, for the Recovery bars the Remainder itſelf; ſo that he cannot falſify or any way plead to defend his Remainder, unleſs he were vouched, nor by Conſequence can thoſe who derive their Intereſt under him.

Cro. Eliz. 718. *Pledgard* v. *Lake.*

But where *A.* was Tenant for Life, Remainder to *B.* in Tail, and *B.* granted a Rent-Charge, or made a Leaſe for Years, to begin after the Death of the Tenant for Life; and *A.* the Tenant for Life, after ſuffered a common Recovery, though with Voucher of *B.* in the Remainder in Tail; yet the Leaſe or Rent ſhall take Place according as they were made or granted for there ſuch a Leſſee or Grantee may falſify the Recovery either by the Common Law or Statutes; for the Tenant for Life hath no Power to bar the Remainder, without the Aſſent or Concurrence of him in the Remainder, as the Tenant in Tail in Poſſeſſion hath; and his Aſſent or Concurrence cannot operate to defeat his own Acts, any more than a Recovery againſt Tenant in Tail in Poſſeſſion can defeat his own Leaſes or Grants; becauſe in both Caſes the Recoveror comes in by the Tenant in Tail, whether in Poſſeſſion or Remainder, who alone has Power over the Eſtate, and ſhall be bound by his own Acts.

Co. 67. Co Lit. 338. 7 Co 65. 1 d Raym. 521.

If *A.* be Tenant for Life, Remainder to his firſt and other Sons in Tail Male; Remainder to *B.* in Fee; and *A.* before the Birth of any Son makes a Leaſe for Years, grants a Rent-Charge, acknowledges a Statute, *&c.* and afterwards ſurrenders to him in the Remainder, or makes a Feoffment, or commits other Forfeiture, for which he in the Remainder enters; yet he ſhall hold the Eſtate ſubject to the Charges of the Tenant for Life; for theſe being his own Acts to determine his Eſtate, ſhall not turn to the Prejudice of the Leſſee or Grantee, who is a Stranger; but his Eſtate for Life ſhall to this Purpoſe be ſtill ſaid to have Continuance, though as to all other Purpoſes it is determined; and therefore the contingent Remainders not being to ariſe out of the Eſtate for Life, but depending thereon till they come *in Eſſe*, are, by the Determination thereof before they come *in Eſſe*, deſtroyed and gone.

So

* So where Leſſee for Years of an Advowſon granted the next Avoidance, and after ſurrendered the Term to the Leſſor, yet this ſhall not defeat the Grantee of the next Avoidance; becauſe the Surrender was his own Act, before which there was a good Grant, and that ſhall bind him in the Remainder, who to this Purpoſe comes in under the Eſtate of the Grantor. *Page 329 8 Co. 145. *Davenport's* Caſe.

So where two Jointenants for Life were, and Judgment in Debt was given againſt one of them, and then he releaſed to the other Jointenant, who died, and he in the Reverſion entered; yet it was adjudged, that he ſhould hold a Moiety ſubject to the Judgment, during the Life of the Jointenant who releaſed; for, as to this Purpoſe, the Eſtate for Life in a Moiety hath ſtill Continuance, though to all other Purpoſes the Leſſor was in of his antient Reverſion for the Whole, and the Jointenant, to whom the Releaſe was made, was in by the firſt Leſſor, and not by him who made the Releaſe. 6 Co. 79. Ld. *Abergaveny's* Caſe.

One ſeiſed of Lands in Fee grants thereout a Rent Charge to *A.* for Life, and after makes a Leaſe to *A.* for 500 Years of the ſame Lands; then *A.* ſurrenders his Leaſe to the Leſſor, who accepts it; and after *A.* diſtrains, and avows for the Rent; and it was held he might, becauſe by the Leaſe for Years the Rent was only ſuſpended, and now, by the Surrender of that Leaſe the Suſpenſion is taken off, and by Conſequence the Rent revived; as if the Leaſe for Years had been made upon Condition only, by Breach of the Condition, the Leaſe being determined, the Rent would revive; though as to any Stranger, who might have Prejudice by ſuch Surrender, the Leaſe for Years ſhall ſtill be ſaid to have Continuance. Cro. Car. 101. Hut t. 91. Sir *Edward Pete* v. *Pemberton.*

Tenant for Life of a Copyhold, Remainder in Fee; he in Remainder makes a Leaſe by Parol (which, as it ſeems, muſt be warranted by Cuſtom); then the Tenant for Life, and he in the Remainder, join in a Surrender to the Uſe of him in the Remainder in Fee, and the Queſtion was, If this was a good Leaſe, and ſhould take Effect in the Life of the Tenant for Life? And it was held that it ſhould; for it was a good Leaſe againſt him in the Remainder; and by the Surrender of the Tenant for Life, to the Uſe of him in the Remainder, his Eſtate is merged in the Fee, and cannot hinder the Leaſe taking Effect, more than if he were dead; and the Whole being in his Hands can have no Privilege ſevered from the Inheritance; as if he in the Remainder grant a Rent-Charge, and after the Tenant for Life ſurrender the Rent ſhall begin preſently. Cro. Eliz. 160. *Dove* v. *Williot*, & *vide* Co. Lit. 338. Cro. Eliz. 547.

So where one made a Leaſe for Years, and after granted the Reverſion to another for Years, to begin after the End or Expiration of the firſt Term; and then, during the Continuance of the firſt Term, made a Leaſe for Life to the firſt Leſſee; whereupon the Grantee for Years of the Reverſion brought an Ejectment; and it was held maintainable, becauſe the firſt Leaſe for Years being, by the taking ſuch Leaſe for Life, ſurrendered and gone, by the Act and Concurrence of the Leſſee and Leſſor, his Grant of the Reverſion comes next to take Place. Plow. 198. *Wrotſley's* Caſe.

If a Woman Inheritrix takes a Huſband, and they have Iſſue a Son, and the Huſband dies, and ſhe takes a ſecond Huſband who lets the Lands to one for Life, and then the Tenant for Life ſurrenders his Eſtate to the ſecond Huſband, the Son may enter upon the ſecond Huſband during the Life of the Tenant for Life; becauſe as to the Son the Eſtate for Life is drowned, and by Conſequence the Inheritance, which the Huſband gained wrongfully by making ſuch Leaſe, is now by the Surrender thereof vaniſhed and gone; and then the rightful Inheritance falls upon the Son, and he may enter as if no ſuch Leaſe had been made, that which hindered his Entry being taken out of the Way. But if a Reverſion Lit. Sect. 636. Co. Lit. 338.

verſion be granted with Warranty, and the Tenant for Life ſurrenders his Eſtate for Life to the Grantee, yet ſhall not the Grantee have Execu-
Page 330 tion in Value upon the Warranty againſt the Grantor, during the Life of the Tenant for Life. So if the Tenant for Life ſurrender to him in the Remainder, or Reverſion, within Age, yet he ſhall not have his Age, becauſe in theſe Caſes ſuch Surrenders would work a Prejudice to a third Perſon, which the Law will not allow; though when it is for the Benefit of a third Perſon, he ſhall take Advantage thereof.

Mod. 108. Raym. 236. 2 Lev. 28. 3 Keb. 274, 287. *Benſon v. Baron Hudſon*, S. C.

A. ſeiſed of Lands in Fee makes a Feoffment to the Uſe of himſelf and the Heirs Male of his Body; Remainder in Tail to ſeveral others, Remainder to his own right Heirs; *Proviſo*, that if there ſhall be a Failure of Iſſue Male of his Body, and that *B.* be dead, and *C.* be married, or of the Age of twenty-one Years, then ſhe ſhall have 200 *l. per ann.* for ten Years; then *A.* dies, leaving *D.* his Son, who makes a Leaſe for one thouſand Years, then levies a Fine and ſuffers a Recovery, and afterwards dies without Iſſue Male; and the Contingencies did all happen; and The Queſtions were, *Firſt*, if this Rent was barred by the Recovery? *Secondly*, If the Leaſe for one thouſand Years was chargeable with it? And it was *adjudged per tot Cur.* that this Recovery that barred all the Remainders *did alſo bar this Rent*, which was to ariſe out of them; for though it were to ariſe precedent to the Remainders, yet it was ſubſequent to the Eſtate-Tail of him who ſuffered the Recovery; and therefore being chargeable upon and to ariſe only out of theſe Remainders, and they being barred by the Recovery, ſo was this Rent alſo, which was to ariſe thereout; and for the very ſame Reaſons given in *Capell*'s Caſe, which it was ſaid was the ſame Caſe with this. *Secondly*, it was adjudged that this Rent could not be chargeable upon the Leaſe for one thouſand Years; becauſe that was derived out of the Eſtate-Tail, which was precedent to and paramount the Commencement of the Rent; and the Leſſee was in after the Remainders barred by the Recovery, in Continuance of the firſt Eſtate-Tail; which Leaſe being before the Recovery, the Recoveror took the Eſtate ſubject thereto; and they agreed that if a Gift in Tail be made, rendering Rent, or upon Condition of Re-entry, that no Recovery by the Tenant in Tail will bar the Rent or the Condition, they being coeval with the very Eſtate-Tail itſelf; and therefore the Recoveror, who comes in, in Continuance of the Eſtate-Tail, takes it ſubject to ſuch Rent or Condition; and yet, in this Caſe of the Rent, the Reverſion is barred, though the Rent continues as a Rent-Service diſtrainable for at Common Law; but the Condition they ſay muſt be a Condition annexed to the Rent, and not a collateral Condition; for that will be barred with the Reverſion by a common Recovery.

(K) To what Purpoſes the Remainder is accounted but as one with the particular Eſtate, and where they are regarded as ſeveral Eſtates.

Hob. 71.

IF one makes a Leaſe to *A.* for Life, Remainder to *B.* for Life, in Tail, or in Fee, and *A.* dies, the Law adjudges the Freehold in *B.* preſently, and he is Tenant to every *Præcipe* till he diſclaims or diſagrees to it; for both the particular Eſtate and Remainder make but one Degree, and a

Writ

Writ of Entry *ſur Diſſeiſin* may be brought againſt him in Remainder after the particular Eſtate ended, as well as it might againſt the particular Tenant himſelf; and if there be Tenant for Life, Remainder over of * a Seignory, and the Tertenant aliens in Mortmain, they both ſhall have but one Year and a Day for Entry; and if Termor or Guardian lets for Life, the Remainder over, and he in the Reverſion agrees, he is a Diſſeiſor as well as the Tenant for Life. *Page 331

If a Diſſeiſor makes a Leaſe for Life, Remainder over in Fee, and the Diſſeiſee releaſe to the Tenant for Life, this ſhall enure to him in the Remainder, becauſe by the Releaſe all his Right is gone; but a Confirmation only of the Eſtate for Life ſhall not enure to him in the Remainder, becauſe nothing is confirmed but the Eſtate for Life, and then the Remainder lies open without any Sanction given to it; but in the other Caſe, by the Releaſe of the Diſſeiſee to the Tenant for Life, all his Right is gone, and the Tenant for Life doing Wrong only during his own Eſtate, the Releaſe can extend only to cure that Wrong, and therefore for the Reſidue muſt fall into the Remainder. So it is if Feoffee upon Condition makes a Leaſe for Life, Remainder in Fee, and the Feoffor releaſe the Condition to the Leſſee for Life, this ſhall enure alſo to him in Remainder, becauſe the Condition went to the whole Eſtate, and therefore being diſcharged muſt exonerate the whole Eſtate, whereof he in the Remainder has Part. Lit. Sect. 521. Co. Lit. 297.

If the Diſſeiſee confirm the Eſtate of him in the Remainder, without any Confirmation made to the Tenant for Life, yet the Diſſeiſee can't enter upon the Tenant for Life, becauſe the Remainder is depending thereon; and if he ſhould defeat the Eſtate for Life, he muſt alſo defeat the Remainder which he has confirmed; but this he can't do, therefore neither can he defeat the Eſtate for Life. Lit. Sect. 521.

So if a Diſſeiſor make a Leaſe for Life, ſaving the Reverſion to himſelf, and the Diſſeiſee confirm the Reverſion of the Diſſeiſor only, yet he can't enter upon the Tenant for Life, becauſe then he muſt draw out and defeat the Reverſion likewiſe, which againſt his own Confirmation he can't do, (and yet ſuch Reverſion is not depending upon the Eſtate for Life, as the Remainder is, but is paramount to it); for if a Diſſeiſor make a Leaſe for Life, and after levy a Fine with Proclamations, and five Years paſs, ſo that the Diſſeiſee is barred for the Reverſion, he ſhall not enter upon the Leſſee for Life. Co. Lit. 298.

If a Reverſion or Seignory be granted to one for Life, Remainder to another in Fee, Attornment to the Tenant for Life is good to him in the Remainder likewiſe, becauſe both make but one Eſtate and Degree; and for this Reaſon it is, that if no Attornment be to the Tenant for Life, but after his Death Attornment is made to him in the Remainder, this is void, becauſe both making but one Eſtate, if the firſt be not compleated, the other can't take Effect. Co. Lit. 310. 2 Co. 67.

Admittance of the Tenant for Life of Copyhold Lands is alſo a good Admittance of him in the Remainder to all Purpoſes, except the Lord's Fines, if there be a Cuſtom for two ſeveral Fines; and though the firſt Tenant were only for Years, yet Admittance of him is ſuch an Admittance of him in the Remainder likewiſe, as ſhall make a *poſſeſſio fratris* of the Remainder, and carry it to the Siſter of the whole Blood. Cro. Eliz. 504, 662. Moor pl. 448, 658. Rol. Abr. 505. 4 Co. 22. Cro. Jac. 31. Mod. 102, 120. Vent. 260. 2 Lev. 107.

Cuſtom of a Manor was, that upon Surrender of Copyhold Lands made to one and his Heirs, if three Proclamations paſſed, and he did not come in to be admitted, the Lord ſhould have it as forfeited; and there a Surrender was made to the Uſe of *A.* for Life, Remainder to *B.* Cro. Eliz. 879. Yelv. 1. *Boſpool* v. *Long.*

in

in Fee; *A.* ſuffers three Proclamations to paſs without coming in to be admitted; yet it was held, that this ſhould not forfeit the Eſtate of *B.* in Remainder, for they are divided Eſtates; and the Cuſtom being to forfeit one Eſtate only, ſhall be taken ſtrictly, and intended of an intire Fee-Simple in Poſſeſſion.

*Page 332 Moor pl. 149. Cro. Jac. 437. * And yet where Copyholds were deviſable for three Lives *ſucceſſive*, whereof each to take in Order as they were named; and the Cuſtom was, that they could not cut Timber; the firſt Tenant for Life cuts Timber; this was held a Forfeiture of all their Eſtates; the Reaſon whereof may be, that this was but one intire Eſtate in Poſſeſſion at firſt, though the Cuſtom after ſhares and divides it to go in Succeſſion; for it is held, that if a Cro. Eliz. 598. Copyholder for Life commit Waſte, this ſhall be no Forfeiture of the Eſtate of him in Remainder; wherein this Diverſity appears, that for the Benefit of him in the Remainder his Eſtate is accounted as one with the particular Eſtate, and therefore one Admittance goes to both; but as to any Prejudice which he may receive by the Act of the particular Tenant, his Remainder is accounted as a ſeveral and divided Eſtate, and ſhall not ſhare in it.

(L) Of croſs Remainders, or thoſe ariſing by Implication and Conſtruction of Law.

Dyer 303. *A.* Having Iſſue five Sons, his Wife being *enſient*, deviſed two Thirds of his Lands to his four younger Sons, and the Child *in ventre ſa mere* if he were a Son, and their Heirs; and (*a*) if they all die without Iſſue Male of their Bodies, or any of them, that the Lands ſhall revert to the right Heirs of the Deviſor; by this Deviſe the younger Sons were Tenants in Tail in Poſſeſſion, with croſs Remainders in Tail to each other, and no Part ſhall revert to the Heirs of the Deviſor till all the younger Sons be dead without Iſſue Male of their Bodies.

(*a*) That each ſhall be Heir to the other, makes croſs Remainders. Hob. 33. & *vide* Cro. Jac. 260, 656, 695. Bulſt. 62. Owen 25. And. 38. Savil 92. Moor 637. Raym. 455. Vent. 224.

Cro. Jac. 655. 2 Rol. Rep. 281. *Gilbert* v. *Witty*. Cart. 173. S. C. cited and admitted to be Law. But where one having Iſſue three Sons, *A. B.* and *C.* deviſes one Houſe to *A.* and his Heirs, another Houſe to *B.* and his Heirs, and a third Houſe to *C.* and his Heirs, provided that if all his ſaid Children ſhall die without Iſſue, that then all the ſaid Meſſuages ſhall remain and be to his Wife and her Heirs; and it was held by three Judges, that upon the Death of one of the Sons without Iſſue the Wife might enter, and that here there were no croſs Remainders from one Son to another, becauſe being deviſed to them ſeverally by expreſs Limitation, there ſhall be no greater Eſtate to them by Implication; but *Lea* Ch. Juſt. doubted; and *Dodderidge* Juſt. ſaid, that though perhaps croſs Remainders may be by *Implication* where there is a Deviſe to (*b*) two ſeveral Perſons, yet not ſo if to more; for when one dies there can't be ſeveral Eſtates by Moieties to ſeveral Perſons, and when another dies, Remainder again to another, becauſe of the Incertainty and Inconvenience; and that it was never ſeen in any Book, where an Eſtate is limited to divers, that there could be croſs Remainders.

(*b*) As in 4 Leon. 14.

Dyer 330. Benl. 212. Rol. Abr. 839. Vaugh. 267. *Cheſtle's* Caſe. One ſeiſed of Lands in Fee, by his Will in Writing deviſes *Blackacre* to *A.* his Daughter and her Heirs, and *Whiteacre* to his Daughter *B.* and her Heirs; and if ſhe die before the Age of ſixteen Years, living *A.* then *A.* ſhall have *Whiteacre* to her and her Heirs; and if *A.* die,

die, having no Iſſue, living *B.* then *B.* ſhall have the Part of *A.* to her and her Heirs; and if both die, having no Iſſue, then to *J. S.* and his Heirs, and dies; *B.* attains her Age of ſixteen Years, and then dies without Iſſue in the Life of *A.* And firſt it was held by three Juſtices againſt *Dyer*, That the Daughters had an Eſtate-Tail upon the * whole Will, and not a Fee determinable upon a Contingent ſubſequent; ſecondly, That by the Words, *if both die without Iſſue*, no croſs Remainders in Tail were created by Implication, but that upon *B.*'s Death without Iſſue, after ſixteen, *J. S.* ſhould have her Part preſently without ſtaying till the Death of *A.* without Iſſue. * Page 333

A. ſeiſed of Lands in Fee, by his Will deviſes all his Lands in the County of to his two Daughters *B.* and *C.* and their Heirs, equally to be divided betwixt them; and in caſe they happen to die without Iſſue, then he deviſes the ſaid Lands to his Nephew *J. S.* and the Heirs Male of his Body, and dies; and it was adjudged, that upon the Death of *B.* one of the Daughters, the other Siſter took her Moiety as a croſs Remainder. Raym. 452. Skin. 17. pl. 19. 2 Jon. 172. 2 Show. 136. pl. 115. Pollex. 434. S. C. *Holmes* v. *Meynell*, & *vide* 2 Vern. 545. 3 Mod. 107.

It hath been ſaid in a great Variety of Caſes, that croſs Remainders can never ariſe between more than two, from the great Confuſion it would otherwiſe create. Cro. Jac. 655. Vent. 224. Raym. 455. Fitzg. 97. *Shaw* v. *Weigh.* 2 Jon. 82.

It is clearly agreed, that croſs Remainders can only ariſe in laſt Wills, and are not to be allowed of in any Deed or Conveyance. Co. Lit. 25. Rol. Abr. 837. 2 Show. 136. pl. 115.

Richard Holden ſeiſed in Fee, and having Iſſue a Son and three Grandchildren, by his Will deviſed Part of his Eſtate to his Wife for her Life, and the Reverſion of ſuch Part expectant on her Death, and all other his Freehold Tenements, &c. he gave to his Son *Richard Holden* for Life, and after his Death to his firſt and other Sons ſucceſſively in Tail Male; and for Default of ſuch Iſſue, and after the Determination of the ſaid Eſtates, he gave the Premiſſes to his Grandſon *Richard Holden*, and his Grandaughter *Elizabeth Holden*, to be equally divided between them, and to the Heirs of their reſpective Bodies iſſuing; *and for Default of ſuch Iſſue* he gave the Premiſſes to his Grandaughter *Anne* in Fee: the Teſtator died ſeiſed, *Richard* the Son died without Iſſue Male, whereupon *Elizabeth* and the Grandſon entered, and *Elizabeth* died without Iſſue generally; *Anne Holden* married *John Jervis*; and the Queſtion was, Whether there were croſs Remainders between *Elizabeth* and *Richard* the Grandſon, or whether the Moiety of *Elizabeth* ſhould go to *Anne* or *Richard?* And it was reſolved, That there were no croſs Remainders between them, becauſe here are no expreſs Words, nor is there a neceſſary Implication, without either of which croſs Remainders can't be raiſed; that the Words, *and for Default of ſuch Iſſue*, being relative to what goes before, mean only, and for Default of Heirs of their reſpective Bodies, and then it is no more than as if it had been a Deviſe of the Moiety to *Richard* and the Heirs of his Body, and of the other Moiety to *Elizabeth* and the Heirs of her Body, and for Default of Heirs of their reſpective Bodies, Remainder over; in which Caſe there could be no Doubt; and it was held, that this Caſe diſtered from the Caſe *ſupra* of *Holmes* and *Meynell*, the Word *reſpective* being wanting in that Caſe, and the firſt Deviſees were the Teſtator's Daughters, and the Remainder-Man only a Nephew; whereas in the preſent Caſe *Anne* was as near to the Teſtator as *Richard*. 2 Stra. 969. *Comber* v. *Hill.* Paſch. 7 G. 2. in *B. R.* and M. 8 G. 2. a like Caſe in *B. R.* between *Brown* v. *Williams.*

*Page 334

* R E N T.

(A) Of the ſeveral Kinds of Rents. 335.

And herein,

1. Of Rent-Service. 335.
2. Of a Rent-Charge. 336.
3. Of a Rent-Seck. 337.

(B) Out of what Things a Rent may iſſue. 338.
(C) Upon what Conveyance a Rent-Service may be reſerved. 340.
(D) By what Words a Rent may be reſerved or created. 341.
(E) How ſeveral Rents may be reſerved in the ſame Deed. 342.
(F) Of the Days of Payment. 343.
(G) To whom Rents may be reſerved or granted. 346.
(H) Of the Continuance of the Rent, and to whom to be paid, and herein of the diſtinct Intereſts of the Heir and Executors of the Leſſor. 349.
(I) Of the Recovery and Demand of the Rent. 353.

And herein,

1. In what Caſes a Demand is neceſſary. 353.
2. The Time of Demand. 357.
3. The Place where a Demand is to be made. 358.

(K) The ſeveral Remedies for Recovery of Rents. 359.

And herein,

1. Of the Remedy by Diſtreſs. 359.
2. Of the Remedy by Writ of Annuity. 360.
3. Of the Remedy by Aſſiſe. 361.
4. Of the Clauſe of Re-entry. 361.
5. Of the Nomine poenae. 362.
6. Of the Remedy by Action of Debt, and as grounded on ſeveral Acts of Parliament. 363.

(L) Rent

(L) **Rent when and how discharged, and herein of the Eviction of the Tenant.** 366.

(M) **Of Apportionment, and herein of the Suspension and Extinguishment of the Rent.** 368.

And therein,

1. In what Cases a Rent may be apportioned by the Act of the Parties, and herein of the Difference between a Rent-Service, and a Rent-Charge. 368.
2. In what Cases they may be apportioned by the Act of Law, or the Act of God. 370.
3. The Manner of such Apportionment, and how the Tenant shall take Advantage of it. 371.

---

*(A) Of the several Kinds of Rents: And herein, *Page 335

1. Of Rent-Service.

LITTLETON describes a Rent (*a*) Service to be where the Tenant holdeth his Land of his Lord by Fealty and certain Rent; or by Homage, Fealty, and certain Rent; or by other Services and certain Rent. Lit. Sect. 213.

(*a*) So called because the ancient Retribution was made by the corporal Service of the Tenant in plowing his Lord's Demesne, and which came afterwards to be changed into Gabel or Rent; but the Service of Fealty is still incident to a Rent-Service. Co. Lit. 142. 2 Inst. 19. Vent. 161.——That Suit to a Mill is Rent-Service, Bro. Tit. *Ten.* pl. 26.

The Services are of two Sorts, either expressed in the Lease or Contract, or raised by Implication of Law. When the Services are expressed in the Contract, the *Quantum* must be either certainly mentioned, or be such as by a Reference to something else may be reduced to a Certainty; for if the Lessor's Demands be uncertain, it is impossible to give him an adequate Satisfaction or Compensation for them, as the Jury cannot determine what Injury he has sustained. Co. Lit. 96. a. Stil. 397. 2 Ld. Raym. 1160.

Hence it is, that the Land cannot distrain his Tenant in *Frankalmoigne*, for the Duty of such Tenant being to make Orisons, Prayers and Masses, and other divine Services for the Soul of the Feoffor, but the Number of them not being expressed, the Service is altogether uncertain; and therefore the Remedy is before the Ordinary, who may inflict Ecclesiastical Censures for such Omission. Lit. Sect. 135, 136.

But if the Tenant holds of his Lord to sheer all his Sheep feeding in such a Manor, this is certain enough, because it is easy to compute the Number within the Precincts of the Manor, and consequently what Expence the Lord is at in imploying others to that Work, and what Damages he has sustained by the Omission of his Tenant. Co. Lit 96. a. 2 Ld. Raym. 1161.

In Debt for Rent on a Demise, *Reddendum* after the Rate of 18*l. per Annum*, was adjudged a void Reservation for Incertainty; because it may be in Corn, or in any Thing satisfactory; also an Action might be brought every Day or every Hour, as no Time is limited when the Rent should be paid; and the Court was the more inclined to think it a void Reser- 4 Mod. 76. Salk. 262. pl. 2. 2 Vent. 249, 270. *Parker* v. *Harris*.

Reſervation, from its being on a *Leaſe at Will*, where the Time of Payment of the Rent ſhould be very certain, as the Tenant by holding over a Day muſt pay the Rent of the next Quarter.

Co. Lit. 22, 23. The Services implied are ſuch, as the Law obliges the Tenant to perform when there are none contracted for in the Grant; and theſe are more or leſs according to the Duration of the Gift; as at Common Law, before the Statute *Quia emptores terrarum*, if the Tenant made a Feoffment in Fee without any Reſervation of Services, the Feoffee held by the ſame Services by which the Feoffor held over; becauſe the Services being by an Incumbrance on the Land, which the Tenant could not diſcharge without his Lord's Conſent, muſt follow the Land into whoſe Hands ſoever it comes.

Lit. Sect. 19. So when after the Statute *de Donis* the Feudal Right of Reverter was turned into a Reverſion in the Feoffor, the Law obliged the Tenant in Tail to do the ſame Services to the Donor, which he was obliged to by his Superior Lord; becauſe this was an Eſtate of Inheritance which poſſibly might have continued for ever.

Co. Lit. 23. Hence it is, that if *A.* ſeiſed of two Acres, one holden of *B.* by Knight's Service, and 12*d.* Rent, and the other of *C.* in Socage and 6*d.* Rent, makes a Gift in Tail of both Acres, without any Reſervation, *Page 336* though the Donor has but one Reverſion, yet the Donee held by two diſtinct Tenures and different Services, and purſuant to the Tenure and the Services, the Avowry of the Donor muſt be ſeveral; becauſe the Donee muſt hold as the Donor held over.

Co. Lit. 23. So if there be Lord Meſne and Tenant, and the Meſne holdeth by 12*d.* Rent, and the Tenant by 4*d.* the Tenant makes a Gift in Tail without any Reſervation, the Donee ſhall hold by the 4*d.* Rent, becauſe his Donor holdeth of the Meſne by that Service; and if the Donor die without Iſſue, by which the Reverſion eſcheats to the Meſne, then the Donee muſt hold by 12*d.* becauſe his Tenure is then of the Meſne; and the Tenant muſt hold by the ſame Services which his Lord holds over.

Co. Lit. 23. But the Law did not make this Conſtruction on Leaſes for Lives or Years, for if the Leſſor made no Reſervation, the Law implied none, except Fealty, which every Tenant that has any determinate Intereſt muſt do; becauſe it is neceſſary there ſhould be ſome *indicium* of the Tenure ſince all Lands muſt be held of ſome Body.

2 Inſt. 505. But ſince the Statute *Quia emptores terrarum*, if a Man makes a Feoffment in Fee, or Leaſe for Life, or a Gift in Tail, Remainder over in Fee; the Feoffee ſhall hold of the ſuperior Lord by the ſame Services which the Feoffor or Donor held; for by that Act the Tenure upon ſuch Donations muſt be of the capital Lord, and not of the Feoffor; wherefore upon ſuch Grants there can be no Rent-Service reſerved at this Day to the Feoffor, becauſe the Feoffee is not obliged to ſwear Fealty to him, inaſmuch as he is not in his Homage, and conſequently not obliged to do any Services to him for Lands which he holds of the capital Lord.

Lit. Sect. 214. But ſince the Statute, if a Man makes a Leaſe for Life, or a Gift in Tail, ſaving the Reverſion to himſelf, with the Reſervation of Rent or other Services, this is a Rent-Service, for which the Law gives the Donor or Leſſor a Remedy by Diſtreſs, as before the Statute; for neither the Leſſee nor Donee is *Feoffatus* within the Act, becauſe there is a Reverſion in the Donor ſufficient to ſupport the Tenure of him.

Lit. Sect. 215. 7 Co. 24, 51. Cro. Eliz. 656. Plow. 134. Therefore in the Caſe of a Feoffment in Fee, or Leaſe for Life, the Remainder in Fee; if the Feoffor reſerves a Rent, ſuch Rent is Seck, becauſe it is unprofitable to the Feoffor, he having no Remedy for the Recovery of it; the Reaſon whereof is, becauſe the Land out of which the

the Rent is reſerved is not held of the Feoffor, and conſequently the Feoffee is not obliged to the Oath of Fealty to him for Lands which are held of another; and where there was no Fealty due, there could be no Seiſure by the old Law for Non-performance of the Services, and conſequently no Diſtreſs without the particular Proviſion of the Parties; and hence the true Reaſon appears, why to a Rent-Service a Power of diſtraining is inſeparably incident by the Common Law, without any Clauſe in the Leaſe or Proviſion of the Parties.

2. Of a Rent-Charge.

Where a Man ſeiſed of Lands grants by a Deed Poll or Indenture a yearly Rent, to be iſſuing out of the ſame Land to another in Fee, in Tail, for Life or Years, with a Clauſe of Diſtreſs, this is a Rent-Charge, becauſe the Lands are charged with a Diſtreſs by the expreſs Grant or Proviſion of the Parties, which otherwiſe it would not be. *Vide* Title *Annuity*.

So if a Man makes a Feoffment in Fee, reſerving Rent, and if the Rent be behind, that it ſhall be lawful for him to diſtrain, this is a Rent-Charge, the Word *Reſerving* amounting to a Grant from the Feoffee. Lit. Sect. 217. Co. Lit. 170. a. Plow. 134.

* A Rent granted for Equality of Partition by one Coparcener to another is a Rent-Charge, and diſtrainable of common Right without Clauſe of Diſtreſs; and although there be no Tenure of the Siſter who grants it; for as the Law for the Conveniency of Coparceners allows of ſuch Grants, it muſt conſequently give a Remedy to the Grantee for the Recovery of it. *Page 337 Lit. Sect. 251, 252.—So if a Rent be granted to a Widow out of Lands, whereof ſhe is dowable. Co. Lit. 169.

3. Of a Rent-Seck.

A Rent-Seck is ſo called, becauſe it is unprofitable to the Grantee, as before Seiſin had he can have no Remedy for Recovery of it; as where a Man ſeiſed in Fee grants a Rent in Fee for Life or Years, or where a Man makes a Feoffment in Fee or for Life, Remainder in Fee, reſerving Rent without any Clauſe of Diſtreſs, theſe are Rents-Seck; for which, by the Policy of the ancient Law, there was no Remedy, as there was no Tenure between the Grantor and Grantee, or Feoffor and Feoffee, and conſequently no Fealty could be due. Lit. Sect. 215, 218. Cro. Car. 520. Keilw. 104. Cro. Eliz. 656.

If a Man grants a Rent out of three Acres, and grants over, that if the Rent be arrear, that he ſhall diſtrain for the Rent in one of the Acres, this is one intire Rent, but it cannot be a Rent-Charge for the Whole, becauſe the greateſt Part of the Land out of which it iſſues is not chargeable with any Diſtreſs for the Recovery of it, and *denominatio ſumenda a majori*, therefore it is taken to be a Rent-Seck, for which, by the Words of the Grant, the Grantee may diſtrain in the third Acre; for, whenever the Remedy by way of Charge for the Rent is not commenſurate to the Rent, the Rent is called Seck, and the Charge is only appurtenant or appendant to the Rent, and does not give it its Denomination; and the Reaſon is, becauſe if ſuch original Grant ſhould be loſt and worn out by Time, and a Man were to preſcribe for it, if he were to give it the Denomination of a Charge, it would graſp more Land than was originally intended to be charged; and therefore the Law binds them down to the Denomination of the Rent as Seck, and to ſet forth the Charge as an Appurtenant, that by Length of Time no more 7 Co. 52. Co. Lit. 147.

ſhould

ſhould be comprehended in the Charge, than was originally intended in the Grant of that Charge.

Co. Lit. 147. b. 7 Co. 51. So it is, if a Rent be granted to two and their Heirs out of one Acre, and that it ſhall be lawful for one of them and his Heirs to diſtrain for it, this is a Rent-Seck, and the Diſtreſs given to one is only an Appurtenant to the Rent; and this comes within the Reaſon of the former Caſe, becauſe both the Grantees have not a Remedy by way of Charge commenſurate to the Rent granted; but if he to whom the Diſtreſs was not limited dies, the Survivor ſhall diſtrain, becauſe the whole Rent is then in him, and the Remedy by Diſtreſs, which was given to him and his Heirs, ought in Reaſon to be extended to the Recovery of the whole Eſtate given, and he is now in Seiſin of the whole Rent under the firſt Grant.

Lit. Sect. 236. Cro. Jac. 142. But if a Rent-Seck be granted, and the Grantee has Seiſin of the Rent given to him, as by the Payment of a Penny, &c. and afterwards the Grantee is diſſeiſed of it, or is denied Payment, which is a Diſſeiſin in Law, the Grantee may, at Common Law, maintain an Aſſiſe for it.

Moor 626. 3 Chan. Ca. 92. And it hath been ruled in Equity, that where an Annuity was deviſed by Will to *A.* and the Land ſubject to the Annuity to *B.* that *B.* ſhould give Seiſin of the Rent-Seck to *A.* that he might have Remedy for the Recovery of it at Common Law, it being the original Intention of the Gift, that the Deviſee ſhould have ſome Benefit from it.

*Page 338 Chan. Ca. 120. *Collet v. Jagues.* * So when a Bill was brought for 3 *l.* for a Rent of 5 *s.* Arrear for twelve Years, the Equity of the Bill being that the Deeds by which the Rents were created were loſt, and conſequently no Remedy for the Rent at Law; and the Court, upon the Plaintiff's proving conſtant Payment till the laſt twelve Years, decreed the Defendant to pay the Arrears and growing Rent; for ſince by the Payment it was evident the Plaintiff had a Right to the Rent, and that he could not without his Deeds make a Title at Law, therefore the Court decreed the Defendant to pay the Rent, and ſo ſubjected his Perſon, which poſſibly might not have been liable by the Deed that created the Rent.

And now by the 4 *G.* 2. *cap.* 28. it is enacted, "That all Perſons ſhall "have like Remedy by Diſtreſs, and by impounding and ſelling the ſame "in Caſes of Rents-Seck, Rents of Aſſiſe and Chief Rents, which have "been anſwered or paid for three Years within the Space of twenty Years, "before the firſt Day of this Seſſion of Parliament, or ſhall be hereafter "created, as in Caſe of Rent reſerved on a Leaſe."

(B) Out of what Things a Rent may iſſue.

Co. Lit. 47. a. 142. a. IT is laid down as a general Rule, that no Rent can iſſue out of any incorporeal Inheritance which lies in Grant, becauſe they are ſuch Things in their Nature as a Man can never recur to for a Diſtreſs.

Cro. Jac. 679. Noy 60.— (*a*) So of a Warren. And. 26. Moor 115. 3 Leon. 1.— So of a Piſcary. As (*a*) a Common which was originally granted for the Benefit of the Beaſts of every one of the Tenants, and therefore cannot be liable to a Diſtreſs by the Act of any particular Tenant, as the Right of Common which every Man has runs through the whole Common, and no particular Tenant has a Right to one Part more than another, it follows that no (*b*) Diſtreſs

Co. Lit. 144. (*b*) Though a Rent cannot, for the Reaſons herein mentioned, iſſue out of a Common, yet by the 11 Geo. 2. c. 19. ſ. 8. it is enacted, That it ſhall be lawful for every

Diſtreſs can be taken thereon, nor can the Recognizors of the Aſſize have the View of any particular Part to which the Grantee of the Rent hath a Right, and therefore cannot put him in Seiſin of the Rent by a Twig or a Turf.

every Landlord, his Steward, Bailiff, Receiver, or other Perſon impowered by him, to ſeiſe as a Diſtreſs for Rent any Cattle or Stock of their Tenants feeding upon any Common appendant or appurtenant to any Part of the Premiſſes demiſed.

So Rent cannot iſſue out of a Rent, for the Statute of *Weſtm.* 2. (13 *Ed.* 1. *ſtat.* 1.) gives an Aſſiſe *in certo loco capiendo*; but a Rent cannot be put in View. Bro. *Aſſiſe.* pl. 2.

So it is of Tithes, for a Reſervation of Rent upon a Releaſe of them is not good, becauſe there is no Place upon which the Diſtreſs can be taken, nor any Land to be put in View to the Recognitors, or of which they may give him Seiſin. 5 Co. 3. Cro. Car. 111, 173.

But it has been decreed in Equity, that where a Rent-Charge of 20*l.* was deviſed out of a Rectory, the Glebe whereof amounted but to 40*s.* *per Annum*, that the whole Rectory ſhould be liable to the Payment of the Rent; and the Proprietor of the Rectory was decreed to pay the Arrears of the Rent and Coſts. Chan. Ca. 79. *Thornside* v. *Allinton.*

A Rent cannot iſſue out of a Hundred, Fair, Office, *&c.* for theſe were inſtituted for particular Purpoſes, and are for publick Utility. So of an Advowſon, in which the Patron has no Intereſt but to appoint an able and fit Perſon to the Church, without making any Profit to himſelf. 7 Co. 23. Noy 60.

* But though a Reverſion or Remainder be incorporeal, and can paſs only by Grant, yet a Rent reſerved upon a Grant of them is good; for though the Grantor has no Remedy for them during the Continuance of the particular Eſtate, yet ſince they relate to Lands which were originally granted to make Profit of, the Judges have gone as far as they could to purſue the Intention of ſuch original Donations, and therefore have admitted ſuch Reſervations to be good immediately, ſince the Lands in which the Grantor had the Reverſion were originally given for that Purpoſe, *viz.* to make Profit of; and this Conſtruction is the more reaſonable, becauſe in this Caſe there is a Remedy by Diſtreſs for all the Arrears, when the Reverſion executes by the Determination of the particular Eſtate, whereas there is no Poſſibility of ſuch Remedy in the Caſe of Tithes, Commons, Fairs, *&c.* *Page 339 10 E. 4. 4. Bro. Title *Diſtreſs* 47. Perk. Sect. 627. Co. 62. *Capel's* Caſe. Co. Lit. 47. a.

So, and for the ſame Reaſon it is, if the Lord grants his Seignory, reſerving Rent; for here is a Proſpect, though it be diſtant, of a Remedy by Diſtreſs upon the Eſcheat of the Tenancy. 2 Rol. Abr. 446.

So if there be Lord Meſne and Tenant, and the Meſne maketh a Gift in Tail of the Meſnalty, reſerving Rent, this is a good Reſervation, becauſe the Tenancy may eſcheat to the Donee, and then the Donor ſhall have Remedy by Diſtreſs for all the Arrears. Perk. Sect. 627. Cro. Eliz. 546.

Alſo if a Leaſe be made for Years of an incorporeal Inheritance, which lies only in Grant, reſerving Rent, ſuch Reſervation is good to bind the Leſſee by way of Contract, for the Non-performance of which the Leſſor ſhall have an Action of Debt, becauſe if the Leſſee undertakes to pay ſuch an annual Sum by his Deed, ſuch Undertaking gives the Leſſor a Right to it, and the Law in all Caſes gives Remedies adequate and correſpondent to every Man's Right. 5 Co. 3. *Jewell's* Caſe. 2 Saund. 303. Vent. 98. Lev. 308.

As when in Covenant, for Non-payment of Rent, the Plaintiff declared that he was ſeiſed of Tithes, and by Indenture demiſed them to the Defendant, rendering Rent, which he covenanted to pay, and for the Non-payment of which the Plaintiff brought his Action; but the Defendant having pleaded Eviction, to which the Plaintiff demurred, it was adjudged for the Defendant; the Court holding that this was Rent, Ld. Raym. 77. *Dalſton* v. *Reeve.*

and that the Eviction was a Suſpenſion of it, and therefore that the Plea was good.

2 Rol. Rep. 467. *Falſtaff's* Caſe. If a Man makes a Leaſe of *Blackacre* to commence *in Futuro*, and of *Whiteacre* to begin *in Præſenti*, rendering Rent, payable at *Michaelmas*, before the Commencement of the Term of *Blackacre*, this is a good Reſervation immediately, for it is but one intire Rent, and as ſuch is payable according to the Reſervation.

2 Rol. Abr. 446, & *vide* 2 Rol. Rep. 407. Plow. 423. So it is, if a Man grants a future Intereſt in Land, as if it be a Leaſe for Years, to commence five Years after the making of the Leaſe, the Leſſor may reſerve a Rent immediately, becauſe this is a good Contract to oblige the Leſſee, and to ground an Action of Debt; and the Leſſor may likewiſe have his Remedy by Diſtreſs for the Arrears when the Leſſee comes into Poſſeſſion.

Co. Lit. 47. A Leaſe of the Veſture or Herbage of Land, reſerving Rent, is good, becauſe the Leſſor may come upon the Land to diſtrain the Leſſee's Beaſts feeding thereon.

Co. Lit. 47. 5 Co. 4, 56. Lane 39. Alſo the King may reſerve Rent out of an incorporeal Inheritance, becauſe by his Prerogative he may diſtrain in all the Lands of his Leſſee for ſuch Rent; and therefore, ſince he has a Remedy for the Rent, there is no Reaſon that ſuch Reſervation ſhould not be good.

Will. Rep. 306. pl. 79. *Attorney General* v. *Mayor of Coventry*. But if the King's Tenant makes a Leaſe of the Lands not holden of the King, either for Years or at Will, the King cannot diſtrain ſuch Lands in the Hands of the Under Leſſee. So if they are extended on an *Elegit*, or if they be under Sequeſtration; but in this laſt Caſe, * upon Application to the Court of Chancery, Liberty will be given to diſtrain without incurring any Contempt of that Court.

*Page 340

(C) Upon what Conveyance a Rent-Service may be reſerved.

10 E. 4. 3. 21 H. 6. 8. Co. Lit. 144, 193. 2 Rol. Abr. 449. HERE it may be laid down as a Rule, that a Rent-Service may be reſerved upon every Conveyance that paſſes any Eſtate to the Tenant, or enlarges an Eſtate already in him; for the Rent being an annual Return by way of Retribution for ſomething given, it follows that where no Eſtate paſſes by the Conveyance, there ought to be no Retribution or Return; beſides, the Thing given was antiently in Nature of a Pledge for the Rent, and therefore ought to be ſuch that the Giver might formerly have reveſted himſelf in, and now may have Recourſe to for a Diſtreſs upon Non-payment of the Rent; hence therefore it is, that if the Diſſeiſee releaſes all his Right to the Diſſeiſor, reſerving Rent, the Reſervation is void.

Lit. Sect. 438. Dyer 230. Mo. 631. 13 Co. 55. So it is, if there be Lord and Tenant, and the Tenant holdeth of his Lord by Fealty and 20*s.* Rent, and the Lord releaſes to his Tenant, or confirms his Eſtate in the Tenancy, yielding to him a Hawk or Roſe yearly, this new Reſervation is void, becauſe there is no Eſtate given to the Tenant, for which he ſhould make that new Return of Service to his Lord; but the Lord upon ſuch Releaſe or Confirmation may confirm the Tenant's Eſtate to hold by leſſer Services, as in this Caſe by Fealty and 5*s.* Rent, becauſe by the ſame Reaſon that he may releaſe his Seignory, he may likewiſe abridge himſelf of Part of it.

10 E. 4. 3. Co. Lit. 193. b. If there be Tenant for Life, and he in Reverſion releaſes to him in Tail, reſerving Rent, the Reſervation is good, becauſe the Tenant's Eſtate is

enlarged

enlarged by the Releaſe, and therefore the Rent reſerved ought to be paid in Return for the Inheritance given, and the Leſſor has immediate Remedy by Diſtreſs for Recovery of it. So upon a Surrender by Deed, Rent may be reſerved. 2 Rol. Abr. 449.

So if the Lord of a Manor, by Indenture at Common Law, releaſes to his Copyholder in Fee, to him and his Heirs, or confirms ſuch Lands to his Copyholder and his Heirs, reſerving a Rent, this Reſervation is good, becauſe the Releaſe or Confirmation enure by Way of *Mitter le Eſtate*, to paſs an Eſtate at Common Law to him, where before he had but a Copyhold or cuſtomary Eſtate at Will; but upon a Releaſe or Confirmation, which enures by Way of *Mitter le Droit*, no Rent can be reſerved; and in the other Caſe, though the Reſervation, be it by Indenture or Deed-Poll, be good, yet without Clauſe of Diſtreſs it is only a Rent-Seck. 13 Co. 55. *Samme's* Caſe. Co Lit. 193.

So upon a Releaſe that enures by Way of *Mitter le Eſtate*, as when one Jointenant releaſes to another, a Rent may be reſerved; but *Quære*, if ſuch Releaſe carries the Fee-ſimple, whether ſuch Rent be a Rent-Service, inaſmuch as the Releaſee being in from the firſt Feoffor, there can be no Tenure of the Releaſor, and conſequently the Rent muſt be Seck, unleſs there be a Clauſe of Diſtreſs in the Deed of Releaſe; for ſo it is in the Caſe of a Feoffment in Fee ſince the Statute *Quia emptores terrarum*, as is before obſerved. Co. Lit. 193.

At Common Law no Rent could have been reſerved upon a Bargain and Sale, becauſe only a Uſe paſſed, which was not any Eſtate to which the Bargainor could have Recourſe for a Diſtreſs; but now by the Statute 27 *H.* 8. (*c.* 10) the Poſſeſſion is executed to the Uſe, and therefore the Bargainor may now have Recourſe to the Land for a Diſtreſs. *Page 341 2 Inſt. 673. 2 Co. 54. Co. Lit. 144. a. Cro. Eliz. 595.

There can be no Rent reſerved upon any Conveyance, that enures by way of Extinguiſhment of the Eſtate of the Grantor, becauſe in ſuch Caſe there is no Reverſion left in him to create a Tenure; and therefore, if a Leſſee ſurrenders his Eſtate, reſerving a Rent, the Reſervation is not good; but this Caſe put by *Roll* muſt, it ſeems, be underſtood of a Leaſe for Life; for ſuch a Reſervation may be good by way of Contract, upon a Surrender of a Leaſe for Years; for when the Leſſor takes an Aſſignment or Surrender of the Leſſee's Term, he agrees to take it under ſuch a yearly Rent; and ſuch Agreement or Contract is a good Foundation for an Action of Debt, if it be not performed, whether the Agreement be by Deed or Parol. 2 Rol. Abr. 449. but ſee Allen 57. 2 Lev. 80. Raym. 222. 2 Mod. 174. *Winton* v. *Pinkney*, and Lutw. 364. Ld. Raym. 82. Sir *John Brownlow* v. *Hewly*.

So if a Rent be reſerved upon a Feoffment in Fee, though the Feoffor hath no Reverſion, yet this is a Rent, and recoverable by the Name of Rent upon the Contract. Carth. 162.

(D) By what Words a Rent may be reſerved or created.

A Rent Service being ſomething in Retribution for the Land that paſſes, it muſt be reſerved by ſuch Words as imply a Return of ſomething that was not in the Grantor before, in Lieu of the Land given; and therefore *Reddendo*, *Reſervando*, *Solvendo*, *Faciendo*, *Inveniendo*, and ſuch like, are proper Words by which a Rent may be reſerved. Co. Lit 47. a. Perk. Sect. 625. Plow. 142. 2 Rol. Abr. 449.

Perk. Sect. 639. But if a Man makes a Leaſe of Lands, except 12*d.* or *præter* 12*d.* Rent, theſe are no good Reſervations, becauſe theſe Words are only proper to reſerve to the Leſſor Part of ſomething in Being, and which would otherwiſe paſs by the Leaſe.

2 Rol. Abr. 449. So it is, if a Man makes a Leaſe, *Salvo* or ſaving 20*s.* Rent, this is no good Reſervation, becauſe there can be no Saving of any Thing not in Being; conſequently a Rent-Service being a Return of ſomething not in the Leſſor, in lieu of the Land given, cannot be reſerved by Words, that, in their moſt extended Signification, can only preſerve ſomething already *in Eſſe*.

Perk. Sect. 650. But if there be Lord and Tenant by Knights Service, and the Tenant makes a Gift in Tail, to hold by a Penny, *Salvo forinſeco Servitio*, that is, ſaving to the Tenant ſuch Service by which he held the Land of his Lord; this is good to make the Donee hold by Knights Service; for though the Tenant had not that Service in himſelf, before the Gift, yet it was a Service in Being, for the Tenant was obliged to do it to his Lord; and therefore it is but reaſonable that he might ſave that Service to himſelf which he was at the Time of the Gift obliged to perform to another.

2 Rol. Abr. 449. So it is, if there be Lord Meſne and Tenant, and the Meſne holds by Knights Service, and the Tenant by Socage; if the Tenant makes a Gift in Tail reſerving Rent, and ſaving the Knights Service, the Donee in this Caſe likewiſe ſhall hold by Knights Service; becauſe this Service was in Being and chargeable upon the Land at the Time of the Gift, though the Tenant was not obliged to it himſelf, and therefore * may be reaſonably
*Page 342 ſaved to him who parts with the Land upon which they were before chargeable; and the rather becauſe ſuch Conſtruction is moſt beneficial to the Publick, and the Donee not injured; becauſe he willingly takes it under ſuch Charge.

Moor 459. Cro. Eliz. 486. *Harrington v. Wiſe.* By Articles of Agreement indented between *A.* and *B.* it is covenanted and agreed, that *A.* doth let *Blackacre* to *B.* for five Years from *Michaelmas* following; provided always, that *B.* ſhall pay at *Michaelmas* and *Lady-day* 10*l.* by even Portions yearly; this *Proviſo* is a good Reſervation of the Rent; for as the Words amounted to an immediate Demiſe of the Lands, ſo the Rent, which is but a Retribution for the Land, ought to be paid immediately; and it cannot be conſtrued to be a Sum in groſs, becauſe by the Words of the Articles (which being indented are the Words of the Parties) it is to be paid Yearly.

Plow. 131. Cro. Car. 207. Rol. Rep. 80. Cro. Jac. 398. 2 Bulſt. 281. Jon. 231. If Lands be leaſed to *A.* and he covenants and grants to render and pay for the ſaid Lands every Year, during the ſaid Term, to the Leſſor, his Heirs and Aſſigns 10*l.* this amounts to a Reſervation. So it is, if the Leſſor covenants that the Leſſee ſhall hold and enjoy the Land, and the Leſſee *in Conſideratione præmiſſorum* covenants to pay to the Leſſor, his Heirs and Aſſigns, an annual Rent of 10*l.* during the Term; for here the Rent is plainly given as a Retribution for the Land which the Leſſee holds; and this being by Indenture, the Words are looked upon to be ſpoke by both Parties, and theſe may reaſonably be conſtrued that the Leſſor in Conſideration of the Land demiſed, reſerves the Rent agreed on by Way of Retribution or Return; and therefore it has been adjudged, that ſuch Rent goes with the Reverſion to the Heir; and the Executor of the Leſſor ſhall never recover it by way of Covenant.

(E) How ſeveral Rents may be reſerved in the ſame Deed.

HERE the Difference is to be obſerved between a Rent reſerved intire in the *Reddendum*, upon a Demiſe of ſeveral Things in the ſame Leaſe (for there though the Rent be after apportioned to the particular Parcels leaſed, yet the Reſervation ſhall be taken as one and intire) and where the Rent is not at firſt reſerved intire, but upon the Reſervation is ſeveral and apportioned to the ſeveral Things demiſed; for Inſtance, If a Leaſe be made of ſeveral Houſes, rendering the annual Rent of 5*l.* at the two uſual Feaſts, *viz.* for one Houſe 3*l.* for another 10*s.* and for the Reſt of the Houſes the Reſidue of the ſaid Rent of 5*l.* with a Clauſe of Re-entry into all the Houſes for Non-payment of any Parcel of the Rent; this is but one Reſervation of one intire Rent; becauſe all the Houſes were leaſed, and the 5*l.* was reſerved as one intire Rent for them all, and the *viz.* after does not alter the Nature of the Reſervation, but only declares the Value of each Houſe. Hob. 172. 5 Co. 54. Moor 51, 199. *Knight's* Caſe.

But if the Leaſe had been of three Houſes, rendering for one Houſe 3*l.* for another 20*s.* and for the third 20*s.* with a Conditition to re-enter in all for the Non-payment of any Parcel, theſe are three ſeveral Reſervations, and in the Nature of three diſtinct Demiſes, for which the Avowries muſt likewiſe be ſeveral; for each Houſe in this Caſe is only chargeable with its own Rent, the intire Sum not being at firſt reſerved out of all the Houſes demiſed, and afterwards apportioned to the * ſeveral Houſes, according to their reſpective Value, as in the former Caſes; but the particular Sums are at firſt reſerved out of the ſeveral Houſes; and therefore the Non-payment of the Rent of one Houſe can be no Cauſe of Entry into another. Dyer 309. 5 Co. 55. Moor 98. *Winter's* Caſe. *Page 343

So if the Lord had reſerved out of one Houſe 3*l.* during five Years, and 20*s.* out of another Houſe during ten Years; and 20*s.* out of the third Houſe to commence ten Years after, theſe are diſtinct Reſervations and ſeveral Demiſes; and each Houſe is ſubject to a Diſtreſs but for its own Rent. 5 Co. 55. 2 Rol. Abr. 448.

Tenant in Tail demiſed the Site and Demeſnes of a Manor which had accuſtomarily been let, and alſo all the Manor, and all Lands and Tenements belonging to it; *habendum* the ſaid Site and Demeſnes, and alſo the ſaid Manor and Premiſſes for twenty-one Years; yielding and paying for the ſaid Site and Demeſnes 10*s.* and yielding for the ſaid Manor and Premiſſes 20*s.* this was adjudged a good Leaſe for the Site and Demeſnes which had been accuſtomarily let; but for the other Parts of the Manor not uſually let the Leaſe was void §; and the whole Leaſe was not held to be void, becauſe that theſe were ſeveral Reſervations, and ſo in nature of ſeveral Leaſes. Cro. Eliz. 341. *Tanfield* v. *Rogers*. §It was void by 32 H. 8. c. 28. ſ. 2.

If a Leaſe be made of two Manors, *habendum* one Manor for 20*s.* and the other Manor for 10*s.* theſe are ſeveral Reſervations, and each Manor is charged with its reſpective Rent. 4 Leon. 30.

A. made a Leaſe of a Cellar for a Year, and if at the End of the Year the Parties ſhould agree that the Demiſe ſhould continue, then to have and to hold the ſame for three Years, *reddendo inde annuatim durante dicto termino* 40*s.* this is one intire Reſervation, as well for the firſt Year as for the three Years; for the Words *dicto termino* extend to both Terms indifferently. 10 Co. 106. Hob. 276. *Humphry Lofield's* Caſe.

And as there may be ſeveral Reſervations in the ſame Leaſe by the Words of the Parties, ſo there may be by Act of Law; as where a Leaſe Moor 202.

for

for Life is made to an Abbot or Biſhop in their publick Capacities, and to *J. S.* reſerving a Rent, the Leſſees are not Jointenants but Tenants in common; and therefore the Reſervation of the Rent muſt be ſeveral, and the Reverſion, to which the Rent is incident, muſt follow the Nature of the particular Eſtates on which it depends, and therefore muſt be ſeveral too.

Lit. Sect. 314. Co. Lit. 197. a. Moor 202. † Tenants in common cannot make a joint Leaſe, ſee 3 V. 445. and 2 Wilſ. 232.

So it is, if there be two Tenants in Common, and they † make a Leaſe for Life, rendering Rent, this Reſervation, though made by joint Words, ſhall follow the Nature of the Reverſion, which is ſeveral in the Leſſors; and therefore they ſhall be put to their ſeveral Aſſizes if they be diſſeiſed, as if there had been diſtinct Reſervations; but if the Reſervation had been of a Horſe or Hawk, which is not in its Nature ſeverable, then for the Neceſſity of the Caſe the Law admits them to join in one Aſſiſe.

(F) Of the Days of Payment.

Hob. 172. Co. Lit. 217. Plow. 171. 2 Brownl. 221.

THESE are either by the particular Appointment of the Parties in the Deed, or by Appointment of Law in Default thereof; and here it is regularly true, that the Law will never controul the expreſs Appointment of the Parties, where ſuch Appointment will anſwer their Intention; but though there be no particular Days mentioned in the Deed for the Payment of the Rent, yet if the Manner of ſuch Appoint-

*Page 344 * ment will not fully anſwer the Deſign of the Contract, the Law in ſuch Caſe will alter or tranſpoſe the Words of the Deed; becauſe it is the great End of the Law to execute all Contracts, however unwarily or inartificially framed, according to the Purport and true Intention of the Parties upon the Whole Deed; thus for Inſtance, If *A.* makes a Leaſe to *B.* the 6th of *Auguſt*, rendering yearly the Rent of 40 *s.* at the two Feaſts of the Year, *viz.* at *Lady-day* and *Michaelmas*, by equal Portions; though in this Caſe, by the Appointment of the Parties *Lady-day* be the firſt Term mentioned, yet the firſt Payment ſhall be made at *Michaelmas*

(a) That the Law will marſhal the Payments. 2 Rol. Rep. 213. 5 Co. 102. 3 Bulſt. 328. 2 Jon. 109.

enſuing the Date of the Leaſe; for without ſuch (*a*) Tranſpoſition the Intention of the Parties could never be fulfilled; becauſe the Rent is reſerved annually, and the Leſſor would loſe the Profits of one half Year, if the Rent was not payable at the firſt *Michaelmas*; for then the Leſſee muſt enjoy the Land from the Date of the Leaſe to the firſt *Michaelmas*, without paying any thing; and ſo likewiſe from the laſt *Lady-day* of the Term to the Expiration of it; becauſe though the Leaſe ended in *Auguſt*, yet the Payment was not to be made till *Michaelmas*, before which the Leaſe expires.

2 Rol. Abr. 450.

If a Man makes a Leaſe the firſt day of *May*, reſerving Rent payable quarterly; this ſhall be intended quarterly from the making of the Leaſe; for if the Beginning of the Quarter ſhould be conſtrued to be any other Day than the Date of the Leaſe, the Leſſor would loſe the Profits of his Land for ſome Time, and conſequently not have a quarterly Payment during the Continuance of the Leaſe; or the Leſſee would be obliged to pay a Quarter's Rent before he had received a Quarter's Profits of the Lands.

2 Rol. Abr. 449.

If a Leaſe be made for Years, provided that the Leſſee ſhall pay for it at *Michaelmas* and *Lady-day* 10 *l.* by even Portions during the Term; tho' this Rent be not made payable yearly, yet the Law conſtrues it to be ſo, becauſe it is payable at the two Feaſts during the Term; and then conſequently it muſt be paid yearly, becauſe if there be an Omiſſion of the

the Payments any one Year, during the Leaſe, it is not paid at the two Feaſts during the Term.

If a Leaſe for Years be made, rendering Rent at the four Feaſts, without ſaying yearly, yet this ſhall be conſtrued to be yearly during the Term. Sid. 316.

So if the Rent had been payable yearly, without ſaying during the Term, yet the Payment muſt be made every Year during the Continuance of the Leaſe. Moor 459.

A Leaſe reſerving Rent *pro quolibet Anno* is all one as if it had been made payable annually, and then it is to be paid at the End of every Year. Lutw. 231.

A (*a*) Rent generally reſerved is payable at the End of the Year, but (*b*) if Rent be reſerved *annuatim durante termino prædicto*, the firſt Payment to begin two Years after, this controuls the Words of Reſervation. So (*c*) if a Rent is made payable yearly, during the Time the Leſſee ſhall enjoy the Land, the Leſſor cannot demand this Rent half-yearly, but muſt wait to the End of the Year. (*a*) Latch 264. (*b*) 3 Bulſt. 329. (*c*) Lit. Rep. 61. Hetl. 53.

If a Man grants a Rent of 10*l.* to another, payable at the two uſual Feaſts of the Year, this ſhall be intended by equal Portions, though it be not ſo mentioned in the Deed; becauſe where there are two ſeveral Days appointed for the Payment, it is the moſt equal Conſtruction that a Moiety of the Rent ſhall be paid at each Day. 2 Rol. Abr. 450. Noy 18.

And if a Leaſe be made, rendering Rent at the two uſual Feaſts in the Year, without ſpecifying what Feaſts in certain, the Law conſtrues ſuch Payments to be at *Michaelmas* and *Lady-day*; becauſe theſe are the uſual Days appointed in Contracts of this Nature for ſuch Payments. 2 Rol. Abr. 450. 2 And. 122.

* Leſſee for Life made a Leaſe for twenty Years if he ſo long lived, reſerving yearly, during the Term, 100*l.* at *Michaelmas* and *Lady-day* by equal Portions, or within thirteen Weeks after every of the ſaid Feaſts; if the Leſſor dies after *Michaelmas* and within the thirteen Weeks there is no Rent due for the laſt half Year: Becauſe the Leſſee has Election in this Caſe either to pay the Rent at *Michaelmas*, or at any Time during the thirteen Weeks; and if it be not paid at *Michaelmas*, it is then the ſame as if the Rent had been made payable thirteen Weeks after *Michaelmas* only; and conſequently the Leſſor dying, and the Leaſe thereby determining before the Rent became due, the Leſſee ſhall not be obliged to make any Return or Retribution for a Thing he has not enjoyed to the Day he was to make the Retribution. † *Page 345 10 Co. 127. *Clun*'s Caſe. Cro. Jac. 310, 500. Cro. Eliz. 380, 565, 575. 4 Leon. 247.

† At the Death of Tenant for Life a proportionable Part of the Rent ſhall be paid to the Executors. 11 Geo. 2. c. 19. ſ. 15.

But if Tenant in Fee makes a Leaſe for Years to begin at *Michaelmas*, rendering 100*l. per Annum* at *Michaelmas* and *Lady-day*, or within ten Days after every Feaſt; it ſeems, by the better Opinion, that the Rent is due the laſt *Michaelmas-day* of the Term, without any Regard to the ten Days; for the Reſervation being annually at the two Feaſts, or within ten Days, it ſhall be conſtrued at the End of every ten Days during the Term, as moſt agreeable to the Deſign of the Contract; and therefore the Law rejects the ten Days after the laſt Feaſt, becauſe the Term ending at *Michaelmas*, there cannot be ten Days after it during the Term for Payment of the Rent; and this Conſtruction is the more reaſonable, becauſe to give the Leſſee his Election to make the laſt Payment either at *Michaelmas* or within the ten Days, as in the former Caſe, were to put it in his Power to avoid the Payment of the laſt Half-Year's Rent; for if it were conſtrued not to be due till the End of the ten Days, the Leſſor could never oblige him to pay it, becauſe Cro. Jac. 227, 233. Yelv. 167. Brownl. 105. 2 Brownl. 220. Bulſt. 1. *Barwick* v. *Foſter*.

cauſe then the Term would be ended before the Rent became due; but the Addition of the ten Days was only to inlarge the Time of Payment but not to prevent the Payment, or to remit any Part of the Rents.

M. 27 Car. 2. in *B. R.* *Biggon* v. *Bridge.* 3 Keb. 534. S. C.

Debt upon an Obligation, Condition that whereas the Plaintiff had demiſed to the Defendant all the Tithes of *W.* which if the Defendant ſhall peaceably enjoy from 20 *February* 1661, *uſque* or until *Michaelmas* 1668, the ſaid Defendant paying every Half-Year the Sum of 30 *l. viz.* on the 29th Day of *September* and *Lady-day*, or twenty-one Days after each Feaſt during the Term, that then, *&c.* and Breach was aſſigned in Non-payment of the Rent at *Michaelmas* 1668, to which the Defendant demurs, becauſe the Enjoyment being to be *uſque* or until *Michaelmas* 1668, this excludes *Michaelmas-day*; and ſo the Term is ended before *Michaelmas* 1668, and then no Rent can be due at *Michaelmas*. But the Court were clear of Opinion that *Michaelmas-day* in this Caſe was to be taken incluſively; and *Hale* cited the Earl of *Northumberland*'s Caſe, who declared on a Demiſe at Will, rendering Rent at *Michaelmas* and *Lady-day*, and declared that the Defendant enjoyed the Land *uſque Feſtum Sancti Michaelis*, and demanded Rent due at *Michaelmas*; and there it was moved, that *uſque Feſtum* excludes the Feaſt; and therefore the Will being determined before the Feaſt, the Rent was not due; but 'twas there ruled that *uſque* included the Day; and they ſaid, that Agreements were not to have ſuch Conſtructions as Pleadings, but to be taken according to the Intent of the Parties, and being *uſque* ſuch a Day, the Day ought to be commenced before the Time is come; and they agreed that the Reſervation *during the Term* goes to both Feaſts, *viz.* 20 *February* 1661, and *Michaelmas* 1668, and that the Word *uſque* ſhall be taken incluſively; for without ſuch Conſtruction no Rent would be then due, becauſe the Term would be ended before *Michaelmas*; and they relied upon the Caſe in *(a) Leon*, and though there be Election given to pay on the ſaid Days, or twenty-one Days after, yet this is not material when the laſt Feaſt * comes, for then it is abſolutely due on that Day; and though *(b) Cro. Eliz.* and *Yelv.* ſeem contrary, yet they were not regarded, for otherwiſe the Leſſor would loſe the laſt Quarter.

(a) 3 Leon. 211.

*Page 346

(b) Cro. Eliz. 702. Yelv. 74. *Umble* v. *Fiſher.*

2 Ld. Raym. 819, 896. Salk. 141. pl. 7. 7 Mod. 96. *Tomkyns* v. *Pinſent.*

In Debt for Rent the Plaintiff declared on a Demiſe, bearing Date the 25 *Aug.* 11 *W.* 3. for ſeven Years from the 24 *June* before, paying quarterly at the four moſt uſual Feaſts in the Year, or within twenty-one Days after each of the ſaid Feaſts, 3 *l.* 10 *s.* the firſt Payment to be made at *Michaelmas* next enſuing the Demiſe, *&c.* and further declared that 14 *l.* of the ſaid Rent was in Arrear for one Year ended the 24 *December* 13 *W.* 3. for which, *&c.* to which the Defendant demurred; and it was objected that the Year did not end the 24 *December*, but at St. *Thomas*'s Day, according to the *Reddendum*, which is 21 *December*; which the Court admitted, and held, that where ſpecial Days of Payment are limited by the *Reddendum*, the Rent muſt be computed according to the *Reddendum*, and not according to the *Habendum*; and that the Computation of the Rent, according to the *Habendum*, is only when the *Reddendum* is general, *viz.* yielding and paying quarterly ſo much Rent.

(G) To whom Rents may be reserved or granted.

HERE *Littleton*'s Text is to be laid down as a sure Rule, that no Rent (which is properly said a Rent) may be reserved upon any Feoffment, Gift, or Lease, but only to the Feoffor, Donor, Lessor, or to their Heirs, and in no Manner may it be reserved to any Stranger; and the Reason of the Rule is, because the Rent is something paid by way of Retribution for the Land, and therefore can only be made to him from whom the Land passes; besides, the Reservation to a Stranger was prohibited to avoid the Danger of Maintenance; for if that was allowable, Persons might make Reservations to powerful Men, who might extort more from the Tenant than was originally contracted for, Lit. Sect. 346. Co. Lit. 47. a. 143. b.

Hence it is, that the King has been excepted out of the Rule, and allowed to make the Reservation of the Rent to a Stranger, because there could be no Danger of Maintenance in this Case, there being no Person so great and powerful in the Kingdom as the King himself, who parted with the Land. Mo. 162. Co. Lit. 143. 2 Rol. Abr. 447.

But where the King made a Lease of a House belonging to his House-keeper of *Whitehall*, reserving a Rent to the House-keeper for the Time being; though in this Case it was admitted that the King might reserve Rent to a Stranger, yet it being here made to an Officer who was removeable at Will the Reservation was held ill. Ld. Raym. 36.

A. infeoffs *B.* upon Condition that *B.* and his Heirs shall render to *C.* and his Heirs a yearly Rent of 10*s.* and if he fail of Payment, that it shall be lawful for *A.* and his Heirs to re-enter, this is not in Nature of any Sort of Rent, but a Sum in gross, which the Feoffee is obliged to pay to prevent the Re-entry of the Feoffor; for at Common Law, before the Statute of *Quia emptores*, it could not be good as a Rent-Service, because nothing passed from *C.* for which a Retribution ought to be made; nor can it be good by way of Rent-Charge, because *C.* hath no Remedy given him by the Deed to charge the *Land with it, or otherwise to recover it; nor is it a Rent-Seck, because though it should be once paid to *C.* and he thereby have Seisin of it, yet he shall never have an Assise for the Recovery of it, because the Penalty by the Deed is a Re-entry to *A.* and his Heirs, which for ever determines it. Lit. Sect. 345. *Page 347

But if *A.* and *C.* in this Case had joined in a Feoffment of the Land by Deed, reserving Rent to them both and to their Heirs, and the Feoffee had granted that it should be lawful for them and their Heirs to distrain for the Rent, this had been a good Grant of a Rent-Charge to them both, because *C.* being Party to the Deed has a Remedy by Distress for the Recovery of it; and when the Feoffee impowers *C.* to distrain on the Land, such Grant always supposes that the Distress, which is in Nature of a Pledge, shall remain in the Person's Hands to whom it is given, till it be redeemed by the Payment of the Thing for which it was originally taken. Co. Lit. 213.

But where the Husband, possessed of a Term for Years in his own Right, joins with his Wife in an Assignment of the Term, reserving Rent to him and his Wife, and the Survivor of them, if they shall so long live; and if the Rent be arrear, that it shall be lawful for them and the Survivor of them, and for the Assigns of the Survivor, to re-enter, but the Wife neither sealed nor delivered the Deed; this Rent determined Cro. Car. 288. Jon. 308. 2 Rol. Abr. 450. *Bland* v. *Inman*. 2 Saund. 360.

mined by the Death of the Huſband, for it could be no good Reſervation to the Wife, becauſe ſhe had no Intereſt in the Land to part with, and therefore could have no Rent-Service reſerved to her by way of Retribution for a Thing ſhe never had in her to part with; nor can this amount to a Grant of a Rent-Charge to her, as in the former Caſe of the Feoffment it did to *C.* becauſe here the Wife, having never ſealed and delivered the Deed, could be no Party to it; and there does not appear to have been any Clauſe of Diſtreſs limited to the Wife by this Deed, as there was to *C.* by the Deed of Feoffment, and conſequently it could not be good as a Charge upon the Land; nor is it good as a Rent-Seck in her, becauſe iſſuing out of the Term for Years it muſt in its Nature be a Chattel Intereſt, for which no Aſſiſe lies, which is the only Remedy after Seiſin for the Recovery of the Rent-Seck; nor could the Executor of the Huſband be intitled to the Rent, though it was limited to them and the Survivor of them, and the Aſſigns of the Survivor during the Term, becauſe the Reſervation to the Wife was evidently intended to create an Intereſt and Right in her to the Rent, and therefore ſhall not be taken as Words of Limitation againſt the original Deſign of them.

Hob. 130. 2 Rol. Abr. 447. Lit. Sect. 346, & *vide* Co. Lit. 99. b. 213. a. Hard. 90, 93.

If a Man makes a Leaſe for Years, reſerving Rent to his Heirs, or makes a Leaſe to commence after his own Death, reſerving Rent, this is a Rent-Service ariſing in the Heir, not by Way of new Purchaſe of ſuch Rent, but as incident to the Reverſion deſcending to the Heir, and therefore may be releaſed by the Anceſtor during his Life, which it could not be if it were a new Purchaſe in the Heir; and ſo it is if the Rent were reſerved upon a Leaſe for Life or Gift in Tail; the Reaſon is, becauſe the Reverſion deſcends from the Anceſtor to ſuch Heir, and the Rent-Service is incident to ſuch Reverſion, and this may as well be as a Man that hath an Eſtate in Land may grant ſuch original Charges.

Hob. 130. *Oates* v. *Fryth.* 2 Rol. Abr. 447. 2 Sand. 370. *Page 348

But if the Reſervation had been made to his Son, though he happened afterwards to be Heir, ſuch Reſervation is void; for it cannot be good by way of Rent-Service, becauſe the Son has not the Reverſion to which the Rent is incident at the Time of the Leaſe made; and if the Son dies before the Rent commences, it may go to a different Perſon than the Reverſion, which belongs to the Heir of the Father; and ſuch Reſervation cannot be good by way of new Grant, * becauſe the Word *Reſervation* will not import a new Grant, unleſs it be made to the Perſon from whom ſuch Intereſt moves.

Bro. Title *Grant* 86. 8 H. 7. 3. Plow. 156. Palm. 29. 2 Vent. 204.

If an original Grant be made of a Rent, to commence after the Death of *J. S.* this is good; for this is not like the Caſe of Lands, where the Livery muſt carry the Freehold immediately, and where the Abeyance or Want of diſtinguiſhing where the Freehold is, may be of Prejudice to the Rights of others; for if the Freehold was to be granted *in futuro*, a Man that had brought his *Præcipe* againſt the Grantor, after he had proceeded in it a conſiderable Time, might have his Writ abated by the Freehold's Veſting in a Stranger, by reaſon of a Conveyance made by the Grantor before the Writ brought; but the Grant of a Rent *de novo* is not attended with this Inconvenience, for no Man can have a precedent Right to a Thing which is originally created by the Grant itſelf; yet *Quære* at what Diſtance of Time ſuch Charges may be allowed to commence, whether it muſt not be after the Lives of the Perſons *in Eſſe*, for if they be indefinite, they ſeem to tend to a Perpetuity?

Bro. Title *Grant* 86. Plow. 156.

But a Rent *in Eſſe*, or already created, cannot be granted to commence after the Death of *J. S.* becauſe to ſuch Rents there may be precedent Titles, and therefore ſuch Grants are not good; for ſuch Freeholds, by thus being ſplit and ſevered, do hide the Perſon in whom the Right is,

and

and therefore the Party that has Right will not be able to diſcern againſt whom to bring his *Præcipe* for the Recovery of it.

If *A.* covenants and grants with *B.* that he ſhall have and enjoy *Black-acre* for ſix Years, and *B.* covenants to pay *A.* his Heirs, Executors and Adminiſtrators, an annual Rent during the Term; this, being a good Reſervation of a Rent, ſhall upon the Death of *A.* be paid to his Heir who has the Reverſion, as a Retribution for the Profits of the Land which he cannot enjoy during the Term; and the Executors of *A.* ſhall never have any Thing by virtue of the Covenant, though it is in expreſs Words granted to *A.* and his Executors. Cro. Car. 207. *Drake* v. *Mundy.*

So if a *A.* makes a Leaſe, reſerving Rent to him and his Executors and Aſſigns, and dies, this Rent is determined, for the Executors cannot have it for the former Reaſon, being Strangers to the Reverſion, which is an Inheritance; and therefore, being never to enjoy the Profits of the Land after the Expiration of the Term, can never have a Right to a Retribution or Compenſation for them. Co. Lit. 47. 2 Rol. Abr. 450.

If a Biſhop leaſes for Years, reſerving Rent, *Proviſo quod tempore vacationis dicti Epiſcopatus redditus prædict. ſecundum ratam temporis ſolvetur capitulo Eccleſiæ cathedralis dicti Epiſcopatus*, with a Clauſe of Reentry to the Succeſſor for Non-payment of Rent to the Chapter, this is a void Proviſo; for the Chapter being never to come into the Succeſſion of the Land belonging to the See, can have no Right to a Return of Service from the Leſſee. Mo. 51. *Eyre's* Caſe. Dyer 221.

If there be two Jointenants, and they make a Leaſe by Parol or Deed Poll, reſerving Rent to one only, yet it ſhall enure to both; but if the Leaſe had been by Deed indented, the Reſervation ſhould have been good to him only to whom it was made, and the other ſhould have taken nothing: The Reaſon of the Difference is this; where the Leaſe is by Deed Poll or Parol, the Rent ſhall follow the Reverſion, which is jointly in both Leſſors; and the rather, becauſe the Rent being ſomething in Retribution for the Land given, the Jointenant to whom it is reſerved ought to be ſeiſed of it in the ſame Manner he was of the Land demiſed, which was equally for the Benefit of his Companion as himſelf; but where the Leaſe is by Deed indented, they are eſtopped to claim the Rent in any other Manner than it is reſerved by the Deed, becauſe the Indenture is the Deed of each Party, and no Man ſhall be allowed to recede from or vary his own ſolemn Act. 2 Rol. Abr. 447. Co. Lit. 47. Vent. 161.

(H) Of the Continuance of the Rent, and to whom to be paid; and herein of the diſtinct Intereſts of the Heir and Executor of the Leſſor.

*Page 349

HERE firſt is obſervable the Difference between a general Reſervation, without mentioning any Perſon in certain to whom the Rent ſhall be paid, and a particular Reſervation to the Leſſor without mentioning any other Perſon to whom it ſhall be paid; for where the Reſervation is general, the Rent ſhall be carried over to the Perſon which ſhould have ſucceeded to the Eſtate, if no Leaſe had been made; but where the Reſervation is particular as to the Leſſor, without going further, there the Rent ſhall determine with his Death, though the Leaſe, upon which it is reſerved, be ſtill continuing; as if *A.* makes a Leaſe for Co. Lit. 47. a. 2 Rol. Abr. 289, 450. Dyer 45. Hard. 95.

Years,

Years, reſerving a certain Rent, without ſaying *to the Leſſor or his Heirs*, yet this general Reſervation ſhall carry the Rent not only to the Leſſor, but even to his Heirs that ſucceed in the Reverſion, becauſe the Rent is reſerved as a Retribution or Compenſation for the Land demiſed, and therefore ought, from the Nature of the Contract, to be of equal Duration with the Demiſe; but if *A.* had made a Leaſe, reſerving a certain Rent to himſelf, he has thereby determined how long the Reſervation ſhall continue, and therefore it ſhall never be carried further than the Period of Time the Leſſor himſelf has fixed it.

12 Co. 35. Latch 274. Co. Lit. 47. Cro. Car. 290. Vent. 162. 2 Lev. 13. Mod. 216.

So if a Leaſe had been made by *A.* yielding and paying to him and his Aſſigns yearly the Rent of 10*s.* this Rent ſhall likewiſe determine by his Death, and his Heirs ſhall never have it, becauſe there are no Words to carry it to the Heir who is to have the Reverſion; and the Leſſor having expreſly limited it to himſelf has thereby determined it to his own Life, for his Aſſigns cannot have it longer than the Leſſor himſelf ſhould have had it, and theſe Words, *his Aſſigns*, cannot enlarge the Reſervation; for if he had aſſigned over the Reverſion, the Rent by his own Death had determined; *ſecus* if he had added *during the Term.*

2 Rol. Abr. 450. Co. Lit. 47.

So if the Reſervation had been made to the Leſſor and his Executors, or to him, his Executors and Aſſigns; in theſe Caſes the Rent determines with the Life of the Leſſor, becauſe the Executor cannot take the Rent; for that if it be continued beyond the Life of the Leſſor, it muſt be carried over to him who is to ſucceed in the Eſtate, and that is the Heir at Law; but the Heir cannot take in theſe Caſes, becauſe there are no Words in the Deed to carry it to him. §

§ *Qu.* If the Words *during the Term* are added to the Reſervation, whether the Heir ſhall not take the Rent, as *Aſſignee* of the Leſſor? *Vide* the preceding Paragraph, and *poſt.* 350. laſt Paragraph, *&c.*

Co Lit. 214. 5 Co. 112. Vent. 163.

If *A.* makes a Leaſe, reſerving Rent to him *or* his Heirs, this is a good Reſervation during the Life of *A.* but void as to his Heirs, becauſe the Reſervation being to him *or* his Heirs in the Diſjunctive, both cannot take it; and the Word *Heirs* cannot be Words of Limitation, becauſe, if they are to take at all they muſt take originally; for if the Rent veſts in the Leſſor, it cannot afterwards go to the Heirs, for that would be contrary to the Words of the Reſervation, which limited the Rent either to the Leſſor *or* his Heirs, but not to both of them. †

† *Sed qu.* If, in theſe ſeveral Caſes, the Parties claiming could not have Remedy at Law? a Court of Equity would not give Relief, according to the Intent of the Parties, ſuppoſing

But it hath been adjudged, that where an Abbot made a Leaſe, rendering Rent to him or his Succeſſor during the Term, that this Reſervation was good to the Succeſſor after the Death of the Leſſor, becauſe here the Rent by expreſs Words is made payable *during the Continuance of the Term*, and therefore as an Incident to the Reverſion * muſt go in Succeſſion with the Inheritance; and therefore the Succeſſor of the Abbot or Aſſignee of the Reverſion muſt neceſſarily have it; for the Rent being but a Retribution for the Land, none can have a Right to it but thoſe who would have ſucceeded in the Eſtate, if the Land for which the Retribution is given had never been leaſed.

*Page 350

5 Co. 111. *Mallory's* Caſe. Cro. Eliz. 805, 832. Vent. 146, 163.

Hard. 89. Vent. 163.

If Tenant in ſpecial Tail leaſes for Years, reſerving Rent to him, his Heirs and Aſſigns, this Rent ſhall go with the Reverſion to the ſpecial Heir in Tail, though it be reſerved to the Heirs generally; for the Word *Heir* ſhall be taken in that Senſe that will beſt anſwer the Nature

Nature of the Contract, which is, that those who would have succeeded in the Estate, if the Lease had never been made, shall enjoy the Rent, which is the Retribution given for the Want of the Land during the Lease.

If there be Tenant for Life with several Remainders over, so settled by Limitation of Uses, with a Power to Tenant for Life to make Leases, who makes a Lease, reserving Rent to him, his Heirs and Assigns, this is a good Reservation, and shall go to those in Remainder; for when the Tenant for Life makes a Lease, pursuant to such Power given to him by the Settlement, such Lessee derives his Estate out of the Inheritance, which before the Settlement was in the Tenant for Life; and the Settlement being by Construction of Law subsequent to the Estate of the Lessee, those in Remainder to the Tenant for Life are his Assignees, to whom the Rent by the express Words of the Lease is reserved and limited after the Death of the Tenant for Life. 8 Co. 69. *Whitlock's* Case.

So if the Reservation had been in this Case to the Lessor, and every Person to whom the Reversion and Inheritance of the Land belongs during the Term, this is a good Reservation to those in Remainder, and the Law will, in such Case, distribute the Rent according to the several Interests under the Settlement; but my Lord *Coke* says, the surest Way is for the Tenant for Life to reserve the Rent annually *during the Term*, and then the Law disposes of it as an Incident to the Reversion. 8 Co. 71.

If a Man seised of Land on the Part of his Mother, makes a Lease or a Gift in Tail, reserving Rent to him and his Heirs, this Rent shall go with the Reversion to the Heirs on the Part of the Mother, because the Nature of the Contract is such, that the Retribution should go to those who lose the Profit of the Land during the Gift or Lease. Co. Lit. 12.

But if he had made a Feoffment in Fee, reserving Rent to him and his Heirs, the Rent shall go to the Heir on the Part of the Father, because here is an intire Disposition of the Land, and the Rent is in Nature of a new Purchase coming into the Family from the Grant of the Feoffee, and therefore the Blood of the Father shall be preferred. Co. Lit. 12.

If a Man possessed of a Term for one hundred Years makes a Lease for fifty Years, reserving Rent to him and his Heirs, this Rent determines with his Death; for the Heir cannot have it, because he cannot succeed in the Estate (being a Chattel Interest), to which the Rent, if it continues after the Death of the Lessor, must belong; and the Executors cannot have it, because there are no Words to carry it to them. ‡ Vent. 161. ‡ *Vide infra* 351.

But if a Man seized of Land in Fee makes a Lease for Years, reserving Rent to him and his Assigns *during the Term*, this Reservation shall not determine by the Death of the Lessor, but the Rent shall go to his Heir; for though there be no Mention of the Heirs in the Reservation, yet there are Words that evidently declare the Intention of the Lessor, that the Payment of the Rent shall be of equal Duration with the Lease, the Lessor having expressly provided that it shall be paid during the Term, and consequently the Rent must be carried over to the Heir, who comes into the Inheritance after the Death of the * Lessor, and would have succeeded in the Possession of the Estate if no Lease had been made; and if the Lessor assigns over his Reversion, the Assignee shall have the Rent as incident to it, because the Rent is to continue during the Term, and therefore must follow the Reversion, since the Lessor made no particular Disposition of it separate from the Reversion. Latch 99, 100. *Sury* v. *Brown*. Vent. 163, & *vide* 2 Rol. Abr. 451. *Page 351

If

5 Co. 112. Cro. Eliz. 217.

If a Leaſe be made for Years, reſerving Rent during the Term, to the Leſſor, his Executors and Aſſigns, this, by the Judgment of *Richmond* and *Butcher*'s Caſe, determined upon the Death of the Leſſor, and did not go to the Heir; but this Judgment hath been ſince overthrown by the Authority of the Caſe of (*a*) *Sacheverell* v. *Frogate*, becauſe the Reſervation being to the Leſſor and his Aſſigns during the Term, (for the Words *Executors* and *Adminiſtrators* are void, the Leſſor having the Inheritance) ſuch expreſs Words evidently diſcover the Intent of the Contract, and that the Leſſee agreed and bound himſelf to the Payment of the Rent during the Continuance of the Demiſe.

(*a*) 2 Saund. 367. 2 Lev. 13. Raym. 213. Vent. 161. *Sacheverel* v. *Frogate*.

Vent. 162.

So and for the ſame Reaſon, if a Termor for fifty Years leaſes for twenty-five Years, reſerving Rent to him and his Heirs *during the Term*, the Executors ſhall have the Rent after the Death of the Leſſor.

Cro. Car. 644. *Darrel* v. *Wilſon*.

If *A.* grants a Rent Charge to *B.* for forty Years, with a Clauſe of Diſtreſs to *B.* and his Heirs during the Term, the Executor of *B.* may diſtrain for it during the Term; for the Diſtreſs is expreſsly given during the Term, and therefore muſt belong to the Executor who has a Right to the Rent-Charge, being a Chattel Intereſt.

Will. Rep. 555 pl. 160. *Sir Matth. Jenniſon* v. *Lord Lexington*.

A. Tenant for three Lives, to him and his Heirs, aſſigns over his whole Eſtate to *B.* and his Heirs, reſerving a Rent of 10*l.* a Year to the Aſſignor, his Executors, Adminiſtrators and Aſſigns, with a Proviſo, that upon Non-payment the Aſſignor and his Heirs, might re-enter, and the Aſſignee covenanted to pay the Rent to *A.* his Executors and Adminiſtrators; the Queſtion was, Whether this Rent ſhould go to the Heir or Executor of the Aſſignor? And it was decreed in Equity that it ſhould go to the Executor, as the Rent was reſerved to him, and as there was no Reverſion left in the Aſſignor to which the Rent could be incident, ſo as to carry it to the Heir; and it was held, that the Covenant to pay the Rent to the Executor and Adminiſtrator of the Aſſignor was good and binding both in Law and Equity; and though the Proviſo was, that in Caſe of Non-payment of the Rent the Aſſignor and his Heirs might re-enter, yet the Court thought this immaterial, as in Equity the Heir, in this Caſe, muſt be looked upon as a Truſtee for the Executor.

10 Co. 127. *Clun*'s Caſe. Cro. Jac. 309. Cro. Eliz. 575. Mo. pl. 1012. Yelv. 167. Saund. 287.

If a Leaſe be made, reſerving Rent at *Michaelmas* or ten Days after, the Rent is not paid at *Michaelmas*, and before the ten Days are expired the Leſſor dies, the Heir, and not the Executor, ſhall have the Rent; for though it was in the Election of the Leſſee to pay the Rent at *Michaelmas*, yet the ten Days after are the true legal Term, ſo that the Rent was not legally due before that Time, and therefore no Chattel. So if the Leſſor dies on the Day on which the Rent is to be paid, after Sunſet, and before Midnight, the Heir, and not the Executor, ſhall have the Rent; for it is not due till the utmoſt Limit of the Day, which ends not till Twelve o'Clock, though the Time for demanding it for Conveniency be a convenient Time before the Sun ſets. ‡

‡ *Vide poſt.* 352.

A. purſuant to a Power in his Marriage-Settlement made Leaſes of ſeveral Parts of his Eſtate which were ſettled on his Wife, reſerving Rent payable at *Lady-day* and *Michaelmas*, and died upon *Michaelmas-day* between Three and Four in the Afternoon, and before Sunſet, leaving *B.* his Executor; one of the Tenants paid *A.* his Rent, being 18*l.* * the Morning of the Day on which he died; and the Queſtion was, as to the Arrears due from all the Tenants, whether, they ſhould go to the Jointreſs as incident to the Reverſion, or to *B.* the Executor? And it was decreed by the Maſter of the Rolls, on the Authority of *Clun*'s Caſe,

*Page 352 Wil. Rep. 177. pl. 43. 179.

Caſe, that they ſhould go to the Jointreſs, being incident to the Reverſion, and to which the Heir would be intitled in caſe there had been no Jointreſs; but that as to the 18 *l.* Rent paid by one of the Tenants to the Leſſor upon *Michaelmas-day* in the Morning on which the Leſſor died, his Honour held this to be a good Payment as to the Leſſee who paid it, and that he ſhould not be compelled to pay it over again, but that *B.* the Executor, to whoſe Hands it came, ſhould pay and account for it to the Jointreſs. 2 Salk. 578. pl. 2. Lord *Rockingham* v. *Penrice.*

But where *A.* granted a Rent-Charge to *B.* for Life, payable at *Lady-day* and *Michaelmas*, and *B.* died on *Michaelmas-day* after Sunſet; and it was held by Judge *Tracy* at *Durham* Aſſizes, that as *B.* lived till after Sunſet, which was the legal Time for demanding the Rent, though he died before Twelve at Night, that it ſhould go to the Executors. Will. Rep. 178. *Cole* v. *Bellaſis.* ——From a Note of Juſtice *Tracy*, who ſaid he had conſulted the Chief Juſtice *Holt* on the Point, and that upon Conſideration of all the Caſes he was of the ſame Opinion.

A. Tenant for Life, Remainder to his Wife for Life, *&c.* makes a Leaſe at Will, reſerving Rent at *Lady-day* and *Michaelmas*, and died on *Michaelmas-day* about Twelve o'Clock at Noon; and it was held in this Caſe that his Adminiſtrator was intitled to this Rent; and herein the Court took a Difference betwixt a Rent incident to a Reverſion that muſt go ſomewhere (if not to the Executor, then to the Heir) and where the Rent was to go no where, unleſs to the Executor; that in the latter Caſe if the Leſſor lived to the Beginning of that Day, at which Time a voluntary Payment of the Rent might be made, this would be ſufficient to intitle the Executor or Adminiſtrator to the Rent, rather than it ſhould be loſt; for it would be ſtrange if the Tenant ſhould pay the Rent to no Body; and in this Caſe the Perſon in Remainder (*viz.* the Wife) can have no Pretence to the Rent, it being a Leaſe at Will, and conſequently ſuch as could have no Continuance with reſpect to her. Preced. Chan. 555. Earl of *Staffford* v. Lady *Wentworth.* Will. Rep. 180. S. C. cited,

A. Tenant for Life, Remainder to *B.* his Son in Tail, *A.* being in Debt and his Eſtate extended, the Creditor made a Leaſe to *J. S.* reſerving 160*l.* a Year payable quarterly; *A.* died the 10th of *March*, and *J. S.* continued the Poſſeſſion till after the *Lady-day* next following; whereupon *B.* claimed the whole Rent from *Chriſtmas* to *Lady day*; but the Court held, that as to the Rent from *Chriſtmas* to the 10th of *March* it was a Gift in Law to the Tenant, not provided againſt by any of the Acts of Parliament; and that there could be no Remedy as to any Apportionment in Point of Time either in Law or Equity. Will. Rep. 392. pl. 105. *Jenner* v. *Morgan.* (a) Salk. 65. pl. 1.

But now by the 11 *Geo.* 2. *cap.* 19. *ſect.* 15. "Where any Tenant for "Life ſhall die before or on the Day on which any Rent was reſerved, "upon any Demiſe which determined on the Death of ſuch Tenant for "Life, the Executors or Adminiſtrators of ſuch Tenant for Life may, on "Action on the Caſe, recover of the under Tenants, if ſuch Tenant for "Life die on the Day on which the ſame was made payable, the Whole; "or if before ſuch Day, then a Proportion of ſuch Rent, according to the "Time ſuch Tenant for Life lived of the laſt Year, or Quarter, or other "Time in which the ſaid Rent was growing due, making all juſt Allow-"ances."

*Page 353 * (I) Of the Recovery and Demand of the Rent: And herein,

1. In what Caſes a Demand is neceſſary.

Co. Lit. 201. b. Hob. 207, 331. 5 Co. 56. Dyer 51. Plow. 70. 7 Co. 56. *Maund's* Caſe. Vaugh. 32.

HERE the material Difference is between a Remedy by Re-entry, and a Remedy by Diſtreſs, for the Non-payment of the Rent; for where the Remedy is by way of Re-entry for Non-payment, there muſt be an actual Demand made previous to the Entry, otherwiſe it is tortious; becauſe ſuch Condition of Re-entry is in Derogation of the Grant, and the Eſtate at Law being once defeated is not to be reſtored by any ſubſequent Payment; and it is preſumed that the Tenant is there reſiding on the Premiſſes in order to pay the Rent for the Preſervation of his Eſtate, unleſs the contrary appears by the Leſſor's being there to demand it; and therefore unleſs there be a Demand made, and the Tenant thereby, contrary to the Preſumption, appears not to be on the Land ready to pay the Rent, the Law will not give the Leſſor the Benefit of Re-entry, to defeat the Tenant's Eſtate, without a wilful Default in him; which cannot appear without a Demand hath been actually made on the Land. ‡

‡ It is uſual now in Leaſes to give the Landlord a Right to re-enter, if the Rent be in Arrear ſo many Days after the reſpective Quarter-Days on which it's payable, without mentioning any Demand to be made; in which Caſe, if an Ejectment is brought by the Landlord, the Tenant cannot defend without entering into the Common Rule, to confeſs Leaſe, *Entry*, and Ouſter, which precludes him from taking that Exception. But the Court will ſtay Proceedings if Ejectment brought for Non-payment of Rent *only*, upon Tenant's paying Arrears and Coſts, by virtue of 4 Geo. 2. c. 28. which *vide poſt*, 359.

Hutt. 114. Hob. 207, 331. 7 Co. 56.

So if there had been a *Nomine Pœnæ* given to the Leſſor for Non-payment, the Leſſor muſt demand the Rent before he can be intitled to the Penalty; or if the Clauſe had been, That if the Rent were behind, that the Eſtate of the Leſſee ſhould ceaſe, and be void; in theſe Caſes there muſt be an actual Demand made, becauſe the Preſumption is, that the Leſſee is attendant on the Land to ſave his Penalty and preſerve his Eſtate, and therefore ſhall not be puniſhed without a wilful Default; and that cannot be made appear without a Demand be proved, and that it was not anſwered; and the Demand in theſe Caſes muſt be made at the Day prefixed for the Payment, and alledged expreſsly to have been made in the Pleading. §

§ See the Note to the preceding Paragraph.

Hob. 207. Hutt. 13, 23. Moor 883. 2 Rol. Abr. 426.

But where the Remedy for the Recovery of the Rent is by Diſtreſs, there needs no Demand previous to the Diſtreſs; though the Deed ſays, That if the Rent be behind, being lawfully demanded, that the Leſſor may diſtrain; but the Leſſor, notwithſtanding ſuch Clauſe, may diſtrain when the Rent becomes due. So it is, if a Rent-Charge be granted to *A.* and if it be behind, being lawfully demanded, that then *A.* ſhall diſtrain; and he may diſtrain without any previous Demand, becauſe this Remedy is not in Deſtruction of the Eſtate, for the Diſtreſs is only a Pledge for the Payment of it, and the very Taking of the Diſtreſs is a legal Demand of the Tenant to pay the Rent, which was all that was required by the Deed; and the Tenant is not injured by the taking of the Diſtreſs, becauſe upon the Tender of the Rent the Pledges are immediately to be reſtored, or a Writ of *Detinue* lies after the *Quantum* of the

the Rent has been ſettled in a Replevin; whereas in the Caſe of Re-entry or of the Penalty, the Tenant is really injured either by the Loſs of his Eſtate, or the Payment of a greater Sum than the Rent, which cannot be reſtored upon the Payment of the Rent; and therefore he ſhall not be puniſhed in ſuch Caſes without a wilful Default in him, which cannot otherwiſe appear than by the Proof of a Demand, which was not anſwered by the Tenant.

But this general Diſtinction muſt be underſtood with theſe Reſtrictions.

Firſt, That if the King makes a Leaſe, reſerving Rent with a Clauſe of Re-entry for Non-payment, he is not obliged to make any Demand * previous to his Re-entry, but the Tenant is obliged to pay his Rent for the Preſervation of his Eſtate, becauſe it is beneath the King to attend his Subject to demand his Rent. ‡ *Page 354

5 Co. 56. 5 Co. 73. Latch 28. Moor 152. Dyer 87, 88.

‡ *Qu.* If this does not relate to an implied Demand, which is the Act of the Law? See *infra.*

But this Exception is not to be extended to the Duchy Lands, though they be in the Hands of the King, for the King muſt make a Demand before he can re-enter into ſuch Lands; but this is by the 1 *H.* 4. which provides, that, when the Duchy Lands come to the King, they ſhall not be under ſuch Government and Regulations as the Demeſnes and Poſſeſſions belonging to the Crown. Moor 149, 160. *Bouny's* Caſe.

So if a Prebend make a Leaſe, rendering Rent, and if the Rent be Arrear and be demanded, that it ſhould be lawful for the Prebend to re-enter; if the Reverſion in this Caſe comes to the King, the King muſt in this Caſe demand the Rent, though he ſhall be by his Prerogative excuſed of an implied Demand; for the implied Demand is the Act of the Law, the other the expreſs Agreement of the Parties, which the King's Prerogative ſhall not defeat; therefore in Caſe of the King, if he make a Leaſe, reſerving Rent, with a *Proviſo*, that if the Rent be in Arrear for ſuch a Time (being lawfully demanded, or demanded in due Form) that then the Leaſe ſhall be void; it ſeems that not only the Patentee of the Reverſion in this Caſe, but alſo the King himſelf, whilſt he continues the Reverſion in his own Hands, is obliged to make an actual Demand by reaſon of the expreſs Agreement for that Purpoſe. Dyer 87, 210.

But if the King, in Caſes where he need not make a Demand, aſſigns over the Reverſion, the Patentee cannot enter for Non-payment, without a previous Demand, becauſe the Privilege is inſeparably annexed to the Perſon of the King. 4 Co. 73. Moor 404. Cro. Eliz. 462. Dyer 87.

Secondly, Another Exception is, where the Rent is payable at a Place off the Land, with a Clauſe that if the Rent be behind, being lawfully demanded at the Place off the Land, or where the Clauſe is, that if the Rent be behind, being lawfully demanded of the Perſon that is to pay it, that then he may diſtrain; in theſe Caſes, though the Remedy be by Diſtreſs only, yet the Grantee cannot diſtrain without a previous Demand; becauſe here the Diſtreſs and Demand being not one complicate, but different Acts, to be performed at different Places and Times, the Demand muſt be previous to the Diſtreſs; for the Diſtreſs is an Act of Grace, not of common Right, and therefore muſt be uſed in the Manner that it is given. Hob. 208. 2 Rol. Abr. 426. Moor 883. Brownl 171. & *vide* Hutt. 23. *Cont.*

But where the Clauſe is no more than that if the Rents be behind, being lawfully demanded, (without ſaying at any Place off the Land, or of the Perſon of the Grantor) that then the Grantee may diſtrain, there needs no actual Demand, becauſe here the Diſtreſs and Demand is but one complicate Act, the one included in the other, and all done at one Time and Place, *viz*, upon the Land; for the Diſtreſs is in itſelf a lawful 2 Rol. Abr. 426. Hob. 208. & *vide* Dyer 348.

Demand, and therefore there needs no actual Demand previous to it; because all that was required by the Deed was a lawful Demand, which the Diſtreſs in its own Nature is.

Plow. 70. 4 Co. 73. Moor 408, 598. Cro. Eliz. 415, 435, 536.

And there ſeems to have been formerly another Exception admitted, that where the Remedy was by way of Entry for Non-payment, that yet there needed no Demand, if the Rent were made payable at any Place off the Land; becauſe they looked upon the Money payable off the Land to be in Nature of a Sum in groſs, which the Tenant had at his own Peril undertaken to pay; but this Opinion has been intirely exploded, for the Place of Payment does not change or alter the Nature of the Service, but it remains in its Nature a Rent, as much as if it had been made payable upon the Land; and therefore the Preſumption is, that the Tenant was there to pay it, unleſs it be overthrown by the Proof of a Demand, and without ſuch Demand, and a Neglect or Refuſal thereupon, there is no Injury to the Leſſor, * and conſequently the Eſtate of the Leſſee ought not to be deſeated. §

*Page 355 § *Vide ante*, 353. n. and the ſtat. 4 Geo. 2. *poſt*. 359.

Dyer 68.

But when the Power of Re-entry is given to the Leſſor for Non-payment, without any further Demand, there it ſeems that the Leſſee has undertaken to pay it, whether it be demanded or not; and there can be no Preſumption in his Favour in this Caſe; becauſe, by diſpenſing with the Demand, he has put himſelf under the Neceſſity of making an actual Proof that he was ready to tender and pay the Rent.

Hob. 207. 2 Rol. Abr. 427.

There is another Exception when the Remedy is by Diſtreſs, and that is, when the Tenant was ready on the Land to pay the Rent at the Day, and made a Tender of it; there it ſeems there muſt be a Demand previous to the Diſtreſs, becauſe where the Tenant has ſhown himſelf ready on the Day by the Tender, he has done all that in Reaſon can be required of him; for it would put the Tenant to endleſs Trouble to oblige him every Day to make a Tender; it being altogether uncertain when the Leſſor will come for his Rent, when he has omitted to receive it the Day which he himſelf has appointed by the Leaſe for Payment and Receipt; wherefore as the Leſſee muſt expect the Leſſor, and be ready to pay it at the Day appointed for the Payment of it, or elſe the Leſſor may diſtrain for it without any Demand; ſo where the Leſſor has lapſed the Day of Payment, and was not on the Land to receive it, he muſt give the Tenant Notice to pay it before he can diſtrain for it; for the Tenant ſhall be put to no Trouble where it appears that he has omitted nothing on his Part.

Hob. 207.

And where the Tender was made by the Tenant on the Land at the Day, there a Demand on the Land is ſufficient to juſtify a Diſtreſs after the Day; becauſe the Demand in ſuch Caſe is of equal Notoriety with the Tender, and by a Parity of Reaſon the Tenant ought to take Notice of ſuch Demand, as well as the Leſſor of the Tender on the Land.

Hob. 207. 2 Rol. Abr. 427.

But if the Tenant had tendered the Rent on the Day to the Perſon of the Leſſor, and he refuſed, it ſeems, by the better Opinion, that the Leſſor cannot diſtrain for that Rent, without a Demand of the Perſon of the Tenant; becauſe the Demand ought to be equally notorious to the Tenant as the Tender was to the Leſſor.

Hutt. 13. Hob. 207.

So if the Services by which the Tenant holds be perſonal, as Homage, Fealty, *&c.* the Demand muſt be of the Perſon of the Tenant, becauſe this Service is only performable by the very Perſon of the Tenant; and therefore a Demand, where he is not, would be improper.

Again, if the Rent be Seck, and the Tenant be ready at the laſt Inſtant of the Day of Payment to pay the Rent, and the Grantor is not there to receive it, he muſt afterwards demand it of the Perſon of the Tenant on the Lands before he can have his Aſſiſe; becauſe the Tenant, by the Tender at the Day, has done all that was required on his Part; and, if the Grantee might have his Aſſiſe, after ſuch Tender on the Day, without a Demand of the Perſon, the Tenant might be made a Diſſeiſor, and Damages for the Diſſeiſin laid upon him, without any wilful Default in him; but, in the Caſe of a Rent-Charge, after ſuch Tender of the Tenant on the Land, the Grantee may afterwards demand the Rent on the Land, becauſe he has his Remedy by Diſtreſs, which is no more than a Pledge for the Rent, and this being to be found and taken on the Land, the Grantee need only demand his Rent where he can find his Remedy which is on the Land? but in this Caſe, if the Grantee cannot find the Tenant on the Land to demand the Rent, he may, on the next Feaſt on which the Rent is payable, demand all the Arrears on the Land; and if the Tenant is not there to pay it, he has failed of his Duty, and is guilty of a * wilful Default, which amounts to a Denial; and that Denial being a Diſſeiſin of the Rent, the Grantee may have his Aſſiſe, and by that ſhall recover all the Arrears. Cro. Car. 508. 7 Co. 57. Hob. 207. 2 Rol. Abr. 427. *Page 356

But if there has been neither a Tender of the Rent, nor a Demand of the Grantee on the Day, there the Grantee may afterwards demand the Rent on the Land; becauſe, the Tenant having omitted to do his Duty by a Tender on the Day, he is ſtill obliged to anſwer the legal Demand of the Grantee, which is well made upon the Land, becauſe the Rent iſſues thereout; for, where there is no Tender on the Day of Payment, the Rent is due and payable every Day afterwards; and therefore a Demand in the ſame Manner as the Law requires is ſufficient; and conſequently the Non-payment, after a Demand on the Land, is a Denial and Diſſeiſin, for which the Grantee may have his Aſſiſe. Lit. Sect. 233. 7 Co. 57. 2 Rol. Abr. 427.

If a Leaſe be made reſerving Rent, and a Bond given for Performance of Covenants and Payment of the Rent, the Leſſor may ſue the Bond without demanding the Rent; for the Bond, being only a collateral Security for the Rent, makes no Alteration in the Nature of it; but it muſt ſtill be paid in the ſame Manner, and at the ſame Time and Place, as if there had been no Bond given; and therefore is ſubject to the former Rules and Diſtinctions as to the Demand. Cro. Eliz. 332. Cro. Car. 76. Hob. 8.

If there be ſeveral Things demiſed in one Leaſe, with ſeveral Reſervations, with a Clauſe, that, if the ſeveral yearly Rents reſerved be behind or unpaid in Part, or in all, by the Space of one Month after any of the Days on which the ſame ought to be paid, that then it ſhall be lawful for the Leſſor, into ſuch of the Premiſſes, whereupon ſuch Rents being behind is or are reſerved, to re-enter; theſe are in the Nature of diſtinct Demiſes, and ſeveral Reſervations; and conſequently there muſt be diſtinct Demands on each Demiſe to defeat the whole Eſtate demiſed. † Vaugh. 71, 72.

† *Vide ante* 353. n. and the ſtat. 4 Geo. 2. *poſt.* 359.

Alſo, as to the Neceſſity of a Demand of the Rents, there is a Difference between a Condition and a Limitation; for Inſtance, if Tenant for Life (as the Caſe was by Marriage Settlement with Power to make Leaſes for twenty-one Years, ſo long as the Leſſee, his Executors or Aſſigns ſhall duly pay the Rent reſerved) makes a Leaſe purſuant to the Power; the Tenant is at his Peril obliged to pay the Rent without any Demand of the Leſſor; becauſe the Eſtate is limited to continue only ſo long as the Rent is paid; and therefore for the Non-performance accord- Vaugh. 31, 32. *Triſtram* v. *Counteſs of Baltinglaſs.*

ing to the Limitation, the Eſtate muſt determine; as if an Eſtate be made to a Woman *dum ſola fuerit*, this is a Word of Limitation which determines her Eſtate upon her Marriage.

Hob. 331. 2 Rol. Abr. 429. 2 Mod. 264. Note; it ſeems the better Way for the Leſſor to have a Clauſe of Re-entry for Non-payment of the Rent, than a Clauſe that the Leaſe ſhall be void for Non-payment; becauſe in the Caſe of a Re-entry, a Demand by the Leſſor and Non-payment by the Leſſee does not avoid the Leaſe; becauſe there muſt be an actual Entry to determine it, to which, as it is ſaid, there muſt be an actual Demand precedent; ſo that in this Caſe an actual Demand does not determine the Leaſe, but only puts it in the Power of the Leſſor to avoid it; and this being diſcretionary in the Leſſor, he may either recover the Rent by Action of Debt, and ſo ſuffer the Leaſe to continue; or after ſuch actual Demand he may by Entry defeat it. § But if the Clauſe be, that for Non-payment the Leaſe ſhall be void, then if the Leſſor ſhould unadviſedly make an actual Demand of the Rent, and the Leſſee not be able at that Time to pay it, he has thereby actually determined the Leaſe; becauſe there is no Re-entry previous to determine an Eſtate already void in itſelf: Yet even in this Caſe, if the Leſſor forbears to make an actual Demand when the Rent is in Arrear, he may recover it by * Action of Debt or Diſtreſs, and ſo continue the Leaſe, becauſe, theſe Remedies being not in Defeazance of the Grant, the Leſſor may purſue without an actual Demand; but this Obſervation is to be intended only of a Leaſe for Years, for in Caſe of a Leaſe for Life no Demand can determine it without actual Entry ‖, though the Clauſe be, that for Non-payment of the Rent the Leaſe ſhall ceaſe and be void.

§ *Vide ante*, 353. n. and the ſtat. 4 G. 2. *poſt.* 359.

*Page 357

3 Co. 64. *Pennant's* Caſe.

‖ *Vide ante* 353. and the ſtat. 4 Geo. 2. *poſt.* 359.

Dyer 87, 88. One makes a Leaſe for Years, rendering Rent, payable at the two moſt uſual Feaſts in the Year, or within a Month after each of the ſaid Feaſts, at ſuch a Place certain, with a Proviſo, that if the Rent be Arrear by the Space of a Month after either of the ſaid Days (being demanded in due Form) that then the Leaſe ſhall be void. If the Leſſee does not pay the Rent at the Feaſt-Day, but ſome Time after within the Month makes a Tender of it at the Place appointed, †'tis doubted if this be ſufficient without a Tender at the laſt Inſtant of the laſt Day of the Month; but it ſeems not, becauſe the Leſſor might have been there on the laſt Inſtant of that Day to have demanded it, and then for Non payment the Leaſe will be void, and conſequently ſuch Tender before the laſt Inſtant cannot ſave it.

† This ſeems to mean a Tender in the Abſence of and without Notice to the Leſſor, and can ſcarce be called a Tender; for ſurely the Leſſor is not bound to be there on any Day but the laſt. If it was a Tender to the Leſſor in Perſon, and refuſed, it would be incumbent on him afterwards to make a Demand, before he could proceed to recover the Rent by Law, or avoid the Leaſe, otherwiſe he might take Advantage of his own Wrong.

Noy 145. *Nicolls* prayed the Opinion of the Court in this Caſe; Leſſee of Tithes (without any Barn or Soil) rendering Rent, with a Proviſo, that if the Rent be not paid, that the Leaſe ſhould be void, Whether the Leſſor ſhould be obliged to ſeek the Leſſee and demand the Rent of him, or that the Leſſee ought to ſeek the Leſſor? And 'twas held that the Leſſee ought to ſeek the Leſſor, and that ſo it had been ruled before that Time, as at the Peril of the Leſſee the Rent muſt be paid, otherwiſe the Leaſe is gone.

2. The

2. The Time of Demand.

The Time for Payment of Rent, and conſequently for a Demand, is ſuch a convenient Time before the Sun ſetting of the laſt Day, as will be ſufficient to have the Money counted; but if the Tenant meet the Leſſor on the Land at any Time of the laſt Day of Payment, and tender the Rent, that is a ſufficient Tender, becauſe the Money is to be paid indefinitely on that Day, and therefore a Tender on the Day is ſufficient. Co. Lit. 202. a. Dalſt. 44. And. 253. Sav. 121. 4 Leon. 171. Saund. 287.

If a Leaſe is made, rendering Rent at *Michaelmas* between the Hours of One and Five in the Afternoon, with a Clauſe of Re-entry, and the (*a*) Leſſor comes at the Day about Two in the Afternoon, and continues to Five, this is (*b*) ſufficient. Cro. Eliz. 15. Ld. *Cromwell* v. *Andrews*.

(*a*) The Demand may be by Attorney. 4 Leon. 179.—But the Power muſt be ſpecial, for ſuch Land of ſuch Tenant Yelv. 37. Brownl. 138. (*b*) Demand muſt be proved by Witneſſes. Dyer 68.—mu t be made of the preciſe Sum due. Leon. 305. Sav. 121. Mo. 207.

If a Leaſe be made, reſerving Rent, upon Condition that if the Rent be behind at the Day, and ten Days after, (being in the mean Time demanded) and no Diſtreſs to be found upon the Land, that the Leſſor might re-enter; if the Rent be behind at the Day and ten Days after, and a ſufficient Diſtreſs be upon the Land till the Afternoon of the tenth Day, and then the Leſſee takes away his Cattle, and the Leſſor demands the Rent at the laſt Hour of the Day, and the Leſſee does not pay it, nor is there any Diſtreſs upon the Land; yet the Leſſor could not enter, becauſe he made no Demand ‖ in the mean Time between the Day of Payment and the ten Days, which by the Clauſe he was obliged to do. Cro. Eliz. 63. *Worceſter* v. *Stone*.

‖ See *ante*, 353 n. and the ſtat. 4 G. 2. *poſt*. 359.

* 3. The Place where the Demand § is to be made.

*Page 358

§ See *ante* 353. n. and the ſtat. 4 Geo. 2. *poſt*. 359.

Here again we muſt obſerve the Difference between a Remedy by Re-entry and Diſtreſs; for when the Rent is reſerved, upon Condition that if it be behind, that the Leſſor may re enter, in ſuch Caſe the Demand muſt be upon the moſt notorious Place on the Land; and therefore, if there be a Houſe upon the Land, the Demand muſt be at the fore Door thereof, becauſe the Tenant is preſumed to be there reſiding, and the Demand being required to give Notice to the Tenant that he may not be turned out of Poſſeſſion without a wilful Default, ſuch Demand ought to be in the Place where the End and Intention will be beſt anſwered. Co. Lit. 153, 201. 2 Rol. Abr. 428.

And it ſeems the better Opinion, that it is not neceſſary to enter the Houſe, though the Doors be open, becauſe that is a Place appropriated for the peculiar Uſe of the Inhabitant, into which no Perſon is permitted to enter without his Permiſſion; and it is reaſonable that the Leſſor ſhall go no further to demand his Rent, than the Tenant ſhall be obliged to go, when he is bound to tender it; and a Tender by the Tenant at the Door of the Houſe of the Leſſor is ſufficient, though it be open, without entering; and therefore by a Parity of Reaſon a Demand by the Leſſor at the Door of the Tenant, without entering is ſufficient. Dalſt. 59. Co. Lit. 201. And. 27. 3 Leon. 4. & *vide* Cro. Eliz. 15.

But when the Demand is only in order for a Diſtreſs, there it is ſufficient, if it be made on any notorious Part of the Land, becauſe this is only to intitle him to his Remedy for his Rent; and therefore, the whole Land being equally the Debtor, and chargeable with the Rent, a Demand upon it, without going to any particular Part of it, is ſufficient. Co. Lit. 153.

If

Co.Lit. 202. If a Wood be let, reſerving Rent, the Demand ought to be made at the Gate, or ſome Highway leading through the Wood, as the moſt notorious Place.

Bendl. 59. Cro. Eliz. 324. Cro. Car. 507. If a Rent-Seck be granted out of *A.* payable at *B.* the Grantee may demand it at *A.* and if the Tenant be not there to pay it, it is a Diſſeiſin, for which the Grantee may have his Aſſiſe, and a Demand at *B.* had likewiſe been good, becauſe that, by the expreſs Appointment and Agreement of the Parties, was the Place where the Rent was made payable.

Cro. Car. 521. Co. Lit. 153. But a Demand of the Perſon of the Tenant is not ſufficient off the Land, becauſe the Demand is required to be made in order to an immediate Payment; but no Perſon is preſumed to carry his Wealth about with him; that is reaſonably ſuppoſed to be at his Place of Habitation, or upon the Land from whence it is gathered, and therefore, the Demand of the Perſon off the Land being not ſufficient to anſwer the Intention of the Demand, is uſeleſs and inſignificant.

4 Co. 73. Co.Lit. 201. Cro. Eliz. 462. Mo. 404. Dyer 87. If the King makes a Leaſe, reſerving Rent, the Tenant muſt pay it without Demand, as is ſaid, either to his Receiver for that Purpoſe, or at the Receipt of the Exchequer, as well as if by the Words of the Leaſe the Rent had been made payable at his Exchequer, or into the Hands of his Receiver; but, if the King grants the Reverſion, the Patentee muſt demand the Rent upon the Land, becauſe that is the Place appointed by Law, for the Reaſons already given, for a common Perſon to demand the Rent.

2 Rol. Abr. 428. If a Rent be reſerved, payable at the Church of *S.* or *D.* upon Condition, it ought to be demanded at both Places, becauſe the Leſſee hath his Election to pay it at either Place; and therefore, to take Advantage of the Condition, the Leſſor muſt demand it in ſuch Places where by his own Agreement he has permitted the Tenant to pay it.

*Page 359. 2 Rol. Abr. 428. * So if it had been reſerved to be paid at or in the Church of *D.* it ought for the ſame Reaſon to be demanded both within and without the Church.

Dyer 329. in Margin. If a Leaſe be made of two Barns, rendering Rent, with Condition of Re-entry for Non-payment, the Leſſee tenders the Rent at one Barn, and the Leſſor demands it at the other, yet the Leſſor cannot re-enter, becauſe one Barn being as notorious, and conſequently as proper a Place as the other for the Payment, 'tis preſumed that the Leſſee was at the proper Place for Payment, unleſs that Preſumption be overthrown by a Demand; and therefore ſince the Demand was not made at both the Barns, there is nothing to deſtroy the Preſumption that the Tenant was at the proper Place ready to pay to ſave the Condition; and if the Leſſor did not demand it at the proper Place, he ſhall not take Advantage of the Condition.

But however juſt and reaſonable the above Caſes and Diſtinctions might have been, and however neceſſary the Knowledge of them, yet now,

By the 4 *Geo.* 2. *cap.* 28. *ſect.* 2. it is enacted "That in all Caſes be-
"tween Landlord and Tenant, as often as one Half-Year's Rent ſhall
"be in Arrear, and the Landlord hath Right by Law to re-enter for
"Non-payment, ſuch Landlord may without any formal Demand or
"Re-entry ſerve a Declaration in Ejectment; or, in caſe the ſame cannot
"be legally ſerved, affix the ſame upon the Door of any demiſed Meſ-
"ſuage, or upon ſome notorious Place of the Lands, *&c.* compriſed in
"ſuch Declaration, which Service or Affixing ſuch Declaration ſhall
"ſtand inſtead of a Demand and Re-entry; and in Caſe of Judgment
"againſt the caſual Ejector, or Nonſuit for not confeſſing Leaſe, Entry
"and Ouſter, it ſhall be made appear to the Court by Affidavit, or be
"proved

" proved upon the Trial in Caſe the Defendant appears, that Half a " Year's Rent was due before the Declaration was ſerved, and no ſuffici- " ent Diſtreſs was to be found, and that the Leſſor in Ejectment had " Power to re-enter, the Leſſor in Ejectment ſhall recover Judgment and " Execution in the ſame Manner, as if the Rent in Arrear had been le- " gally demanded, and Re-entry made; and in caſe the Leſſee, or other " Perſon claiming under the Leaſe, ſhall ſuffer Judgment to be recovered " on ſuch Ejectment, and Execution executed, without paying the Rent " and Arrears, with Coſts, and without filing any Bill for Relief in Equity " within ſix Calendar Months after Execution executed, the ſaid Leſſee " and all Perſons claiming under the Leaſe ſhall be barred from all Relief " in Law or Equity, other than by Writ of Error, provided that nothing " herein ſhall bar the Right of any Mortgagee of ſuch Leaſe who ſhall " not be in Poſſeſſion, ſo as ſuch Mortgagee within ſix Calendar Months " after Execution executed pay all Rent in Arrear, and Coſts and Da- " mages, and perform all Covenants and Agreements on the Part of the " firſt Leſſee."

(K) The ſeveral Remedies for the Recovery of Rents: And herein,

1. Of the Remedy by Diſtreſs.

THE Remedy by Diſtreſs is by the Common Law incident to a Rent Service, but in Caſe of a Rent-Charge it muſt be expreſly provided for by the Deed.† *Vide* Title *Diſtreſs.*

† The Executors of Tenants in Fee-ſimple, *&c.* of Rents, ſhall have Debt or Diſtreſs for the Arrears. 32 H. 8. c. 37.—Exception of Manors in *Wales. Id. ſ.* 2.—Huſbands ſeiſed in Right of Wives, or Tenants *pur auter vie*, after the Death of the Wife or *ceſtui que vie*, may diſtrain or have Debt for the Arrears. *Id. ſ.* 3.—Diſtreſs given for *Rent-Seck.* 4 Geo. 2. c. 28. ſ. 5.—Crops growing may be diſtrained. 11 G. 2. c. 19. ſ. 8. *Vide poſt.* 360.—Goods liable to Diſtreſs not to be taken in Execution without paying the Arrears, not exceeding one Year's Rent. 8 Ann. c. 14.—On this Statute the following Caſes have been determined: If the Money be levied by Sale of Goods taken in Execution againſt Defendant, who was a Tenant owing Rent, after the Landlord's Death inteſtate, and before Adminiſtration granted, the Court will not order the Sheriff to pay the Year's Rent to the Adminiſtrator afterwards. *Waring* v. *Dewberry*, T. 4 Geo. Str. 97.—A Landlord is obliged to demand the Arrears before the Removal of the Goods, or it is too late. *Ibid.* Fort. 360. *Darling* v. *Hill*, P 9 Geo. 2. Ca. B. R. *Temp.* Hardw. 255.—An Executor has the ſame Benefit of the Act as the Landlord, for it is an Intereſt veſted. *Chace* v. *Chace*, H. 2 Geo. 2. Fort. 359.—If Goods are ſeized on an Extent on an Outlawry, the Landlord ſhall not have the Goods delivered to him, though he diſtrained before the Extent. *Rex* v. *Southerly*, P. 1716. *in Sc.* Bunb. 5.—The Landlord is to have his Year's Rent without any Deduction. *Gore* v. *Goſton*, M. 12 G. Str. 643.—The Ground Landlord of a Houſe is not intitled to a Year's Rent on an Execution againſt an Under-Leſſee. *Bennet*'s Caſe, M. 1 Geo. 2. Str. 787.—On an Outlawry, *Capias Utlagatum*, and Goods ſeized by Proceſs ſtill remaining in the Sheriff's Hands, Landlord ſhall have a Year's Rent *Greaves* v. *D'Acaſtro*, P. 1725. Bunb 194.—If Extent iſſues againſt a Tenant, and afterwards, but before the Extent is executed, the Landlord diſtrains, and the Inquiſition finds the Goods diſtrained to be in the Poſſeſſion of the Tenant, the Landlord ſhall not have the Benefit of the Stat 8 Ann. *Rex* v. *Pritchard*, T. 1729. Bunb. 269.—When there are two Executions, the Landlord ſhall not have a Year's Rent on each. *Dod* v. *Saxby*, M. 9 Geo. 2. Str. 1024.———*A.* lets Land to *B.* at 75*l. per Annum* for one Year; a few Days before the End *B.* ſays he can hold it no longer, but deſires as much as will feed ſixteen Cows, which *A.* complies with, and demiſes alſo the Houſe and Garden; ſome Months after *B.*'s Goods are taken in Execution, no Part of the Rent of 75*l.* being paid; *A.* ſhall not have the 75*l.* on Motion, and *ſemb.* no Rent under the Act, though he proceed by Action. *Cook* v. *Cook*, P. 11 Geo. 2. And. 217.—On an Execution for Coſts on Judgment of Nonſuit, Sheriff cannot, after he has received Notice of Rent due, remove the Goods before he has ſatisfied Landlord one Year's Rent; unleſs the Rent paid. Sheriff muſt quit it; if he does not, Action lies againſt him; or on Motion the Court will order Reſtitution to the Amount of the Goods ſold, deducting Coſts incurred before Notice. *Henchett* v. *Kempſon*, P. 2 Geo. 3. 2 Wilſ. 140.—A Bill of Sale held to Amount to a Removal of Goods taken by *Fieri facias*, and the Sheriff ſhall pay the Year's Rent out of the Money levied. Barnes 211.

This

*Page 360 * This Remedy by Diſtreſs is greatly enlarged by ſeveral Acts of Parliament, which are taken Notice of under the Head of DISTRESS, and therefore I ſhall here only ſubjoin ſome Clauſes in a late Law for the more eaſy Recovery of Rents.

By the 11 *Geo.* 2. *cap.* 19. *ſect.* 1. it is enacted, "That in caſe any "Tenant or Leſſee of Lands or Tenements, upon the Demiſe whereof "any Rent is payable, ſhall fraudulently or clandeſtinely carry off his "Goods to prevent the Landlord from diſtraining, it ſhall be lawful for "every Landlord, or any Perſon by him impowered, within thirty Days "next enſuing ſuch Carrying off, to ſeiſe ſuch Goods wherever the ſame "ſhall be found, as a Diſtreſs for the Rent, and the ſame to ſell or diſpoſe "of as if the ſaid Goods had been diſtrained upon ſuch Premiſſes, pro-"vided that no Landlord ſhall ſeiſe Goods ſold *bona fide* and for a valua-"ble Conſideration to any Perſon not privy to ſuch Fraud."

And by *ſect.* 3. "If any ſuch Tenant ſhall fraudulently remove his "Goods, or if any Perſon ſhall knowingly aſſiſt ſuch Tenant in fraudu-"lently conveying away his Goods, or in concealing the ſame, all Per-"ſons ſo offending ſhall forfeit to the Landlord, from whoſe Eſtate ſuch "Goods were carried off, double the Value of the Goods, to be recovered "by Action of Debt, *&c.*

And by *ſect.* 8. "It ſhall be lawful for every Landlord to ſeiſe, for a "Diſtreſs, Corn and Graſs, Hops, Roots, Fruits, or other Product grow-"ing on the Eſtates demiſed as a Diſtreſs for Rent; and the ſame to cut, "gather, and lay up when ripe in the Barns or other proper Place on the "Premiſſes; and in caſe there ſhall be no proper Place, then in any "other Barn or proper Place which ſuch Landlord ſhall procure as near "as may be to the Premiſſes, and in convenient Time to appraiſe, ſell, or "diſpoſe of the ſame towards Satisfaction of the Rent, in the ſame Manner "as other Goods may be ſeiſed and diſpoſed of; the Appraiſement to be "taken when gathered and made."

2. Of the Remedy by Writ of Annuity.

Lit. Sect. 219
F.N.B. 152.
6 Co. 58.

If a Man grants by his Deed an annual Rent to *J. S* in Fee, for Life or for Years, and the Rent is behind, the Grantee may bring his Writ of Annuity againſt the Grantor, and thereby charge his Perſon; and this Remedy is founded on the Words of the Contract, which being preſumed to be founded on a valuable Conſideration, are always taken moſt ſtrongly againſt the Grantor; and therefore, where a Man grants an annual Rent, the Perſon granting is as well liable to the Charge as the Land, becauſe the Perſon of the Grantor ought to be liable to the Payment of what he himſelf hath given.

Rol. Abr. 226.

Hence it follows, that no Writ of Annuity lies for a Rent-Service, becauſe the Rent-Service being ſomething reſerved by the Leſſor by way of Retribution for the Land demiſed, proceeds not from the Grant of the Leſſee, the Reſervation being the Act of the Leſſor, and conſequently the Perſon of the Leſſee ought not to be liable to the Diſcharge of a Thing it never granted; for the Leſſee is only paſſive, and takes the Lands upon ſuch Terms as the Leſſor is willing to part with it, and by ſuch Acceptance of the Land agrees to the Reſervation of the Rent.

6 Co. 58. b.

It follows alſo, that if a Man deviſes a Rent out of his Land, and dies, that no Writ of Annuity lies for ſuch Rent, becauſe the Deviſe cannot take Effect till after the Death of the Deviſor, and then it is impoſſible to charge the Perſon.

So no Writ of Annuity lies for a Rent granted for Equality of Partition, or in lieu of Dower; for though theſe be given by the Perſon, yet,

* yet, being granted in Satisfaction of a real Eſtate, they retain the Nature of the Things for which they are given, and therefore not recoverable in a Perſonal Action. *Page 36

But for the further Explanation hereof, *vide* Tit. ANNUITY || AND RENT-CHARGE.

|| Since the printing of the former Part of this Work, by Statute 17 Geo. 3. it is enacted, That a Memorial of all Deeds, Bonds, &c. for granting Life Annuities, ſhall, within twenty Days of the Execution thereof, be inrolled in the Court of Chancery; and that ſuch Memorial ſhall contain the Date, Names of the Parties, Witneſſes, &c. otherwiſe every ſuch Deed, Bond, &c. ſhall be void.—Before Judgment ſhall be entered of Record upon any Warrant of Attorney for recovering any Annuity already granted, and before Execution ſhall be ſued out, &c. on any Judgment already entered, &c. a Memorial ſhall be inrolled as aforeſaid.—All future Deeds for granting Annuities ſhall contain the Conſideration and the Names of the Parties in Words at Length. If any Part of the Conſideration ſhall be returned, or any Notes ſhall not be paid when due, &c. the Court may order the Deed to be cancelled, &c.—And the Act alſo directs, that a particular Roll ſhall be kept by the Clerk of the Inrollments in Chancery, and that every Memorial ſhall be inrolled in Order of Time, as the ſame are brought to the Office; and the Day, Hour and Time of bringing Memorials to the Office are to be ſpecified on the Roll. It alſo appoints the Clerks Fees.—All Contracts for purchaſe of Annuities with any Perſon under twenty-one Years of Age are declared void.—Any Perſon who ſhall procure or ſolicit any Minor to grant an Annuity, &c. ſhall be puniſhed by Fine or Impriſonment, &c.—Soliciters, Scriveners, &c. who ſhall take more than 10*s.* *per* 100*l.* for procuring Money for Annuities, ſhall be puniſhed by Fine and Impriſonment, &c.—The above Act does not extend to any Annuity or Rent-Charge given by Will or Marriage Settlement, or for the Advancement of a Child; nor to any Annuity, &c. ſecured upon Lands of equal or greater annual Value, whereof the Grantor was ſeiſed in Fee-ſimple, or in Tail in Poſſeſſion at the Time of the Grant, or ſecured by the actual Transfer of Stock in any of the publick Funds, the Dividends whereof are of equal or greater annual Value than ſuch Annuity; nor to any voluntary Annuity granted without Regard to pecuniary Conſideration; nor to any Annuity, &c. granted by any Body Corporate, or under any Authority or Truſt created by Act of Parliament; nor to any Annuity where the Sum to be paid does not exceed 10*l.* annually, unleſs there be more than one ſuch laſt mentioned Annuity from the ſame Grantor, to or in Truſt for the ſame Perſon or Perſons.

3. Of the Remedy by Aſſiſe.

The Writ of Aſſiſe lies to reſtore the Party to the actual Seiſin of that Freehold that he hath been deveſted of, and conſequently the Party who brings it muſt have at leaſt an Eſtate for Life in the Rent, and muſt have been in the Seiſin and Enjoyment thereof. *Vide* Title *Aſſiſe.*

4. Of the Clauſe of Re-entry.

The Condition of Re-entry for Non-payment of Rent was the Remedy by the antient Law, which was afterwards changed into a Diſtreſs; but is yet a Remedy allowable at Law, where the Party provides it by the Deed; as if a Man makes a Feoffment, Gift, or Leaſe, reſerving Rent, with a Condition that if the Rent be behind, that it ſhall be lawful for the Feoffor, &c. and his Heirs into the Lands to re-enter; in theſe Caſes, if the Rent be not paid according to the Deed, the Feoffor or Leſſor may enter into the Lands, and hold them in his former Eſtate, becauſe the Feoffment or Leaſe was not abſolute, but defeaſible by the Non-performance of the Condition. Lit. Sect. 325. Co. Lit. 201, 202.

But where a Feoffment is made of Lands, reſerving Rent, upon Condition that if the Rent be behind, that it ſhall be lawful for the Feoffor and his Heirs to enter and hold the Lands, and take the Profits *till he be ſatisfied and paid* the Rent behind; this is not a Condition abſolutely to defeat the Eſtate; but the Feoffor in this Caſe ſhall upon his Entry only hold the Land as a Pledge, or in Nature of a Diſtreſs, till the Rent be paid him, and the Profits ſhall not go into the Account of the Rent, but ſhall be applied to his own Uſe, that by ſuch Perception Lit. Sect. 327.

ception the Tenant may be obliged the ſooner to pay the Arrears of Rent.

Co.Lit. 203. But if the Condition had been, that if the Rent be behind, that the Leſſor ſhall re-enter, and take the Profits *until thereof he be ſatisfied*, there the Profits ſhall go into the Account of the Rent, and conſequently, when the Profits received are equivalent to the Arrear of Rent, the Leſſee may re-enter and hold it under the former Leaſe.

Cro. Jac. 511. 4 Leon. 8. And though Part of the Rent be paid him before Re-entry, yet, if the Whole be not ſatisfied, he may re-enter for any Part that is in Arrear, becauſe the Condition is to inforce the Payment of the whole Rent, and therefore he may take Advantage for Non-payment of any Part thereof.

Cro. Jac. 510, 512. 2 Rol. Rep. 12, 427. Poph. 126, 147. 3Bulſt. 250. Sid. 262. Lev. 171. If a Man grants a Rent-Charge to *J. S.* his Heirs and Aſſigns, and if it ſhall happen that the Rent ſhall be behind and unpaid, that then the ſaid *J. S.* his Heirs and Aſſigns, ſhall enter into the Land, and have and enjoy the Rent thereof, *until the Arrears be fully ſatisfied*, and the Grantor covenants to levy a Fine to the Uſes of the ſaid Deed, if after the Fine levied the Rent be Arrear, the Grantee may enter into the Land, or make a Leaſe for Years to try his Title in Ejectment, becauſe by the Fine there is an Eſtate veſted in the Conuzees to raiſe an Uſe in the Grantee of the Rent-Charge when the Rent is behind; and whenever the Rent becomes Arrear, *the Poſſeſſion is executed to that Uſe*, and conſequently the Grantee has a Right to take and keep that Poſſeſſion till the Uſe for which it was executed be ſatisfied, and that was till the * Arrears of Rent be paid by the Perception of the Profits; and therefore though the Grantee's Intereſt in the Land be uncertain, (becauſe 'tis uncertain when the Rents will be paid out of the Profits) yet while his Intereſt remains, if his Poſſeſſion be diſturbed or deveſted, he may reſtore it by Ejectment, which is the proper Remedy to recover the Poſſeſſion; and if the Grantee aſſigns over the Rent, the Aſſignee may likewiſe enter and maintain a Title in Ejectment; for though the Uſe ariſes out of the Eſtate of the Conuzee only as the Rent is in Arrear, and till the Rent be behind and unpaid, there is nothing more than a bare Poſſibility of a Uſe, which in its Nature is not aſſignable, yet, by the Conveyance of the Rent, it ſhall paſs, becauſe 'tis nothing more than a Remedy or Security for the Rent, and therefore ſhall attend that, into whoſe Hands ſoever it comes.

*Page 362

Cro. Car. 512. And by the better Opinion it ſeems, that if the Rent be Arrear before the Fine levied, yet the Fine levied afterwards ſhall be ſufficient to raiſe an Uſe in the Grantee to enter into the Land for the Recovery of thoſe Arrears, becauſe the Fine is guided by the Deed of Grant, and both amount but to one Aſſurance, and conſequently the Fine ſhall have Relation to that Deed which leads the Uſe of it, and makes it operate.

Sid. 223, 262, 344. Lev. 170. Keb. 784. Raym. 135, 158. Saund. 112. *Jemett* v. *Cowley*. So it is, if ſuch a Rent had been granted to a Man and his Heirs, and if the Rent be behind and unpaid, then it ſhall be lawful for the Grantee and his Heirs to enter, *&c.* The Grantee, when the Rent is Arrear, may by ſuch Proviſo enter and hold the Land till he be paid the Rent by the Perception of the Profits; for though it was objected that there was no Eſtate conveyed, out of which a Uſe might ariſe to the Grantee upon the Non-payment of the Rent, and that this Grant could paſs no Eſtate to the Grantee as a Conveyance at Common Law, becauſe the Grantee could have no Inheritance or Freehold in the Land when the Rent was in Arrear for want of Livery, nor an Eſtate for Years for want of a certain Commencement and Determination; yet it was adjudged, that by the Grant he had an Intereſt veſted in him when the Rent was arrear; and though it be an uncertain Intereſt, which for the

the Uncertainty of its Commencement and Determination might be void by the ſtrict Rules of Law, if it were granted independent on any Eſtate certain, yet it is good in this Caſe, becauſe 'tis created to attend a determined Eſtate, and the Non-payment of the Rent fixes the Certainty of its Beginning, and the Satisfaction of the Arrears by the Perception of the Profits, the End and Determination of ſuch Intereſt, and therefore the Grantee may reduce ſuch Intereſt as it ariſes into his Poſſeſſion by Ejectment, which is the proper Remedy to recover the Poſſeſſion.

5. Of the *Nomine pœnæ*.

This is not ſo much a Remedy for the Recovery of Rent, as a Penalty to oblige the Tenant to a punctual Payment, and this as well of a Rent-Charge as a Rent-Service; and herein theſe Things ſeem obſervable. Lil. 4. Palm. 206. 2 Lutw. 1151.

That in Caſe of a Rent-Service or Rent-Charge, if it be granted that if the Rent be arrear, that the Tenant ſhall forfeit 8 *s.* a Day as a *Nomine pœnæ*, there muſt be an actual Demand of the Rent at the Day to give a Title to the Penalty, becauſe till an actual Demand made it cannot appear that there was any Default or Neglect in the Tenant, and it were unreaſonable to oblige the Tenant to pay ſuch Penalty without a wilful Default; for the Preſumption is, that he was ready to pay the Rent to ſave the Penalty; and there is no Way to overthrow that Pre-
*ſumption but by proving an actual Demand made, and then if ſuch *Page 363
Demand be not anſwered by Payment, it is evident that the Tenant has wilfully neglected it, and conſequently has ſubmitted himſelf to the Penalty. Hob. 82, 208. Brownl. 171. 2 Jon. 33.

But if the Rent be demanded at the Day, and not paid, and conſequently the Penalty forfeited; as if a Rent be granted to *A.* for Life, and, if it ſhall be Arrear by the Space of ten Days after the Feaſts of Payment, being lawfully demanded, that then the Grantor ſhall forfeit 10 *s.* by way of Pain, and that then and ſo often it ſhall be lawful for the Grantee to diſtrain; till the Rent and Penalty be ſatisfied; by the Opinion of *Hob.* if the Grantee demands the Rent at the End of the ten Days, by which he becomes intitled to the Penalty, the Grantee on the eleventh Day muſt likewiſe demand the Penalty, becauſe it is not due till after the ten Days incurred, and the Grantor has the whole Day, on which the Penalty becomes due, to pay it; but *Quære* whether the Grantee be obliged to demand the Penalty after it becomes due. Hob. 208. Hutt. 42, 114. Hetl. 87.

But if the Plaintiff brings an Action of Debt, or avows for the Rent and *Nominæ pœnæ*, without laying an actual Demand for the Rent, though he cannot recover the Penalty for want of ſuch Demand, yet he ſhall, by ſuch Suit, have Judgment for the Rent, becauſe that is really due, and ought to be paid without any Demand. Hob. 82, 135.

If the Tenant, that is chargeable with the Rent, aſſigns over his Intereſt in the Land, it ſeems that the Aſſignee is chargeable with the Penalty for any Arrear incurred in his own Time, becauſe the *Nomine pœnæ* being intended as an Obligation on the Tenant to pay the Rent, that Obligation, from the Nature of the Contract, muſt have Continuance ſo long as the Rent is payable; and therefore whoever takes the Land, takes it under the Charge of the Rent, and conſequently muſt be ſubject to that Security which was originally taken upon the Creation of the Rent. Cro. Eliz. 383. *Thynn* v. *Cholmly*. Moor pl. 486.

If

Cro. Eliz. 895. *Bendloſs* v. *Phillips.* If the Rent be deviſed without Mention of the *Nomine pœnæ*, yet it ſhall paſs as incident to the Rent, becauſe whoever has a Right to the Rent ought to have all that Security for the Payment of it, which was taken upon the original Creation of it.

Co. Lit. 162. The *Nomine pœnæ*, as an Incident to the Rent, ſhall deſcend to the Heir, becauſe, being a Security or Penalty to engage the Payment of the Rent, whoever has a Right to the Rent ought in reaſon to have the Penalty, which is to oblige the Tenant to pay it; but the Statute of 32 *H.* 8. (*c.* 37.) gives no Remedy for the Recovery of the *Nomine pœnæ*, as it does for Rents, becauſe the Grantee of a Rent-Charge might have an Action of Debt for the Arrears of the *Nomine pœnæ* at Common Law; for, being only a Penalty, they looked on it to be only a Chattel, ſince it did not grow due with every Gale of the Rent, but aroſe caſually upon the Non-payment of the Rent at the Day; and for the ſame Reaſon the Executors of the Grantee might have an Action of Debt, and conſequently there was no Neceſſity for the Statute to provide a Remedy.

6. Of the Remedy by Action of Debt, &c. and as grounded on ſeveral Acts of Parliament.

The Remedy by Action of Debt extended only to Rents reſerved on Leaſes for Years, but did not affect Freehold Rents; the Reaſon whereof is this; Actions of Debt were given for Rent reſerved upon Leaſes for Years, for, that ſuch Terms being of ſhort Continuance, it was neceſ-
*Page 364 ſary that the Leſſor ſhould follow the Chattels of his Tenant * wherever they were or whereſoever he ſhould remove them; but, when the Rents were reſerved on the durable Eſtate of the Feud, the Feud itſelf, and the
Co. Lit. 162. Chattels thereupon, were Pledges for the Rent; and, if the Land were unſtocked for two Years, the Lord had his *Ceſſavit per biennium* to recover the Land itſelf; and hence it is, that if the durable Eſtate of the Feud determined, as if the Leſſee for Life died, the Leſſor might have an Action of Debt for the Arrears; becauſe the Land was no longer a Security for the Rent; and therefore the Chattels of the Tenant were liable to ſatisfy the Arrears in an Action of Debt wherever the Tenant removed them.

Co. Lit. 162. 4 Co. 49. So it was in Caſe of a Rent-Charge; for if a Man were ſeiſed of it in Fee, and it was Arrear, he could have no Action of Debt for the Arrears; and if he dies, his Heir cannot have any real Action for the Arrears, for that is proper for the Recovery of the Poſſeſſion, which is ſtill in him, nor can he have a perſonal Action, becauſe, beſides the former Reaſon, it were abſurd to give a real Action for the Rent running on in his own Time, and a perſonal Action for the Arrears in the Life-time of the Anceſtor at the ſame Time; for it could not be ſuppoſed to be both a real and perſonal Thing; for this Reaſon alſo the Executor could have no Action for the Arrears, who is intitled to the perſonal Eſtate; as alſo becauſe the Executor could not intitle himſelf by virtue of the Contract that created the Rent, ſince the Heir was conſtituted Repreſentative by the Contract, and by Conſequence that Repreſentation excluded all other Perſons from taking any Benefit as Repreſentatives, that did not come under that Character.

8 Ann. c. 14. ſ. 4. But theſe Inconveniencies and Miſchiefs are remedied by a late Act of Parliament, by which it is provided, "That whereas no Action of Debt "lies againſt a Tenant for Life or Lives, for any Arrears of Rent, "during the Continuance of ſuch Eſtate for Life or Lives, be it enact-"ed, that, from the firſt Day of *May* 1710, it ſhall and may be lawful

"for

"for any Perſon or Perſons, having any Rent in Arrear, or due upon "any Leaſe or Demiſe for Life or Lives, to bring an Action or Actions "of Debt for ſuch Arrears of Rent, in the ſame Manner as they might "have done in caſe ſuch Rent were due and reſerved upon a Leaſe for "Years."

And by the Statute of 32 *H.* 8. (*c.* 37.) the Executors of a Man ſeiſed either of a Rent-Charge, Rent Service, or Rent-Seck, either in Fee-Simple or Fee-Tail, have now a double Remedy given them for ſuch Arrears, either by Action of Debt or Diſtreſs; the Action of Debt lies not only againſt the Tenant that ought to have paid the Rent, but againſt his Executors and Adminiſtrators; the Diſtreſs runs with the Land as long as it continues in the Tenant's Poſſeſſion that ſuffered the Rent to run in Arrear, or of any other Perſon claiming by or from him.

Co. Lit. 162. Cro. Car. 471. Lit. Rep. 93. 4 Co. 48, 50. Vaugh. 40.

And therefore, if a Man grants a Rent-Charge in Fee, and afterwards makes a Feoffment of the Land, out of which it iſſues, and the Feoffee makes a Leaſe at Will, the Executors of the Grantee may diſtrain the Tenant at Will for any Arrears that became due in the Life-time of the Grantor, becauſe ſuch Tenant claims from the Grantor; and ſo every Feoffee of the firſt Feoffee *in infinitum* claims immediately from the Grantor.

4 Co. 50. 2 And. 178. 4 Leo. 115. *Andrew Ognell's* Caſe.

So if the Tenant makes a Gift in Tail, and the Donee dies, the Iſſue is chargeable with the Arrears of the Rent; becauſe though he claims by Deſcent *per formam doni*, yet it is by virtue of the Gift made by the Tenant.

4 Co. 50.

But if Tenant in Tail makes a Gift in Fee, and dies, and the Diſcontinuee charges the Land with a Rent in Fee, and then infeoffs the Iſſue in Tail within Age, ſo as he is remitted, the Iſſue is chargeable with none of the Arrears; becauſe, being remitted by the Feoffment to * the old Eſtate-Tail, he cannot claim under the Diſcontinuee, but from the firſt Donor.

*Page 365

Noy 48. Moor 486. pl. 1143. 2 Rol. Abr. 422. 2 Vern. 612.

So it is, if the Tenant dies without Heirs, ſo that the Tenancy eſcheats to the Lord, he ſhall not be chargeable with any Arrears of a Rent-Charge incurred in the Life of the Tenant.

Co. Lit. 162.

But before theſe Acts, if there had been Tenant for Life of a Rent, and he died, the Rent being in Arrear, his Executors, by the Common Law, might have an Action of Debt for the Arrears; for the Executor, repreſenting the Perſon of the Teſtator, ſucceeds in all his perſonal Rights; and, when the Rent is Arrear at his Death, it is no more than a ſingle perſonal Duty, diſtinct and ſeparate from the real Eſtate; for which there can be no Remedy by real Action, which recovers the Freehold of which the Poſſeſſor was diſſeiſed; but the Arrears of the Rent being no Freehold, but a perfect Chattel or ſingle Duty, were recoverable by the Executor as all other perſonal Things; and though the Freehold determined by the Death of the Tenant for Life, yet they did not conſtrue ſuch Duties to ceaſe, becauſe there were no Words in the Contract to found ſuch a Conſtruction upon; for the Contract gave him the intire Rent during Life, and the Act of God did not take it away.

Co. Lit. 162.

If Tenant *pur auter vie* or Tenant for Years held over, yet the Leſſor could not diſtrain them for the Rent that became due before the Determination of their reſpective Leaſes, though they continued in the Poſſeſſion of the Land afterwards; for when the Leaſe was determined, the Leſſor could not avow on them as his Tenants, claiming under a Leaſe that was ended; to remedy this It (*a*) is provided that whereas Tenant *pur auter vie* and Leſſees for Years, or at Will, frequently hold over the

(*a*) By the ſaid Statute 8 Ann. c. 14.

the Tenements to them deviſed, after the Determination of ſuch Leaſes; and whereas after the Determination of ſuch, or any other Leaſes, no Diſtreſs can by Law be made for any Arrears of Rent that grew due on ſuch reſpective Leaſes before the Determination thereof; it is enacted, "That it ſhall and may be lawful for any Perſon or Perſons, having any "Rent in Arrear or due upon any Leaſe for Life or Lives, or for Years "or at Will ended or determined, to diſtrain for ſuch Arrears, after the "Determination of the ſaid reſpective Leaſes, in the ſame Manner as they "might have done if ſuch Leaſe or Leaſes had not been ended or deter-"mined; provided that ſuch Diſtreſs be made within the Space of ſix Ca-"lendar Months after the Determination of ſuch Leaſe, and during the "Continuance of ſuch Landlord's Title and Intereſt, and during the Poſ-"ſeſſion of the Tenant from whom ſuch Arrears became due."

4 Geo. 2. c. 28. Alſo for the more effectual Recovery of Rents it is provided, "That in "caſe any Tenant for Life or Years, or other Perſon who ſhall come into "Poſſeſſion of any Lands, &c. under or by Colluſion with ſuch Tenant, "ſhall wilfully hold over after the Determination of ſuch Term, and after "Demand made in writing, for delivering of the Poſſeſſion thereof, by the "Perſon to whom the Remainder or Reverſion ſhall belong, or his Agent, "ſuch Perſon holding over ſhall pay double the yearly Value of the Lands, "&c. ſo detained, to be recovered by Action of Debt, whereunto the "Defendant ſhall be obliged to give ſpecial Bail; againſt which Penalty "there ſhall be no Relief in Equity."

11 Geo. 2. c. 19. And by a ſubſequent Act it is provided, "That in caſe any † Tenant "ſhall give Notice of his Intention to quit the Premiſſes, and ſhall not "accordingly deliver up the Poſſeſſion at the Time in ſuch Notice con-"tained, the ſaid Tenant, his Executors or Adminiſtrators, ſhall pay "to the Landlord double the Rent which he ſhould otherwiſe have "paid."

† Tenant by Parol demiſe from Year to Year, is within this Statute, and liable to pay double Rent, if he does not quit after giving Notice. *Timmins* v. *Rowliſon*, H. 5 Geo. 3. 3 Bur. 1603.——If Tenant gives Parol Notice that he will quit, it is ſufficient and ſubjects him to double Rent if he does not. *Ibid.*

*Page 366 * And by the ſaid laſt mentioned Statute it is enacted, "That where the "Demiſe is not by Deed, the Landlord ſhall recover a reaſonable Satis-"faction for the Tenements (*a*) occupied by the Defendant, in an Action "on the Caſe, for the Uſe and Occupation of what was ſo held or enjoy-"ed; and if, in Evidence on the Trial of ſuch Action, any Parol Demiſe, "or any Agreement (not being by Deed) whereon a certain Rent was re-"ſerved, ſhall appear, the Plaintiff in ſuch Action ſhall not be nonſuited, "but may make Uſe thereof as an Evidence of the *Quantum* of the Da-"mages to be recovered."

11 Geo. 2. ſ. 14.

(*a*) That on a Leaſe at Will the Plaintiff muſt ſhow an Occupation; *ſecus* on a Leaſe for Years.

Lutw. 313. Salk. pl. 1, 209. Ld. Raym. 28, 170. Comb. 255. See 3 Salk. 136. pl. 2.

3 Lev. 150. —That an *Aſſumpſit* will lie on

And though at Common Law no Action lay for Rent, but an Action of Debt, yet it was held, that for the Uſe and Occupation of a Farm, &c. an *Aſſumpſit* would lie.

an expreſs Promiſe, and where the Reſervation is of a Sum in Groſs. Hard. 61. 4 Mod. 78. Noy 60. Allen 57. Vent. 98, 272. 2 Vent. 67. [See the Clauſe of the Stat. *ſupra*.]

(L) Rent when and how diſcharged; and herein of the Eviction of the Tenant.

IF the Lands demiſed be evicted from the Tenant, or recovered by a Title Paramount, the Leſſee is diſcharged from the Payment of the Rent from the Time of ſuch Eviction; but, notwithſtanding ſuch Recovery or Eviction, the Tenant ſhall pay the Rent that became due before the Recovery; becauſe the Enjoyment of the Land being the Conſideration for which the Tenant was obliged to pay the Rent, ſo long as the Conſideration continued, the Obligation muſt be in Force; there being the ſame Reaſon that the Tenant ſhould pay the Rent for Part of the Time contracted for, as for the whole Term, if he had enjoyed the Land ſo long. 2 Rol. Abr. 429. Hob. 82. Cro. Eliz. 47. Co. Lit. 148, 201.

So if a Diſſeiſor makes a Leaſe for Years, rendering Rent, and afterwards the Diſſeiſee enters, and *(a)* ouſts the Leſſee, yet the Leſſee ſhall be accountable for the Rent incurred before the *Ouſter*; becauſe the Leſſee cannot be taken for a Treſpaſſer, ſince he came into the Lands under the Sanction of a legal Contract; though the Diſſeiſor having but a deſeaſible Title could not perform that Contract, however, till it was deſtroyed, and while the Leſſee had the peaceable Enjoyment, the Obligation to pay the Rent, which was founded on the Enjoyment, muſt continue, and conſequently the Leſſee be obliged to pay the Rent till the Entry of the Diſſeiſee. 2 Rol. Abr. 429, 430. (a) Muſt be an actual *Ouſter*. 1 Ld. Raym. 370.

For the ſame Reaſon, if Part only of the Land letten be evicted from the Tenant, ſuch Eviction is a Diſcharge of the Rent in Proportion to the Value of the Land evicted. 10 Co. 128. a. Dyer 56. Rol. Abr. 235.

If *A.* lets ſeveral Lands to *B.* and afterwards the Inhabitants of the Town, where Part of the Lands lie, recover a Right of Common in Part of the Lands demiſed; this Recovery, it ſeems, by the ſtrict Rules of the Common Law, ſhall make no Apportionment of the Rent; becauſe the Recovery of the Common is no Eviction of the Land, becauſe the Soil ſtill remains in the Leſſee; and therefore there can be no Apportionment; but a Court of Equity conſiders that the Leſſee can have little Benefit by the Soil itſelf, while others * are permitted to take the Profits in Common with the Leſſee, and therefore in ſuch Caſes have apportioned the Rent; unleſs it appears, that, notwithſtanding ſuch Right of Common recovered, the Lands demiſed are well worth the Rent reſerved upon the Leaſe. Ch. Ca. 31, 32. *Jew* v. *Tirkwell*. * Page 367

But the former Caſes are to be underſtood with this Reſtriction, that if the Tenant be ouſted by a Title Paramount, before the Day appointed for the Payment of the Rent, ſuch Eviction intirely diſcharges the Tenant from the Payment of any Part of the Rent; for Inſtance, if *A.* Leſſee for Life, makes a Leaſe to *B.* for Years, rendering Rent, payable at *Eaſter*, and *B.* by Virtue of the Leaſe enjoys the Land for nine Months, and then *A.* dies, by which the Intereſt of *B.* is determined; in this Caſe *B.* ſhall pay no Rent at all, for though he held the Land for nine Months, yet his Leaſe being ended before the Expiration of the Year, (for the Rent being made payable at *Eaſter* only was payable but once in a Year) there could be no Rent due by the Contract, for it was in Conſideration of the Enjoyment of the Land that the Leſſee was by the Contract obliged to pay the Rent at the Expiration of the Year; and when the Enjoyment is interrupted and deſtroyed, the Leſſee ſhall not be 10 Co. 128. Salk. 65. pl. 1. Wil. Rep. 392. pl. 105.

be obliged to pay for what he had not; nor can there be any Apportionment, becauſe by the expreſs Words of the Leaſe it was to be paid at *Eaſter*, and not before †.

† *Sed qu.* now, as according to the Stat. 11. Geo. 2. c. 19. ſ. 15. at the Death of Tenant for Life, a proportionable Part of the Rent ſhall be paid to the Executor. *Vide* the ſtat. *infra.*

Vaugh. 199. Pollex. 142. As the Tenant is diſcharged from the Payment of the Rent when the Land is evicted by a Title Paramount, ſo by a Parity of Reaſon he ſhall be diſcharged from it when the Lord purchaſes the Tenancy; for in ſuch Caſe the Lord cannot have both the Land and the Rent, nor ſhall the Tenant be under any Obligation to pay the Rent, when the Land, which was the Conſideration, is reſumed by the Lord into his own Hands; and this Reſumption or Purchaſe of the Tenancy by the Lord, makes what the Law Books call an Extinguiſhment of the Rent.

Bro. Tit. *Extinguiſhment* (17). Vaugh. 39. Pollex. 142. But if the Conveyance to the Lord was not abſolute, but upon Condition, or if it were only of a particular Eſtate of ſhorter Duration than the Eſtate which the Lord had in the Rent-Service; in theſe Caſes, tho' there be an Union of the Tenancy, and the Rent in the ſame Hand, yet, becauſe that Union is but temporary, for, upon the Performance of the Condition or Determination of the particular Eſtate, the Tenant is reſtored to the Enjoyment of the Land, and conſequently the Obligation to pay the Rent revives; therefore the Rent in ſuch Caſe is only ſuſpended, and not extinguiſhed.

11 Geo. 2. cap. 19. By the 11 *Geo.* 2. *cap.* 19. Reciting, that, whereas any Leſſor or Landlord, having only an Eſtate for Life in the Land, *&c.* dies before or on the Day on which any Rent is reſerved or made payable, ſuch Rent or any Part thereof, is not recoverable by the Executors, *&c.* of ſuch Leſſor; nor is the Perſon in Reverſion intitled thereto, any other than for the Uſe and Occupation of ſuch Lands, *&c.* from the Death of the Tenant for Life; of which Advantage hath been taken by the Undertenants, who thereby avoid paying any Thing for the ſame; for Remedy whereof it is enacted, that where any Tenant for Life ſhall die before or on the Day on which any Rent was reſerved, or made payable on any Demiſe or Leaſe of any Lands, *&c.* which determined on the Death of ſuch Tenant for Life, the Executors or Adminiſtrators of ſuch Tenant for Life ſhall and may, in an Action on the Caſe, recover of and from ſuch Undertenant or Undertenants of ſuch Lands, *&c.* if ſuch Tenant for Life die on the Day on which the ſame was made payable, the Whole; or if before the Day, then a Proportion of ſuch Rent, according to the Time ſuch Tenant for Life lived of the laſt Year, or Quarter of a Year, or other Time, in which the ſaid Rent was growing due as aforeſaid, making all juſt Allowances, or a proportionable Part thereof reſpectively.

*Page 368

(M) Of Apportionment*, and herein of the Suspension and Extinguishment of the Rent: And therein,

* *Vide* the Stat. 11 Geo. 2. *ante*, 367.

1. In what Cases a Rent may be apportioned by the Act of the Parties, and herein of the Difference between a Rent-Service, and a Rent-Charge.

AND first, it is necessary to distinguish between a Rent-Service and a Rent-Charge; for if a Man, who hath a Rent-Service, purchases Part of the Land out of which the Rent issues, the Rent-Service is not extinguished, but shall be apportioned according to the Value of the Land; so that such Purchase is a Discharge to the Tenant for so much of the Rent only, as the Value of the Land purchased amounts to; but if a Man has a Rent-Charge, and purchases Part of the Land out of which the Rent issues, the whole Rent is extinguished. Lit. s. 222. 8 Co. 105. b.

But if the Grantor, by Deed reciting the Purchase, had granted that the Grantee should distrain for the same Rent in the Residue of the Land, the Whole Rent-Charge had been preserved; because such Power of Distress had amounted to a new Grant. Co. Lit. 147-8. Rol. Abr. 236.

If a Man grants a Rent-Charge out of two Acres, and afterwards the Grantee recovereth one Acre by Title Paramount the Grant, the whole Rent shall not be extinguished; because the Law, which gives the Remedy for the Recovery of a Man's Right, will not prevent the Prosecution of such Right, by depriving the Prosecutor of a greater Profit than the Thing recovered may amount to; but in this Case there shall be no Apportionment, but the Grantee shall have the whole Rent after he has recovered one Acre. Co. Lit. 148. b. Where intire Services, as a Horse, Hawk, *&c.* shall be extinguished or revive, *vide* 6 Co. 1, 2. Co. Lit. 149. 8 Co. 105.

In some Cases a Rent-Charge may be apportioned by the Act of the Party; as if the Grantee releases Part of his Rent to the Tenant of the Land, such Release does not extinguish the whole Rent. So if the Grantee gives Part of it to a Stranger, and the Tenant attorns, such Grant shall not extinguish the Residue which the Grantee never parted with, because such Release or Disposition makes no Alteration in the original Grant, nor defeats the Intention of it, as the Purchase of Part of the Land does; for the whole Rent is still issuable out of the whole Land, according to the original Intention of the Grant; besides, since the Law allowed of such Sort of Grants, and thereby established such Sort of Property, it would have been unreasonable and severe to hinder the Proprietor to make a proper Distribution of it for the Promotion of his Children, or to provide for the Contingencies of his Family, which were in his View. The Objection, that has been made to these Sort of Apportionments or Divisions of Rent Charges, is this, that the Tenant thereby would be exposed to several Suits and Distresses for a Thing, which in its original Creation was intire and recoverable upon one Avowry. Co. Lit. 148. *vide* Cro. Eliz. 742. which seems contrary. *Quære* whether by the Statute 4 *Anne* c. 16. s. 9. such Grants be good without the Attornment of the Tenant. [That is, so as to affect the Tenant. By 1 Geo. 2. c. 19. s. 11. Attornment by Tenants, unless made in consequence of some Judgment at Law, or Decree or Order of a Court of Equity, or made with the Privity and Consent of the Landlord, or to any Mortgagee after the Mortgage is become forfeited, are void.]

*Page 369 Cro. Eliz. 742. *Wotton* v. *Shirt.*

* And if a Rent-Charge may partly be aſſigned by the Grant of the Party, much more may Part of it be extended for his Debts, by the Favour and Aſſiſtance of the Law; for though the Tenant is thereby, without his Attornment, poſſibly made liable to ſeveral Suits and Diſtreſſes, yet it is an Inconvenience he may avoid by a punctual Performance of his own Grant.

2 Inſt. 504. Rol. Abr. 234. Cro. Eliz. 651, 851. Co. Lit. 148. a. 8 Co. 79. b. Dy. 326. Hob. 177. 13 Co. 57, 58. Moor pl. 255, 260.

It is next to be conſidered, whether a Rent-Service, incident to the Reverſion, may be apportioned by the Grant of Part of the Reverſion; and it ſeems formerly to have been doubted whether upon ſuch Grant there could be any Apportionment? or whether the whole Rent ſhould not be entinguiſhed and loſt? for ſince the Reverſion and Rent incident thereto, were intire in their Creation, they thought it hard that by the Act of the Leſſor they ſhould be divided, and thereby the Tenant made liable to ſeveral Actions and Diſtreſſes for the Recovery of them; but this Conception was too narrow and abſurd to govern Men's Property long; for if I make a Leaſe of three Acres, reſerving 3 *s.* Rent, as I may diſpoſe of the whole Reverſion, ſo may I alſo of any Part of it, ſince it is a Thing in its Nature ſeverable, and the Rent, as incident to the Reverſion, may be divided too; becauſe that being given in Retribution for the Land, ought from the Nature of it to be paid to thoſe who are to have the Land upon the Expiration of the Leaſe; and hence it is, that the Rent paſſes incidently with the Reverſion without any expreſs Mention of it in the Grant; but the Tenant has really no Prejudice from ſuch Grant, becauſe it is in his Power and his Duty to prevent the ſeveral Suits and Diſtreſſes by a punctual Payment of the Rent; and therefore he ought not to complain of a Miſchief which he has wilfully brought upon himſelf; beſides that formerly ſuch Grants could not take Effect without the Attornment and Conſent of the Tenant; but on the other Hand it would be extremely prejudicial, if upon ſuch Grants the Rent ſhould not be apportioned; becauſe then the Leſſor could not out of his Property make a Proviſion for his younger Children, or anſwer the Contingencies of his Family which are in View.

Cro. Eliz. 637, 651. *Ardes* v. *Watkins.* Roll. Abr. 234. Moor pl. 737. Cro. Eliz. 771. *Ewer* v. *Moyle.*

And upon this Reaſon the Apportionment of Rents had been carried a Step farther; as if *A.* poſſeſt of a Term for 20 Years, leaſes it for 10 Years, reſerving 30*l.* Rent, and afterwards *A.* deviſes 20*l.* of the Rent to three of his Sons equally to be divided, this is a good Deviſe, and each of the Sons ſhall have an Action of Debt for his third Part, though the Reverſion, to which the Rent was originally incident, remains intire; for there is nothing in the Nature of the Thing to hinder ſuch a Diviſion or Apportionment; and if the Tenant omits to pay the Rent, the ſeveral Actions are a Miſchief which he brings on himſelf, and which he might and ought to have prevented.

7 Co. 23. *Butt's* Caſe. Co. Lit. 147. S. P.

If *A* ſeiſed in Fee of one Acre, and poſſeſſed of a Term for Years in another, grants a Rent out of both to *B.* in Fee, *B.* takes a Leaſe or Grant of the Leaſehold Acre, the Rent ſhall not thereby be ſuſpended.

Co. Lit. 148. a. Rol. Abr. 235. Dyer 5. a. 13 Co. 58.

If Leſſee for Life or Years ſurrenders Part, or if he commits a Forfeiture of Part, by making a Feoffment or doing Waſte, the Rent ſhall be apportioned; becauſe the Rent is a Retribution for the Land, and therefore muſt neceſſarily ceaſe, according to the Proportion of the Land reſumed.

Moor pl. 255. Co. Lit. 148. b. Bro. Tit *Extinguiſhment* 48. Roll. Abr. 938. 4 Co. 52. 9 Co. 135. Poll. ex. 142, 144. Vent. 277.

Where the Leſſor takes a Leaſe of Part of the Land, or enters wrongfully into Part, there are Variety of Opinions, whether the intire Rent ſhall not be ſuſpended during the Continuance of ſuch Leaſe or tortious Entry; and in the laſt Caſe it ſeems to be the better Opinion and the ſettled Law at this Day, that the Tenant is diſcharged from the Payment of the whole Rent till he be reſtored to the whole Poſſeſſion, that no Man might be encouraged to injure or diſturb his Tenant in his Poſſeſſion, whom

* whom by the Policy of the Feudal Law he ought to protect and defend. * Page 370

But there is no Colour of Reaſon why the whole Rent ſhould be ſuſpended, when the Lord or Leſſor takes a Leaſe of Part of the Land, becauſe here is the Concurrence of the Tenant, who by his own Act and Conſent parts with ſo much of the Land as is redemiſed, and thereby ſuperſedes the former Contract as to that Part; but ſince the Obligation to pay the Rent was by the firſt Contract founded upon the Conſideration of the Tenant's enjoying the Land, that Obligation muſt ſtill continue on the Tenant ſo far as it is not cancelled or revoked by any ſubſequent Contract between the Parties, and conſequently the whole Rent ſhall not be extinquiſhed by ſuch Redemiſe; but the Tenant ſhall pay Rent in Proportion to the Land he enjoys, becauſe the Obligation of the firſt Contract muſt ſubſiſt ſo far as the Tenant enjoys the Conſideration which firſt engaged him in ſuch Contract. Pollex. 141, to 145. Vent. 176. 2 Lev. 143. *Hodgeſkins* and *Thornborough*, 3 Keb. 500, 505. Rol. Abr. 938. 7 E. 3. 56, 57. and the following Caſes and Books denied to be Law.

Co. Lit. 148. b. 4 Co. 52. b. 9 Co. 134. Bro. Tit. *Extinguiſhment* 48. and *per Hale* Ch. J. if the Tenant upon ſuch Redemiſe reſerved a Rent, no Part of the Rent reſerved upon the firſt Contract ſhall be ſuſpended. Vent. 276.

2. In what Caſes they may be apportioned by the Act of Law, or by the Act of God.

In this Place we are to conſider, whether the Tenant ſhall pay the whole Rent, though Part of the Thing demiſed be loſt and of no Profit to him, or though the Uſe of the Whole be for ſome Time intercepted or taken away without his Default; and here it ſeems extremely reaſonable, that, if the Uſe of the Thing be intirely loſt or taken away from the Tenant, the Rent ought to be abated or apportioned, becauſe the Title to the Rent is founded upon this Preſumption, that the Tenant enjoys the Thing during the Contract; and therefore if Part of the Land be ſurrounded or covered with the Sea, this being the Act of God, the Tenant ſhall not ſuffer by it, becauſe the Tenant without his Default wants the Enjoyment of Part of the Thing, which was the Conſideration of his paying the Rent; nor has the Leſſor Reaſon to complain, becauſe if the Land had been in his own Hands, he muſt have loſt the Benefit of ſo much as the Sea had covered. Rol. Abr. 236.

If Part of the Land be burnt with Wild-fire, that ſhall make no Abatement or Apportionment of the Rent, becauſe the Uſe of the Land is not thereby taken away, and the Land may be again reſtored to its former Fertility by the Care and Induſtry of the Tenant. Rol. Abr. 236. If a Leaſe be made of Land with a Flock of

Sheep, and all the Sheep die, *Quære* whether the Rent ſhall be apportioned. Dyer 56.—When a Houſe was burnt down, Tenant liable for the Rent. 2 Ld. Raym. 1477.

If *A.* ſeiſed of one Acre in Fee, and poſſeſſed of another for Years, makes a Leaſe of both, reſerving Rent, and dies, the Rent ſhall be apportioned with the Reverſion, and the Heir and Executor ſhall have each his Proportion. Rol. Abr. 237.

So if a Moiety of a Reverſion be extended by *Elegit*, the Rent ſhall be apportioned, and the Leſſor ſhall ſtill enjoy Half the Rent as incident to the Reverſion that remains in him. Rol. Abr. 237. *Cambell's* Caſe.

So if a Huſband leaſes for Years reſerving Rent, and dies, the Wife recovers a third Part of the Reverſion, ſhe ſhall have the ſame Proportion of the Rent; for in all theſe Caſes the Law diſtributes the Rent as it diſpoſes of the Reverſion. Rol. Abr. 237.

If Part of the Lands deſcend on the Grantee of a Rent Charge, the Rent ſhall be apportioned according to the Value of the Land; for the Lit. ſ. 224. Rol. Abr. 236. S. P.

*Page 371 * the Grantee in this Caſe is perfectly paſſive, and concurs not by any Act of his to defeat the Grant.

3. The Manner of ſuch Apportionment, and how the Tenant ſhall take Advantage of it.

Vent. 276. Rol. Abr. 237. This is properly the Buſineſs of a Jury, who upon the Evidence offered are to judge of the Value of the Land purchaſed by the Lord or Leſſor, or aliened by the Tenant, according to the Statute *Quia emptores, &c.* from whence it is eaſy for them to compute how much is due from the Tenant for the Reſidue of the Land in his Hands.

Vent. 276. This may be done upon a Plea of *Nil debet* pleaded by the Tenant, becauſe when Iſſue is joined on ſuch Plea, 'tis the Buſineſs of the Jury to determine whether any Thing and how much is due; and this is done with regard to the real Value of the Land remaining in his Hands, and not with regard to the Quantity of it.

Vent. 276. So the Tenant may in his Pleading ſet forth the Value of the Land purchaſed by the Leſſor, and that the Rent ought to be apportioned or abated in Proportion to the Value thereof.

Hodgeſkins v. Thornborough. But the Rent cannot be apportioned upon a Demurrer, becauſe the Judges only determine what is the Law in ſuch Caſe, but the Value of the Land never comes in Queſtion.

2 Inſt. 503. Rol. Abr. 237. If there be Lord and Tenant by Fealty, and 20*s.* Rent, the Lord purchaſes two Acres, and then diſtrains for 18*s.* Rent, ſuppoſing the Rent to be apportioned according to the Quantity of the Land, the Tenant reſcues, and the Lord brings his Aſſiſe, and the Tenant pleads *Nul Tort*, the Recognitors of the Aſſiſe ſhall extend the Land according to the real Value; for the Jury upon View of the Land are capable of judging of the Value of each Acre; and therefore if they find the two Acres aliened of greater Value than the Reſt, they may apportion the Rent accordingly, and give the Lord but 16*s.* for the remaining eighteen Acres; and though the Lord demanded more than his Due, yet he ſhall recover what in Juſtice he ought to have, becauſe it were unreaſonable to expect the Lord ſhould exactly judge of the Value of the Land, and conſequently too ſevere to put him to the Expence of a freſh Suit for ſuch Miſtake.

2 Inſt. 504. But in this Caſe, if the Lord demand leſs than his Due, he ſhall not recover more than he demanded, becauſe the Court muſt give Judgment correſpondent to the Right of the Demandant.

5 Mod. 214. Comb. 365. but *vide* Ld. Raym. 255. But if in Debt or Covenant the Landlord declares for more Rent than is due to him, he may releaſe the Overplus, and take Judgment for that which is really owing.

* Replevin and Avowry. *Page 372

(A) The Nature and Deſcription thereof. 372.
(B) The different Kinds of Replevins; and herein of Replevin by Writ at Common Law, and by Plaint or Act of Parliament. 373.
(C) Replevins, out of what Courts and by what Authority they iſſue; and herein of the Power and Duty of the Sheriff. 374.
(D) Of the Pledges in Replevin, and the Proceedings againſt them. 375.
(E) Of the Writs or Proceſſes in Replevin. 378.

And herein,

1. Of the original Writ of Replevin. 378.
2. Of the Withernam. 379.
3. Of the Writ of Second Deliverance. 380.
4. Of the Writ *de proprietate probanda*, and the Claim of Property. 381.
5. Of the Writ *de returno habendo*. 382.
6. Of Returns irrepleviſeable. 383.
7. In what Manner the Sheriff is to return and execute ſuch Proceſſes. 383.

(F) Of what Property and for what Things a Replevin lies. 384.
(G) Replevin, for and againſt whom it lies. 385.
(H) Of the Declaration in Replevin. 386.
(I) Pleas in Replevin. 387.
(K) Avowries in Replevin; and herein of what Seiſin and Services, and the Certainty required therein. 389.

Coſts and Damages in Replevin. Vide Tit. Coſts Letter (F).

(A) The

(A) The Nature and Deſcription thereof.

Co. Lit. 145. b. 2 Inſt. 139. REPLEVIN is a Redelivering to the Owner, by the Sheriff, his Cattle or Goods diſtrained upon any Cauſe, upon Surety that he will purſue the Action againſt him that diſtrained; and if he purſues it not, or if it be adjudged againſt him, then he who took the Diſtreſs ſhall have it again, and for that Purpoſe may have a Writ of *returno habendo*.

*Page 373. Co. Lit. 145. * Replevin is a Writ, and uſually granted in Caſes of Diſtreſs, and is a Matter of Right; ſo that if a Man grants a Rent with Clauſe of Diſtreſs, and grants further, that the Diſtreſſes taken ſhall be irrepleviſeable, yet may they be replevied; for ſuch a Reſtraint is againſt the Nature of a Diſtreſs, and no private Perſon can alter the common Courſe of the Law.

2 Bendl. 84. Cro. Eliz. 799. 2 Mod. 149. In this Writ or Action both the Plaintiff and Defendant are called Actors; the one, *i. e.* the Plaintiff, ſuing for Damages, and the Avowant or Defendant to have a Return of the Goods or Cattle.

Carth. 122. 6 Mod. 103. Yelv. 148. That the Avowant is in Nature of a Plaintiff, appears, 1ſt, from his being called an Actor, which is a Term in the Civil Law, and ſignifies Plaintiff; 2dly, from his being intitled to have Judgment *de returno habendo*, and Damages as Plaintiff; 3dly, from this, that the Plaintiff might plead in Abatement of the Avowry, and conſequently ſuch Avowry, muſt be in Nature of an Action.

Plow. 263. The Avowant being in Nature of a Plaintiff, need not aver his Avowry with an *hoc paratus eſt verificare*, more than any other Plaintiff need aver his Count.

2 Inſt. 339. An Avowant being an Actor, ſhall not have a Protection caſt for him more than any other Plaintiff.

Cro. Eliz. 530. That an Avowant ſhall not have a *Decem tales*. 2 Bendl. 26. † But though an Avowry be in Nature of an Action, yet one Tenant in common may avow for taking Cattle Damage-Feaſant.

† 'Tis *Daliſon* not *Bendl.* and there ſaid, that Avowant ſhall not have a *Decem tales* if he aſſign not Default in the Plea, notwithſtanding he be Actor; but if the Avowant purchaſe the *Venire facias*, there he ſhall have a *Decem tales*.—A *Tales* may be granted at the Prayer of the Defendant by 14 Eliz. c. 9. why then ſhall not an Avowant have it?

Carth. 74. Yelv. 148. Hob. 16. Cro Eliz. 799. Replevin is an Action founded on the Right, and different from (*a*) Treſpaſs.

(*a*) Different from a Writ of Execution. Carth. 380. Ld. Raym. 218.—Different from Detinue. Winch. 26.

Finch's Law, 316. *& vide* Comb 476. Fitzg. 109. (*b*) In the Caſe of *Eaton* v. *Soutoby*. M. 12 G. 2. in *C. B.* In *Finch* it is held, that when in the Pleadings in Replevin the Title of the Lands is brought in Queſtion, it is then a real Action; but if otherwiſe, that it is a Perſonal one; but this Diſtinction has of late been exploded, and it is now (*b*) held, that as no Lands can be recovered in this Action, it cannot with any Propriety be conſidered as a real Action, though the Title of Lands may incidently come in Queſtion, as it may do in an Action of Treſpaſs, or even of Debt, which are Actions merely Perſonal.

(B) The

(B) The different Kinds of Replevins; and herein of Replevin by Writ at Common Law, and by Plaint or Act of Parliament.

REPLEVIN may be either made by original Writ of Replevin at Common Law, or by Plaint by the Statute of *Marl.* (52 *H.* 3.) *cap.* 21. Co. Lit. 145. F. N. B. 69.

By this Statute, it is provided, "That if the Beasts of any Person be "taken, and wrongfully with-holden, the Sheriff, after Complaint made "to him thereof, may deliver them without Leet or Gainsaying of him "that took the Beasts, if they were taken out of Liberties; and if the "Beasts were taken within any Liberties, and the Bailiff of the Liberty "will not deliver them, then the Sheriff for Default of those Bailiffs shall "cause them to be delivered."

*The Mischiefs before this Act were the great Delay and Loss the Party was at by having his Beasts or Goods with-holden from him; as also that when Cattle were distrained and impounded within any Liberty that had Return of Writs, the Sheriff was obliged to make a Warrant to the Bailiff of the Liberty to make Deliverance; and there was another Mischief when the Distress was taken without and impounded within the Liberty; to remedy which, *Page 374 2 Inst. 139. 13 Co. 31.

By this Statute the Sheriff, upon a Plaint made unto him without Writ, may either by Parol or Precept command his Bailiff to deliver the Beasts or Goods, that is, to make Replevin of them, and by these Words *(Post querimoniam sibi fact')* the Sheriff may take a Plaint out of the County Court and make Replevin presently, which he is to enter in the Court, as it would be inconvenient and against the Scope of the Statute that the Owner, for whose Benefit the Statute was made, should tarry for his Beasts till the next County Court, which is holden from Month to Month. And by this Act the Sheriff may hold Plea in the County Court on Replevin by Plaint, though the Value be of 20*l.* or above; and yet in other Actions he shall only hold Plea where the Matter is under 40*s.* Value. 2 Inst. 139. Keb. 205. Dalt. Sh. 430.

By the Words of this Law, *Si averia capiant', Vicecomes post querimoniam sibi fact' deliberare posset*; so that it becomes the Sheriff's Duty upon such Complaint, by Parol or by Precept to his Bailiff, to replevy them, which Precept may be given before any County Court; but such Plaint is afterwards to be entered, and as holden in *Cum.* by the Party who made the Complaint, and not by the Sheriff. [*Sed qu?*] Cum. 591.

(C) Replevins, out of what Courts, and by what Authority they issue; and herein of the Power and Duty of the Sheriff.

REPLEVINS by Writ issue (*a*) properly out of the Courts of *K. B.* and *C. B.* at *Westminster* and are returnable into such Courts. ‡ Dyer 246. (*a*) Lies by Writ in the Cinque Ports. F. N. B. 67. Reg. Brev. 79.

‡ As to the original Writ of Replevin, see *post.* 378. (E).

Replevins

Bro. *Rep.* pl. 40. Co. Lit. 145. 2 Inſt. 139.

Replevins by Plaint are made by the Sheriff by Force of the above-mentioned Statute of *Marleb.* (52 *H.* 3. *c.* 21.) by which he is directed, upon Complaint made to him by the Party that his Goods or Cattle are diſtrained, to command his Bailiff (which may be by Parol or Precept) to make Deliverance; and which Plaint may be taken at any Time, as well out of, as in Count.

Carth. 380. (*a*) Replevin lies by Plaint in *London*. 2 Lil. Reg. 557.

Alſo it hath been agreed, that the Hundred Court, and (*a*) other Courts of Lords of Manors, may by Preſcription hold Plea in Replevin, and ſo may incidently have Power to replevy Goods or Cattle taken; but that, it ſeems, muſt be by Proceſs of the Court after a Plaint entered, but not by a Parol Complaint out of Court.

—But where on a *Pluries* to the Sheriffs of *London* they return the Cuſtom of the City, that Replevin ought to be made in the Sheriff's Court there, and not by the King's Writ, and an Attachment was granted; for they cannot ouſt the King's Courts of their Juriſdiction by their Cuſtoms, though confirmed by Act of Parliament. Dyer 245. F. N. B. 68.———By the Uſage in *Northamptonſhire*, in the Abſence of the Sheriffs, Bailiff, *&c.* the Frankpledge may make Deliverance by Replevin. 2 Inſt. 139.——Replevin does not lie in the *Marſhalſea* Court. 10 Co. 74.———Nor in the Court of *Canterbury*. 3 Keb. 573.———Whether to the Court of *Halifax*. Q. 3 Keb. 550.

*Page 375 2 Salk. 580. pl. 1. 5 Mod. 252. Skin. 674. pl. 1. Carth. 380. Ld. Raym. 219. *Hallett* v. *Birt*.

* And therefore where in Treſpaſs for taking, *&c.* the Defendant juſtified that the Place where, *&c.* was a Hundred, and Time out of Mind had a Court of all Actions, Replevins, *&c.* grantable in or out of Court, and that a Replevin was granted to him by the Steward out of Court, *Virtute cujus*, *&c.* the Queſtion was, if good or not? And the Reaſon of the Doubt was, becauſe the County Court could not hold Plea in Replevin at Common Law; but were enabled by the Statute of *Marlebridge*, which extends not to the Hundred Court, which is a Court derived out of the County Court; but *per cur.* clearly, ſuppoſing they may grant them in Court, yet they cannot preſcribe to grant them out of Court.

Carth. 381. † If the Defendant claims Property before the Sheriff,

The Sheriff is obliged to grant Replevins in all ſuch Caſes as they are allowed of by Law; and the Officer, who takes the Goods by virtue of a Replevin iſſuing for what Cauſe ſoever, is not liable to an Action of Treſpaſs, unleſs the Party in whoſe Poſſeſſion the Goods were claims Property † in them; and note, that in all Caſes of Miſbehaviour by the Sheriff or other Officers, in relation to Replevins, they are ſubject to the Controul of the King's ſuperior Courts, and puniſhable by Attachment for ſuch Miſbehaviour.

he may return it upon the *Alias* Replevin, and thereupon a Writ *de proprietate probanda* iſſues; for the Property cannot be tried but by Writ. Co. Lit. 145. b. 1 Brownl. 167. *Vide* 5 Com. Dig. 293. See *poſt*. 381.

4 H. 6. 30. 2 H. 7. 6. Co. Lit. 145.

And though the Sheriff may grant Replevins by Plaint, and may proceed thereon in the County Court, yet if any Thing touching the Freehold come in Queſtion, or ancient Demeſne be pleaded, the Sheriff can proceed no further; nor can any ſuch Proceedings be carried on in the Hundred Court, Court Baron, or any other Court claiming a Juriſdiction herein by Preſcription.

Bro. *Rep.* pl. 3. Brown. 33. [See Madox. Exch. 672.]

So when the King § is Party, or the Taking is in Right of the Crown, in theſe Caſes the Sheriff is to ſurceaſe.

§ A Replevin lies againſt the King if Goods be in his Hands. *Per Hide* to the Lords. 3 Ruſh. 1361.

T. 12 W. 3. in *C. B.* *Bradſhaw*'s Caſe.

It was ruled in the Caſe of one *Bradſhaw*, that when an Act of Parliament orders a Diſtreſs and Sale of Goods, this is in Nature of an Execution,

cution ‖, and Replevin does not lie; but if the Sheriff grants one, yet it is not such a Contempt as to grant an Attachment against him; and *Powell* Justice said, he remembered a Case in the *Exchequer*, where a Distress was taken for a Fee-Farm Rent due to the King, yet upon Debate in the Court no Attachment was granted, though it was in the King's Case. *Vide* 14 Car. 2. c. 12.

‖ A Replevin does not lie for Goods seized by Warrant of a Justice of Peace, upon a Conviction for Destruction of the Game, *&c. Semb.* 2 Mod. Ca. 208, 9.——Replevin does not lie for Goods distrained for a Fine imposed on an Officer by Commissioners of Land-Tax; and if he takes out Replevin it is a Contempt, and an Attachment will be granted. *Rex* v. *Oliver*, T. 1717. Bunb. 14.——Replevin does not lie for Goods distrained on a Conviction (for Deer-stealing). *Rex* v. *Monkhouse*, P. 16. G. 2. Stra. 1184.——And if the Under-Sheriff grants it an Attachment shall go against him. *Ibid.*

And for the greater Ease in bringing Replevins and as a Duty incumbent on the Sheriff, it is enacted, by the 1st and 2d *Ph. & Mar. cap.* 18. 1 & 2 P. & M. c. 18.

"That the Sheriff shall at his first County Day, or within two Months "after he receives the Patent, depute and proclaim in the Shire-Town "four Deputies to make Replevins, not dwelling above twelve Miles "distant from one another, in Pain to forfeit for every Month he wants "such Deputy or Deputies 5 *l.* to be divided between the King and the "Prosecutor."

(D) Of the Pledges in Replevin, and the Proceedings against them.

WHEN the Sheriff makes Replevin, he ought to take two Kinds of Pledges, *Plegii de prosequendo*, by the Common Law, and *Plegii de returno habendo*, by the Statute of *West.* 2. (13 *Ed.* 1. *stat.* 1.) *cap.* 2. by which it is provided, "That Sheriffs or Bailiffs from thenceforth shall "not only receive of the Plaintiff Pledges for the pursuing of the Suit, "before they make Deliverance of the Distress, but also for the Return "of * the Beasts, if Return be awarded; and if any take Pledges other- "wise he shall answer for the Price of the Beasts, and the Lord that dis- "trains shall have his Recovery by Writ, that he shall restore to him so "many Beasts or Cattle; and if the Bailiff be not able to restore, his Su- "perior shall restore." 2 Inst. 340. Dalt. Sh. 433. Hutt. 77. *Page 376

In the Construction hereof the following Cases have been ruled, and Opinions holden.

That if the Sheriff returns insufficient Pledges, he shall answer according to the Statute; for insufficient Pledges are no Pledges in Law; and such Pledges must not only be sufficient in Estate, *viz.* capable to answer in Value, but likewise sufficient in Law, and under no Incapacity; and therefore Infants, Feme Coverts, Persons outlawed, *&c.* are not to be taken as Pledges, nor are Persons Politic, or Bodies Corporate. Co. Lit. 145. 2 Inst. 340. 10 Co. 102.

In Replevin the Sheriff does not return any Pledges, and after Issue joined and found, it was moved, if they could be put in by the Court after Verdict; and the Court held they might, notwithstanding the said Statute of *Westm.* 2. (13 *Ed.* 1. *st.* 1.) as before that Statute the Court might take Pledges on the Omission of the Sheriff; and a Diversity was taken between Pledges for prosecuting, which were at Common Law, and *pro returno habendo* given by this Statute; and the Court held, that though upon Noy 156. T. 4 Car. 1.

upon the Default of the Sheriff he was ſubject to the Actions of the Party, that yet the taking of Pledges by the Court did not make the Judgment erroneous.

Skin. 244. pl. 9. 2 Show. 421. pl. 388. Comb. 1, 2. 3 Mod. 56. S. C.

A Replevin by Plaint was ſued in the Sheriff's Court in *London*, and Pledges were found *de returno habendo ſi*, &c. this Plaint was removed according to their Cuſtom into the Mayor's Court, and after into the King's Bench by *Certiorari*, and there Oyer of the *Certiorari* being demanded, the Party declared in *B. R.* Upon this a Return awarded, and upon an *Elongat'* returned a *Scire Facias* went againſt the Pledges in the Sheriff's Court of *London*. Upon a Demurrer the Queſtion was, whether this Caſe being removed by a *Certiorari*, the Pledges in the inferior Court are diſcharged, or whether they remain liable to be charged by this *Scire Facias?* The Court was inclined to be of Opinion, that the Pledges are not diſcharged, for the Miſchief that might enſue; for then the Plaintiff might bring a *Certiorari*, and the Defendant would loſe his Pledges; and on the other Side, they doubted whether the *Principal* be in Court but at his Pleaſure, and that he is not demandable, and cannot be nonſuited; || but afterwards at another Day it was adjudged, that the Pledges were not diſcharged.

|| See *poſt*, 382. Div. 5.

Cro. Car. 446. Jon. 378. S. C. *Moyſer* v. *Gray*, Mayor of *Beverly*.

In caſe the Plaintiff declared, that he diſtrained for 7 *l.* 10 *s.* Rent, reſerved on a Leaſe, and that the Defendant delivered the Cattle without taking Pledges; to which the Defendant pleaded, that the Plaintiff in the Replevin delivered to him 3 *l.* 10 *s.* for Pledges, which he accepted; and on Demurrer the Court held, that Pledges being to be found to anſwer the Party, if he had good Cauſe of Avowry, and to be anſwerable for the Amercement to the King, if he be nonſuited; or if it be found againſt him, the taking of Money or a Pledge was not lawful; and that altho' he might take Money for Pledges, yet he ought not to accept leſs than the Plaintiff's Demands; on which Account the Court likewiſe held the Plea vicious; but they agreed, that if the Mayor had taken but one Pledge, (if he had been ſufficient) it had been well enough. †

† On a *Scire facias* againſt a Sheriff for not taking Pledges, he muſt plead *ad idem*. *Hayn* v. *Bigg*. Fort. 331.

Ld. Raym. 278. 2 Lutw. 686. *Blakitt* v. *Criſſop*.

But it hath been adjudged, that a Bond taken by the Sheriff, conditioned that if the Party applying for the Replevin ſhould appear at the next County Court, &c. and proſecute his Action with Effect, and ſhould make Return of the Thing replevied, if Return ſhould be adjudged, and ſave the Sheriff harmleſs, &c. was good in Law, and agreeable to the Intent of the Statute of *Marleb.* (52 *H.* 3. *c.* 21.) which requires Pledges or Sureties, of which Nature the Obligors are; and this Method of taking Bond inſtead of Pledges was ſaid to be of antient Uſage; and that in the old Books *Plegii* ſignified the ſame as Sureties; and that there being a proper Remedy on ſuch Bond, it differed from the above Caſe in *Cro. Car.* of taking a Depoſite or Sum of Money; but the Court agreed, that at Common Law this Bond had been void, becauſe it had been to ſave the Sheriff harmleſs in making Replevin by Plaint, which he could not have done before the Statute of *Marleb.*

*Page 377

Carth. 248. Show. 400. S. C. *Chapman* v. *Butcher*.

If in Replevin in an inferior Court, the Condition of the Bond is, *If he proſecute his Suit commenced with Effect in the Court of and do make Return*, &c. *if a Return be adjudged by Law*, and it happens, that the Plaintiff hath Judgment in the Court below, which is afterwards reverſed on a Writ of Error in *B. R.* in ſuch Caſe, unleſs the Party makes a Return, he forfeits his Bond; for, though he had Judgment in the Court below, yet the Words, *if he proſecute his Suit commenced*, &c. extend to the Proſecution of the Writ of Error, which is

Part

Part of the Suit commenced in the Court below; and, in this Caſe, the Taking ſuch Bond was held to be (*a*) lawful, and ſaid to be the common Practice.

(*a*) Fitzg. 158. Forteſc. Rep. 209, 210.

In Debt upon a Replevin Bond taken by the Sheriff, conditioned that if *C. B.* appear at the next County Court, and proſecute with Effect for Taking, &c. and make Return, &c. if Return be adjudged, and ſave harmleſs the Sheriff, &c. then, &c. the Defendant after Oyer pleaded, that at the next County Court, *tent*, *tali die*, he did appear, and proſecuted, &c. until it was removed by *Recordari*, and did ſave harmleſs the Sheriff, but doth not ſay, that no Return *habend'* was adjudged; and upon Demurrer the Court inclined for the Plaintiff; for the Defendant ſhould have ſaid, that no Return was adjudged at all; and tho' he proſecuted to the *Recordari*, yet Return *habend'* might be adjudged afterwards; and the Condition goes to any Adjudication of Return. §

Comb. 228. *Lane* v. *Foulk*.

§ In Debt on a Replevin-Bond, it is a bad Plea, that Defendant appeared at the County Court; he muſt follow it, whereever removed, to the End of the Cauſe. *Anon.* Fort. 209. *Nichols* v. *Newman*, P. 3 Geo. 2. Fort. 361.——In Debt on a Replevin-Bond, that he had performed all Conditions is a bad Plea; he ſhould plead he did indemnify. *Lutwydge* v. *Jameſon*, M. 4 Geo. 2. *C. B.* Fort. 210.——If Debt is brought on a Replevin-Bond for not proſecuting in County Court with Effect, and Plaintiff replies, he (preſent Defendant) removed it by *Recordari* into *C. B.* and was there nonſuited, the Replication is well. *Vaughan* v. *Norris*, T. 8 Geo. 2. Rep. *Temp.* Hardw. 137.

An Action was brought upon a Bond in Replevin to proſecute his Suit with Effect, and alſo to make Return, &c. the Defendant pleaded, that *E. G.* did levy a Plaint in Replevin in the Court before the Steward of *Weſtminſter*, and that afterwards, and before the Suit was determined, *viz.* on ſuch a Day, &c. *E. G.* died, *per quod* the Suit abated; the Plaintiff replied, *quod bene et verum eſt*, that *E. G.* levied ſuch a Plaint againſt the Defendant, who immediately afterwards exhibited an *Engliſh* Bill in the Exchequer againſt the Plaintiff in that Suit, and by Injunction hindered the Proceedings below until ſuch a Day, &c. on which the ſaid *E. G.* died; ſo that he did not proſecute his Suit with Effect; and upon a Demurrer to this Replication the Defendant had Judgment; for, *per Holt*, Ch. J. this was a Proſecution with Effect, becauſe there was neither a Nonſuit or Verdict againſt *E. G.*

Carth. 519. Duke of *Ormond* v. *Bierly*.

In an Action upon a Replevin-Bond Common Bail ſhall be filed.

Salk. 99. pl. 8. Ld. Raym. 278.

There are two Sorts of Pledges, *Plegii de proſequendo* and *Plegii de returno habendo*; the Pledges of proſecuting were at Common Law, but thoſe *de returno habendo* were appointed by *Weſt.* 2. (13 *Ed.* 1. *ſtat.* 1.) *cap.* 2. by which Statute an Action lies againſt the Sheriff, if he omits to take Pledges, or if he takes thoſe that are inſufficient; for, the Party may have a *Scire Facias* againſt the Pledges, where the Suit is in any Court of Record; and though, in the County Court, &c. a *Scire Facias* will not lie againſt the Pledges, becauſe theſe are not Courts of Record, and every *Scire Facias* ought to be grounded on a Record, yet there the Party may have a Precept in Nature of a *Scire Facias* againſt the Pledges.

per Holt, Ch. J. & *vide* Comb. 1, 2. Com. 593.

* An Action on the Caſe was brought againſt a Sheriff for taking inſufficient Pledges upon a Replevin; to which he pleaded Not guilty, and a Verdict being found againſt him, and Judgment given thereon in the Court of *C. B.* on a Writ of Error in *B. R.* it was objected, firſt, that an Action on the Caſe was not the proper Remedy; 2dly, ſuppoſing ſuch Action lay, that there ought to have been a *Scire Facias* firſt ſued out againſt the Pledges. As to the firſt the Court held, that the Party diſtraining has by the Statute of *Weſtm.* 2. (13 *Ed.* 1. *ſt.* 1.) an Intereſt in the

*Page 378

16 Vin. Abr. 399. pl. 4. M. 12 G. 2. *Rouſe* v. *Paterſon* in *B. R.*

the Pledges, and if the Sheriff omits to take ſuch, or, which is the ſame Thing, takes inſufficient ones, he is aggrieved, and conſequently intitled to his Action. 2dly, That tho' a *Scire Facias* may be brought againſt the Pledges, yet it does not follow from thence, that an Action does not lie againſt the Sheriff; and ſuch *Scire Facias*, which is only to certify the Sufficiency of the Pledges, is the leſs neceſſary in the preſent Caſe, ſuch Inſufficiency being ſet forth in the Declaration, and found by the Verdict.

And for the greater Security of Perſons diſtraining for Rent, it is enacted,

11 Geo. 2. c. 19. ſ. 23. "That Sheriffs, and other Officers having Authority to grant Replevins, ſhall in every Replevin of a Diſtreſs for Rent take in their own "Names, from the Plaintiff and two Sureties, a Bond in double the Value of the Goods diſtrained, (ſuch Value to be aſcertained by the Oath "of one or more Witneſſes not intereſted, which Oath the Perſon granting ſuch Replevin is to adminiſter) and conditioned for proſecuting the "Suit with Effect and without Delay, and for returning the Goods, in "caſe a Return ſhall be awarded, before any Deliverance be made of "the Diſtreſs; and ſuch Sheriff or Officer taking ſuch Bond, ſhall, at "the Requeſt and Coſts of the Avowant or Perſon making Conuzance, "aſſign ſuch Bond to the Avowant, *&c.* by indorſing the ſame, and atteſting it under his Hand and Seal in the Preſence of two Witneſſes, which "may be done without any Stamp, provided the Aſſignment be ſtamped "before any Action be brought thereon; and if the Bond be forfeited, "the Avowant, *&c.* may bring an Action thereupon in his own Name, "and the Court may by Rule give ſuch Relief to the Parties upon ſuch "Bond, as may be agreeable to Juſtice; and ſuch Rule ſhall have the "Effect of a Defeazance."

(E) Of the Writs or Proceſſes in Replevin: And herein,

1. Of the original Writ of Replevin.

F. N. B. 69, 70. *Doct. pl.* 313, 314. 2 Inſt. 139. Salk. 410.—That it is uſual to take out the Writ and *Alias* and *Pluries* at the ſame Time. Dalt. Sh. 273.

THE original Writ of Replevin iſſues out of Chancery, and neither it nor the *Alias* Replevin are returnable, but are only in Nature of a *Juſticies* to impower the Sheriff to hold Plea in his County Court, where a Day is given the Parties; but the *Pluries* Replevin is always with this Clauſe *vel cauſam nobis ſignifices*, and it is a returnable Proceſs.

If a *Pluries* Replevin be returned in *Michaelmas* Term, that the Defendant claimed Property, and after Nothing is done, nor any Appearance nor Continuance till *Eaſter* Term after, at which Term they * appeared and pleaded, and Judgment was thereupon given; tho' no Continuance was between *Michaelmas* and *Eaſter*, yet this is not any Diſcontinuance, becauſe there is not any Continuance till Appearance, for the Parties have not any expreſs Day in Court, and where there is not any Continuance, there cannot be any Diſcontinuance.

*Page 379

Rol. Abr. 485. *Gawen* v. *Ludlow.* Moor 403.

S. C. adjudged, that the Plaintiff may have a Writ *de proprietate probanda* without Continuance of the Replevin, tho' it be two or three Years after, becauſe by the Claim of Property the firſt Suit is determined.

The

The *Pluries* Replevin ſuperſedes the Proceedings of the Sheriff, and the Proceedings are upon that, and not upon the Plaint, as they are when that is removed by *Recordari*; and tho' there is no Summons in the Writ, yet it gives a good Day to the Defendant to appear, and if he does not appear, then a *Pone* iſſues, and then a *Capias*. Ld. Raym. 617.

Capias and Proceſs of Outlawry lies in Replevin; for, when on the *Pluries Replegiari fac'* the Sheriff returns *Averia elongata*, then a *Capias* in Withernam iſſues, and on that's being returned *Nulla bona*, a *Capias* iſſues, and ſo to Outlawry.—*Capias* and Proceſs of Outlawry in Replevin were given by 25 *E.* 3. *c.* 17. 6 Mod. 84.

2. Of the Withernam. †

†*Vide* Black. Com. 3 V. 148, *&c.*

2. If on the *Pluries* Replevin the Sheriff return, that the Cattle are eloigned to Places unknown (*a*), *&c.* ſo that he cannot deliver them to the Plaintiff, then ſhall iſſue a *(b) Withernam* directed to the Sheriff, commanding him to take the Cattle or Goods of the Defendant, and detain them till the Cattle or Goods diſtrained are reſtored to the Plaintiff; and, if upon the firſt *Withernam* a *Nihil* be returned, then an *Alias* and *Pluries* Replevin ſhall iſſue, and ſo to a *Capias* and *Exigent*. F. N. B. 73. (*a*) On what Returns made by the Sheriff a Withernam ſhall iſſue. Dalt. Sh. 276.

(*b*) The Derivation of the Word, and that it is a Repriſal of other Goods in Lieu of them that were formerly taken, and eloigned or with-holden. 2 Inſt. 141.

The Writ of Withernam ought to rehearſe the Cauſe which the Sheriff returns, for which he cannot replevy the Cattle or Goods; ſo that it does not lie upon a bare Suggeſtion, that the Beaſts are eloigned, *&c.* F. N. B. 69, 73.

If upon the Withernam the Cattle are reſtored to the Party who eloigned them, yet he ſhall pay a Fine for his Contempt. 2 Leon. 174.

Cattle taken in Withernam may be worked, or if Cows, may be milked; for the Party hath them in lieu of his own. Leon 220. Dyer 280. in Margin.

And as the Party is to have the Uſe of the Cattle, he is not to have any Allowance or Payment made to him for the Expences he has been at in Maintaining them. Owen 46. Cro. Eliz. 162. 3 Leon. 235.

Scire Facias againſt an Executor, reciting that where Replevin was brought againſt his Teſtator for a Cow, and Judgment againſt him *de returno habendo*, which was not executed, that he ſhould ſhew Cauſe why he ſhould not have Execution. The Executor pleads *Plene adminiſtravit*, upon which the Plaintiff demurred; and *Wyld* Juſtice ſaid, that upon the Judgment the Cow is in the Cuſtody of the Law, and therefore he ought to have Execution; but the Doubt is, becauſe the Replevin is determined by the Death of the Party; yet, by him and *Rainsford* only, being in Court, the Plaintiff ſhall have Execution, for the Defendant cannot be prejudiced; for, if the Sheriff return *Averia elongata*, he ſhall not have a Withernam but of the Goods of the Teſtator; or if there are no Goods of the Teſtator, the Sheriff can take nothing, but ſhall return *Nulla bona*, and then the Plaintiff hath his ordinary Way to charge the Defendant, if he hath made a *Devaſtavit*; and it was adjudged for the Plaintiff. Paſch. 27 Car. 2. in *B. R. Sucklin* v. *Green.*

**W.* ſues a Replevin, *H.* removes it by *Recordari* into the King's Bench, the Plaintiff does not declare, and upon that a Return awarded to *H.* upon which the Sheriff returns *Averia elongata*, and then a Withernam was awarded and executed; and now the Plaintiff comes and prays he *Page 38. Noy 50. *Webb* v. *Hind*, and ſaid, that the Courſe of *B. R.* is contrary to that of *C. B.* may

may be admitted to declare, and prays a Deliverance of the Withernam? and it was teſtified by the Clerks, that upon the Plaintiff's Submiſſion to a Fine for not declaring, and that's being impoſed upon him by the Judges, he ſhall have Deliverance of the Withernam; and a Fine of 3*s.* 4*d.* being accordingly impoſed on the Plaintiff, he then declared, and had Deliverance.

Ld. Raym. 614. If upon an *Elongata* returned the Sheriff's Cattle are taken in Withernam, yet upon the Defendant's Appearance, and pleading *Non cepit*, or claiming Property, the Defendant ſhall have his Cattle again; and if they are eloigned, a Withernam againſt the (*a*) Plaintiff; for, if the Property or Taking be in Queſtion, there is no Reaſon that the Plaintiff ſhould have the Defendant's Cattle.

(*a*) That both the Plaintiff and Defendant may have a Withernam, *Bro.* Tit. *Withernam*, *pl.* 17.

Ld. Raym. 614. & *vide* Comb. 201. 2 Salk. 582. The Withernam is but Meſne Proceſs, and cannot be an Execution, becauſe it is granted before Judgment.

3. Of the Writ of Second Deliverance.

2 Inſt. 340. At the Common Law, if the Plaintiff in the Replevin had been nonſuited either before or after Verdict, the Defendant who diſtrained ſhould have had Return, but not irrepleviſeable; ſo as the Plaintiff after Nonſuit might have had as many Replevins as he would, which was vexatious and miſchievous; for Remedy whereof the Statute of *Weſt.* 2. (13 *Ed.* 1. *ſt.* 1.) *cap.* 2. reſtrains the Plaintiff from any more Replevins after Nonſuit, but gives a Writ of Second Deliverance.

2 Inſt. 341. And if in ſuch Writ of Second Deliverance the Plaintiff be nonſuited, or if the Plea be diſcontinued, or the Writ abates, or if he prevails not in his Suit, Return irrepleviſable ſhall be granted.

2 Rol. Abr. 435. If Defendant in Replevin has Return awarded upon Nonſuit of the Plaintiff, upon which he ſues a Writ *de returno habendo*, upon which Writ the Sheriff returns *Averia elongata per querentem*, and upon this a Withernam is awarded, and upon the Withernam the Defendant has *tot Cattella* to him delivered of the Goods of the Plaintiff, and thereupon the Plaintiff ſues a ſecond Deliverance; he ſhall ſue it for the firſt Diſtreſs taken, and not for the Withernam; and this appears by the Nature and Form of the Writ of Second Deliverance.

Dyer 41. Dalt. Sh. 275. If a *returno habendo* be awarded to the Sheriff after a Writ of Second Deliverance prayed by the Plaintiff, this is a *Superſedeas* to the *returno habendo*, and cloſes the Sheriff's Hand from making any Return thereto; and if the Sheriff will not execute the Writ of Second Deliverance, the Party has his Remedy againſt him.

Plow. 206. This Statute of *Weſtm.* 2. 13 *Ed.* 1. *ſtat.* 1. gives the Writ of Second Deliverance out of the ſame Court, where the firſt Replevin was granted, and a Man cannot have it elſewhere; for if he may, then he ſhall (*b*) vary from the Place limited as to this by the Statute.

(*b*) That the Writ of Second Deliverance cannot vary from the firſt in Year, Day, Place, or Number of Beaſts. *Bro.* Tit. *Second Deliverance* (3). But if the firſt Writ was of a Heifer, the ſecond may be of a Cow, as by Preſumption it may in that Diſtance of Time grow to ſuch. 26 H. 8. pl. 7.

*Page 381 Salk. 95. pl. 6. and like Point adjudged. Palm. 403. Latch 72. * In Replevin the Defendant avowed, and the Plaintiff being nonſuited brought a Writ of Second Deliverance, whereupon it was moved to ſtay the Writ of Inquiry of Damages; & *per Curiam*, this is a *Superſedeas* to the *Returno habendo*, but not to the Writ of Inquiry of Damages; for theſe Damages are not for the Thing avowed for, but are given by

by the Statute of 21 *H.* 8. *cap.* 19. as a Compenſation for the Expence and Trouble the Avowant has been at.

Error of a Judgment in *C. B.* in a ſecond Deliverance; upon Demurrer in Pleading the Error aſſigned was, becauſe there was not any Writ of ſecond Deliverance certified, and *In nullo eſt erratum* being pleaded, it was moved not to be material, becauſe it is awarded on the Roll, and the Parties had appeared and pleaded to it; but it was adjudged ill, and reverſed for that Cauſe; for there ought to be a Writ, and if it vary from the Declaration in the Replevin, it ſhall be abated. Cro. Jac. 424. *Newman* v. *Moor.*

No Second Deliverance lies after a Judgment upon a Demurrer, or after a Verdict, or Confeſſion of the Avowry; but in all theſe Caſes the Judgment muſt be entered with a Return irrepleviſeable; but upon a Nonſuit, either before or after Evidence, a Writ of Second Deliverance will lie, becauſe there is no Determination of the Matter, and there a Writ of Second Deliverance lies to bring the Matter in Queſtion; but in the Caſe of a Demurrer and Verdict the Matter is determined by Law; and in the Caſe of a Confeſſion it is determined by the Confeſſion of the Party. 2 Lill. Reg. 457.

If the Plaintiff's Writ abates, he may have a new Writ, and is not put to his Writ of Second Deliverance. Com. 122. pl. 85.

Note, by the 17 *Car.* 2. *cap.* 7. that in an Avowry for Rent the Writ of Second Deliverance is taken away. 2 Ld. Raym. 188.

If the Plaintiff in Replevin be non-ſuited for Want of delivering a Declaration, if it happened thro' any Cauſe that would have intitled him to a Writ of Second Deliverance, as Sickneſs of the Perſon employed, *&c.* the Court will order the Defendant to accept of a Declaration on Payment of Coſts; otherwiſe the Plaintiff would be remedileſs, the Writ of Second Deliverance being taken away by the 17 *Car.* 2. *cap.* 7. Vent. 64.

4. Of the Writ *de Proprietate probanda*, and the Claim of Property.

If the Defendant in Replevin claims Property, the Sheriff cannot proceed; for Property muſt be tried by Writ; and in this Caſe the Plaintiff may have the Writ *de Proprietate probanda* to the Sheriff; and if it be found for the Plaintiff, then the Sheriff is to make Deliverance; if for the Defendant, then he is to proceed no further; but as this is but an Inqueſt of Office, if it be found againſt the Plaintiff, he may have a Replevin to the Sheriff; and if he return the Claim of Property, yet ſhall it proceed in the *C. B.* where the Property ſhall be put in Iſſue and finally tried. Co. Lit. 145. b. F. N. B. 77. Dyer 173. Com. 592.

None but he who is Party to the Replevin ſhall have the Writ *de Proprietate probanda*; ſo that if upon a Replevin the Beaſts of a Stranger are delivered to the Plaintiff, ſuch Stranger, being no Party to the Replevin, ſhall not have this Writ. 14 H. 4. 25. 2 Rol. Abr. 431.

The Sheriff is to return the Claim of Property on the *Pluries*, before which Time the Writ *de Proprietate probanda* does not iſſue, for it recites the *Pluries*. *Reg.* 83. Com. 595.

The Writ *de Proprietate probanda* is an Inqueſt of Office, and the Sheriff is to give Notice to the Parties of the Time and Place of executing of it. Dalt. Sh. 274.

* If the Defendant claims Property in Replevin, the Plaintiff may have the Writ *de Proprietate probanda* without Continuance of the Replevin, tho' it be two or three Years after, becauſe by the Claim of Property the firſt Suit is determined. *Page 382 Moor 403.

If

7 H. 4. 46. Com. Rep. 594. If the Party who hath the Cattle claims Property, the Sheriff cannot determine it without a Writ *de Proprietate probanda*; and then, if the Property be found for the Party claiming it, it is but an Inqueſt of Office, and the Party who made the Plaint may after ſue a Writ of Replevin, to which Property may again be pleaded.

Cro. Eliz. 475. Winch 26. Show. 402. Salk. 5. pl. 12. 94. pl. 3. If the Plaintiff has Property, and omits to claim it before the Sheriff, he may notwithſtanding plead Property in himſelf or in a Stranger, either in Abatement or in Bar, tho' it was formerly held, that Property in a Stranger could only be pleaded in Abatement. 2 Ld. Raym. 984. 6 Mod. 81.

Comb. 477. *Barret* v. *Scrimſhaw.* In Replevin the Defendant in his Avowry pleads, that the Beaſts taken belong to a third Perſon, and not to the Plaintiff, and therefore prays a Return; to which the Plaintiff demurs; for on the Avowant's own ſhewing he ought not to have Return, having admitted the Property of the Beaſts to be in another; but Judgment was given for the Defendant, for the prior Poſſeſſion was in him, and he hath a Right againſt all others but the right Owner, and the Plaintiff by his Demurrer hath admitted, that he hath no Property in them.

6 Mod. 68. 139. *Leonard* v. *Stacy*, and *vide* 2 Mod. 242. In Treſpaſs for entering the Plaintiff's Houſe, and taking away his Goods, the Defendant juſtifies by Virtue of a Replevin out of the Sheriff's Court in *London*, and a Precept thereupon to *J. S.* an Officer, and that he the Defendant came in Aid of him; Plaintiff replies, that before the Taking away the Goods he claimed Property in them, and gave Notice thereof to the Defendant; and the Queſtion upon a ſpecial Verdict was, whether the Taking away, after the Claim of Property, and Notice thereof, did not make him a Treſpaſſer *ab initio?* And it was held *per tot. Cur.* that he was a Treſpaſſer *ab initio*; for tho' the Claim ought to be to the Sheriff or Officer, and that a Claimer to a Perſon that comes to his Aſſiſtance be not enough to the making the Execution legal, if the Officer does not deſiſt; yet if it be notified to him that comes in Aid, that Claim of Property is made, he at his Peril ought to deſiſt.

5. Of the Writ *de returno habendo.*

35 H. 6. 40. Dyer 280. Co. Lit. 145. The *Returno habendo* is a Judicial Writ, that lies for him who has avowed the Diſtreſs, and proved the ſame to be lawfully taken; or where, upon the Removal of the Plaint into the Courts above, the Plaintiff, whoſe Cattle were replevied, makes Default, or does not declare or proſecute his Action, and thereby becomes nonſuited, *&c.* and by this Writ the Sheriff is commanded to make a Return of the Cattle to the Defendant in the Replevin.

Co. Ent. 59. A Bailiff who makes Conuzance may have Judgment of a Return, and conſequently a Writ *de returno habendo* grounded on ſuch Judgment.

2 Rol. Abr. 433. The Writ *de returno habendo* is not a returnable Proceſs.

F. N. B. 172. If the Defendant hath a Return awarded to him, and he ſueth a Writ *de returno habendo*, and the Sheriff return on the *Pluries*, *quod Averia elongata ſunt*, *&c.* he ſhall have a *Scire Facias* againſt the Pledges, *&c.* according to the Statute of *Weſtm.* 2. (13 *Ed.* 1. *ſt.* 1.) and if they have Nothing, then he ſhall have a *Withernam* againſt the Plaintiff's own Cattle.

* 6. Of Returns irrepleviſeable. *Page 383

Return irrepleviſeable is a Judicial Writ directed to the Sheriff for the final Reſtitution or Return of Cattle unjuſtly taken by another, and ſo found by Verdict, or after a Nonſuit in a Second Deliverance. 2 Rol. Abr. 434.

If the Plea be to the Writ, or any other Plea be tried by Verdict, or judged upon Demurrer, Return irrepleviſeable ſhall be awarded, and no new Replevin ſhall be granted, nor any Second Deliverance by the Act of *Weſtm.* 2. (13 *Ed.* 1. *ſt* 1.) but only upon a Nonſuit. 2 Inſt. 340. Dyer 280.

If upon Iſſue joined in Replevin the Plaintiff does not appear on the Trial, being called for that Purpoſe, yet Return irrepleviſeable ſhall not be awarded, as in Caſe of a Verdict's being given, but the Party may have a Writ of Second Deliverance, as well as if it had been a Nonſuit before Declaration or Appearance. 3 Leon. 49.

If a Man has Return irrepleviſeable, and a Beaſt die in the Pound, he may diſtrain anew; ſo if the Beaſt die before Judgment. Hob. 61.

If Return irrepleviſeable be awarded, the Owner of the Cattle may offer the Arrearages; and if the Defendant refuſes to deliver the Diſtreſs, the Plaintiff may have Detinue, becauſe the Diſtreſs is only in Nature of a Pledge. Ld. Raym. 720.

7. In what Manner the Sheriff is to execute and return ſuch Proceſſes.

By the Statute of *Weſtm.* 1. (3 *Ed.* 1.) *cap.* 17. if the Party who diſtrains, conveys the Diſtreſs into any Houſe, Park, Caſtle, or other Place of Strength, and refuſes to ſuffer them to be replevied, the Sheriff may take the *Poſſe Com.* and on Requeſt and Refuſal may break open ſuch Houſe, Caſtle, *&c.* and make Deliverance; and this was a neceſſary Law ſo ſoon after the irregular Time of *H.* 3. 2 Inſt. 193. 5 Co. 93. Dalt. Sh. 373.

If the Sheriff returns, that the Beaſts are incloſed in a Park among Savages, or in a Caſtle, *&c.* he ſhall be amerced, and another Writ of Replevin ſhall be awarded; for he ought to have taken the *Poſſe Com.* for this was a Denial. F.N.B. 157. *Hale's* Notes.

If the Sheriff return, *quod Mandavi Ballivo Libertatis, &c. qui nullum dedit mihi reſponſum*, or that the Bailiff will not make Deliverance of the Cattle, theſe are not good Returns; for, by the ſaid Statute *Weſtm.* 1. (3 *Ed.* 1.) the Sheriff, upon ſuch Return made to him by the Bailiff, ought preſently to enter into the Franchiſe, and make Deliverance of the Cattle taken. F.N.B. 157.

If a Man ſue a Replevin in the County Court without Writ, and the Bailiff return to the Sheriff, that he cannot have View of the Cattle to deliver them, the Sheriff by Inqueſt of Office ought to inquire into the Truth thereof; and if it be found by a Jury, that the Cattle are eloigned, *&c.* the Sheriff in the County Court may award a Withernam to take the Defendant's Cattle; and if the Sheriff will not award a Withernam, then the Plaintiff ſhall have a Writ out of Chancery directed unto the Sheriff rehearſing the whole Matter, commanding him to award a Withernam, *&c.* and he may have an *Alias*, and after a *Pluries*, and an Attachment againſt the Sheriff, if he will not execute the King's Command. F.N.B. 158.

If the Sheriff return, *quod Averia elongata ad loca incognita*, this is a good Return, and the Party muſt purſue his Writ of *Withernam*; but, if the Sheriff return *Averia elongata ad loca incognita infra Comitatum meum*, Bro. *Retur. de Br.* pl. 100.

Page 384 *meum*, he ſhall be amerced, for the Law intends that he may have Notice in his County.

Bro. *Retur. de Br.* pl. 125. If in Replevin the Sheriff return, *quod Averia mortua ſunt*, this is a good Return.

Dalt. Sh. 556. (a) Allen 33. It is a good Return, *quod nullus venit ex parte querentis ad demonſtranda Averia*; (a) but it ſeems the Sheriff is not obliged to require this.

2 Rol. Abr. 552. Com. Rep. 596. (b) Keilw. 119. If the Sheriff be ſhewn a Stranger's Goods, and he takes them, an Action of Treſpaſs lies againſt him, for otherwiſe he could have no Remedy; for being a Stranger he cannot have the Writ *de Proprietate probanda*, and were he not intitled to this Remedy, it would be in the Power of the Sheriff to ſtrip a Man's Houſe of all his Goods; but (b) *Keilw.* ſeems to hold, that the Action lies more properly againſt the Perſon who ſhews the Goods.

20 H. 6. 28. 2 Rol. Abr. 552. If the Sheriff comes to make Replevin of Beaſts impounded in another Man's Soil; if the Place be incloſed, and has a Gate open to the Incloſure, he cannot break the Incloſure, and enter thereby, where he may enter by the open Gate; but if the Owner hinders him, ſo that he cannot go by the open Gate for fear of Death, he may break the Incloſure and enter there.

Ld. Raym. 613. Latw. 581. The Sheriff is to return, that the Cattle are eloigned, or that no Perſon came to ſhew, &c. or a Delivery; but he cannot return, that the Defendant *non cepit* the Cattle, becauſe it is ſuppoſed in the Writ, and is the Ground of it, which the Sheriff cannot falſify.

(F) Of what Property, and for what Things a Replevin lies.

Co. Lit. 145. IT is a general Rule, that the Plaintiff ought to have the Property of the Goods in him at the Time of Taking; yet if the Goods of a Villain be diſtrained, the Lord of the Villain ſhall have a Replevin, becauſe the Bringing the Replevin amounts to a Claim in Law, and veſts the Property in the Plaintiff; but in this Caſe, if the Goods of a Villain be taken by a Treſpaſſer who claims Property in them, the Lord can have no Replevin, becauſe the Villain had but a Right.

Co. Lit. 145. Alſo in a ſpecial Caſe one may have a Replevin of Goods, tho' they were not diſtrained; as if the Meſne put in his Cattle in Lieu of the Cattle of the Tenant Peravail, whom he is bound to acquit, he ſhall have a Replevin of them.

F. N. B. 69. If the Lord diſtrains his Tenant's Cattle wrongfully, and afterwards the Cattle return back to the Tenant, yet the Tenant ſhall have a Replevin againſt the Lord for thoſe Cattle, and ſhall recover Damages for the wrongfully diſtraining of them, becauſe he cannot have an Action of Treſpaſs againſt his Lord § for that Diſtreſs, but againſt a Bailiff or Servant he may.

§ *Qu.* If this does not mean a *Villein*, and not a free Tenant.

Co. Lit. 145. (c) Winch 26. Not only a general Property which every Owner hath, but alſo a ſpecial Property, ſuch as a Perſon has, who hath Goods pledged to him, or who hath the Cattle of another to manure his Lands, &c. is ſufficient to maintain a Replevin (c), and ſuch like Caſes either Party may bring a Replevin.

A Re-

A Replevin does not lie of Things which are *Feræ Naturæ*, as Conies, Hares, Monkies, Dogs, *&c.* but if Thing's wild by Nature are * made tame, or are reclaimed, ſo long as they continue in that Condition, they belong to the Perſon who has the Poſſeſſion of them, and he may bring a Replevin; and the general Rule herein ſeems to be, that a Replevin lies for any Thing that may by Law be deſtrained. *Page 385 2 Rol. Abr. 430. Godb. 124. 4 Co. 54.

A Replevin lies of a *Leveret*; for it has *Animum revertendi*; ſo and for the ſame Reaſon it lies of a *Ferret*; but it is ſaid not to lie for a Maſtiff-Dog, though an Action of Treſpaſs will. Bro. Repl. 64. 2 Rol. Abr. 430.

Replevin lies of a Swarm of Bees. F. N. B. 68.

Replevin does not lie of Trees, or Timber growing; nor of Things annexed to the Freehold, becauſe ſuch Things cannot be diſtrained; but a Replevin lies of certain Iron belonging to the Party's Mill. F. N. B. 68.

So Replevin does not lie of Deeds or Charters concerning Lands; for they are of no Value, but as they relate thereto. Bro. *Repl.* 34.

Replevin lies not of Money, nor of Leather made into Shoes. Moor 394. 2 Brownl. 139.

If a Mare in Foal, a Cow in Calf, *&c.* are diſtrained, and they happen to bring forth their Young whilſt they are in the Cuſtody of the Diſtrainer, a Replevin lies of the Foal, Calf, *&c.* Bro. *Repl.* 41. F. N. B. 69. Sid. 82.

Replevin lies for a Ship; ſo of the Sails of a Ship. March 110. Raym. 232.

It was ruled by *Pollexfen* Ch. J. upon Evidence at *Guildhall* in Replevin for Goods taken by Order of the *Eaſt-India* Company from Interlopers in the *Indies*, that no Replevin lies for Goods taken beyond the Seas, though brought hither by the Defendant afterwards. ‡ Show. 91.

‡ In thoſe Caſes where Replevin will not lie the Party may bring an Action of Detinue to recover the Deeds, Goods, *&c. in Specie.*

(G) Replevin, for and againſt whom it lies.

HEREIN the general Rule is, that he who brings a Replevin, muſt have a general or ſpecial Property in him at the Time, and that therefore a Lord for a Heriot, a Parſon for a Mortuary, ſhall not have it before Seiſure; for the Seiſure veſts the Property in ſuch Caſes. Plow. 281. Co. Lit. 145.

An Executor ſhall have a Replevin of the Taking of Beaſts in the Life-time of his Teſtator; for this affirms the Property to remain. Bro. *Repl.* 59. Sid. 82.

If the Cattle of a Feme Sole be taken, and afterwards ſhe marries, the Huſband alone may have a Replevin; but it hath been held, that in ſuch Caſe the Wife cannot join, for that this Action admits and affirms Property in the Feme at the Time of the Marriage, which by Conſequence muſt have veſted in the Huſband. F. N. B. 69. Vent. 261. 2 Lev. 107. Sid. 172.

But of the Taking of Goods which a Feme has as Executrix, the Huſband and ſhe may join in Replevin. Bro. *Bar. & Fem.* pl. 85.

And in a late Caſe where Huſband and Wife brought a Replevin, and concluded their Declaration *ad Damnum ipſorum*, Defendant avowed for Rent in Arrear on a Demiſe for Years; Plaintiff in Bar of the Avowry pleaded *Non demiſit*, and Iſſue being joined on the Demiſe, a Verdict was found for the Plaintiffs, and 1 *s.* Damages; and in Arreſt of Judgment two Objections were made, firſt, that Huſband and Wife cannot join in Replevin; 2dly, that tho' they might join in an Action, Paſch. 8 G. 2. in *B. R.* *Bourne & Ux'* v. *Mataire.* 2 Stra. 1015. S. C. but not S. P.

yet it cannot be laid to the Wife's Damage, ſhe having no Property in Perſonal Chattels during the Coverture; and in Support of theſe Exceptions were cited *F. N. B.* 69. 1 *Sid.* 172. becauſe Replevin admits and affirms Property in the Wife at the Time of the Marriage, which muſt neceſſarily veſt in the Huſband; and the Court can make no Intendment, that they were Jointenants before Coverture, or that the Feme had the Goods as Executrix: but *per Cur.* As to the firſt Exception, tho' it be generally true, that Huſband and Wife cannot have a joint Property in Perſonal Chattels after Marriage; yet, as a Man and a Woman may have a joint Property before Marriage, or the Wife might have theſe Goods as Executrix, and the Taking in both Caſes might be before Marriage, we do not ſee why they may not declare jointly in an Action for ſuch Taking; and, if the Law will admit of ſuch a joint Action, the Fact is admitted by the Pleading; for, the Defendant has not made it a Point of Conteſt with the Plaintiff, whoſe the Property was at the Time of Taking; and therefore if there can be a Caſe where Huſband and Wife may join in an Action for a Perſonal Chattel, we think, that after a Verdict this ought to be intended that Caſe. As to *F. N. B.* 69. the Book ſays, the Huſband may have a Replevin ſingly; but this does not prove he may not join his Wife with him. And as to 1 *Sid.* 172. we think the Diſtinction there made not Law, and that it is not neceſſary the Huſband ſhould ſue alone in ſuch Caſes as affirm a Property; but this is expreſsly contrary to the Year Books, and to the Opinion in 1 *Vent.* 261. where it is held, they may join in Detinue, which affirms Property as well as Replevin; for the ſpecific Goods there are to be recovered. And as to the ſecond Exception, this muſt follow the Fate of the firſt; for if the Tort preceded the Marriage, the Action would ſurvive; and *Cro. Eliz.* 259 is expreſs, that where Damages may ſurvive, they may be aſſeſſed to both.

*Page 386

2 Rol. Abr. 431. If *A.* takes Beaſts by the Command of *B.* the Replevin may be brought againſt both, or it may be brought againſt the Commander only, as Treſpaſs may be.

Co. Lit. 145. 5 Co. 19. a. 38. b. If the Beaſts of ſeveral Men be diſtrained, they cannot join in a Replevin; ſo it is a good Plea to ſay, that the Property is in the Plaintiff and a Stranger, and where there be two Plaintiffs, that the Property is in one.

(H) Of the Declaration in Replevin.

Cater 218. Co. 45. IT hath been holden by ſome Opinions, that the Count or Declaration in Replevin muſt be certain and particular in ſetting forth the Numbers, Kinds and Qualities of the Cattle or Things diſtrained; for that otherwiſe the Sheriff cannot tell how to make Deliverance of the ſame.

Allen 33. Sid. 71 S. C. *More* v. *Cliptam.* As in Replevin the Plaintiff declared, that the Defendant took *centum Oves Matrice & Verveces* of the Plaintiff's; after Verdict for the Plaintiff Exception was taken to the Declaration, becauſe it did not appear in the Declaration how many Ewes and how many Wethers; and the Sheriff is bound to make Deliverance of either Sort according to the Writ; and though he may be informed by the Party; ſo that it is a good Return to ſay, that none came on the Behalf of the Party to ſhew the Beaſts, yet he is not bound to require it, but ought to have ſufficient Certainty within the Record and therefore Judgment was given for the Defendant;

Defendant; but it was agreed, that *Owes* without Addition had been good enough.

But notwithſtanding this Caſe, it ſeems to be now ſettled, that a Declaration in Replevin being certain to a general Intent is ſufficient, eſpecially if it be after a Verdict. 7 Co. 25. Show. 170.

* As where a Replevin was brought *quare Defend' cipit bona & catalla, (viz.) quandam parcell' lintei & quandam parcell' Papiri*, Defendant avowed for Rent; and after Verdict for the Plaintiff Exception was taken in Arreſt of Judgment, that the Declaration was uncertain in not ſpecifying the Quantities contained in the Parcels, and *Parker* Ch. J. who delivered the Opinion of the Court, ſaid, that the Declaration would undoubtedly have been ill on Demurrer; but that the Defendant having avowed the Taking the Goods in the Declaration, the Avowry had cured the Defect, as thereby both Parties were agreed what the Goods were; and the Defendant himſelf having prayed a Return of them, there was no Controverſy between him and the Plaintiff about them; and to oblige the Plaintiff to a greater Certainty, would have been of no Service to the Defendant; for if he had demanded 500 Reams of Paper, and proved only one, he muſt recover; and as to the Difficulty of Delivering the Goods upon a *Keturno habendo*, he ſaid there was no Weight in that Objection; for the Sheriff, when he came to make a Return, might have the Defendant's Aſſiſtance to ſhew him which were the Goods; and he was not obliged to execute the Writ without Somebody attended to point out the Things he was to deliver; and in this Caſe that of *Allen* 33. was fully conſidered, and over-ruled. * Page 387 Trin. 1 Geo. 1. in B. R. *Kempſton* v. *Neljon*.

So in the Caſe beforementioned of *Bourne* verſus *Mattaire*, where a Replevin was brought for 14 Skimmers and Ladles; and the Objection that the Plaintiff had not diſtinguiſhed in his Count how many Skimmers and how many Ladles, was over ruled. 2 Stra. 1015. Paſch 8 Geo 2. in B. R. *Bourne & Ux.* v. *Mattaire*.

The Plaintiff in his Count muſt alledge the Taking to be at a certain Place, or according to the Precedents, *in quodam loco vocat'*, that the Defendant may have Notice to what he is to anſwer, and make his Title; and therefore the Alledging the Taking *apud Dale*, or ſuch a Vill, is too general and uncertain. Cro. Eliz. 896. *Ward* v. *Saville*. Godb. 186. Brownl. 176. *et vide* Hob. 16. Moor 678. Raym. 34. Carth. 196.

In Replevin both the Vill and Place are traverſable.

A Man may count of ſeveral Takings, Part at one Day and Place, and Part at another Day and Place. F. N. B. 68. in the Notes to the new Edition.

In Replevin the Plaintiff counted of four Oxen taken at divers Times and Places, and that Delivery was made of two, but the other two were with-held to his Damage 10 *s.* and this was held ſufficient without any Severance made as to the Damages. *Bro.* Tit. *Damages* 42.

In Replevin in *T.* the Plaintiff declared the Taking of twenty Beaſts in *A.* and *B.* & *per Cur.* he need not ſhew how many he took in one Vill, and how many in another. Bro. *Repl.* 48.

The Count, as in other Actions, muſt agree with the Writ; ſo that if the Writ is *de Averiis*, and the Count *de Averiis & Catallis*, this is ill. 3 Keb. 671. *vide* Tit. *Pleadings*.

In Replevin the Writ was in the *Detinet*, and the Count in the *Detinuit*, and this was thought to be a material Variance; for in Replevin in the *Detinet* the Plaintiff recovers as well the Value of the Goods, as Damages for Taking; but when the Writ and Count are, that the Defendant *detinuit* the Goods againſt Pledges, &c. by this it is implied, that the Plaintiff has had his Goods again; and for this he ſhall only recover Damages for the Taking; but the Parties agreed to amend. 2 Lutw. 1154.

*Page 388

* (I) Pleas in Replevin.

Vide 9 Co. 134.

PLEAS in Replevin are generally of four Kinds; *viz.* either, first, Pleas in Bar; 2d, In Juſtification; 3d, By Way of Conuzance; 4th, By Way of Avowry.

3 Lev. 205. 2 Keb. 729.

In Replevin the Defendant may either juſtify or avow at his Election, with this Difference, that if he juſtifies, he cannot have a Return.

Vent. 249.

The general Iſſue in Replevin is *Non cepit*.

2 Lev. 92. Vent. 249. Salk. 594. 6 Mod. 81, 103. 2 Ld. Raym. 984.

If the Defendant in Replevin claim Property to himſelf, or a Stranger, above, as he may do; though it ought to have been before the Sheriff, this does not amount to the general Iſſue, but may be pleaded in Bar or Abatement; and if the Plaintiff demur, the Defendant ſhall have a Return without avowing; for it appears the Beaſts are not the Plaintiff's; but on Iſſue *Non cepit*, Property cannot be given in Evidence, for that were contrary to it.

Cro. Eliz. 14. Vent. 314. 2 Lev. 210. & *vide* 3 Lev. 20.

If the Defendant in Replevin make Conuzance as Bailiff to *J. S.* the Plaintiff cannot traverſe that he is his Bailiff; for it is a Matter of which by no Intendment he can have Knowledge; but if in Bar of the Avowry the Plaintiff pleads, that another had made Conuzance as Bailiff to *J. S.* for the ſame Cauſe, and was barred, he need not ſhew that it was with the Privity of *J. S.* for it ſhall be intended; and if in Truth it was without, the Defendant may traverſe his being ever his Bailiff; but the Law is, that the Plaintiff in Replevin may traverſe his being Bailiff.

Salk. 107. pl. 1. 409. 2 Rol. Abr. 433. Show. 169. cited.

In a Replevin againſt the Maſter and Bailiff or Servant, if the Bailiff makes Conuzance as Bailiff, and the Maſter pleads, that he did not take, the Servant ſhall not have any Return upon his Conuzance; for by the Plea of the Maſter his Conuzance is changed into a Juſtification.

Sid. 81. *Arundell* v. *Trevil.*

In Replevin for Mare and Colt the Defendant pleaded Not guilty of the Taking within ſix Years; and in Support of this Plea it was inſiſted upon, that it was the ſame in Effect with the Plea of *Non cepit*, and that if the Statute of Limitations had deſtroyed the Plaintiff's Action as to the Taking, the Defendant could not be guilty of the Detaining; and if this were not to be allowed, the Statute would be evaded, and could never be a Bar in Replevin; but *per Cur.* the Plea is not good in not anſwering to the Detainer; for it might happen, that at the Time of Taking the Mare the Colt was not in Being, but might have foaled in the Pound; and a Thing may be lawfully diſtrained, but unlawfully detained, as by being put into a Caſtle, *&c.*

6 Mod. 103. Com. Rep. 122. pl. 85. Vent. 137.

Priſel in auter Lieu is only Matter in Abatement, and the Plaintiff may have a new Writ without being put to his Second Deliverance.

In Replevin of Beaſts taken at *D.* the Defendant pleads in Abatement, that they were taken at another Place, *abſque hoc*, that they were taken at *D.* and *pro returno habendo* avows for Rent on a Leaſe for Years, *&c.* the Plaintiff replies and traverſes the Leaſe, *&c.* this is ill; for though the Defendant, when he pleads in Abatement, muſt alſo avow to have a Return, yet the Plaintiff cannot anſwer to it, but muſt take Iſſue on the other Matter.

* (K) Avowries in Replevin; and herein of what Seiſin and Services, and of the Certainty required therein.

* Page 389

AN Avowry, as has been before obſerved, is the ſetting forth, as in a Declaration, the Nature and Merits of the Defendant's Caſe; and the ſhewing that the Diſtreſs taken by him was lawful, and which muſt be done with ſuch ſufficient Certainty as will intitle him to *Returno habendo*; but the Caſes on this Head are of ſuch different Natures, that it is difficult to range them in any Order; and as the Niceties herein are in many Inſtances remedied by late Acts of Parliament, it may be ſufficient to take Notice of thoſe that follow. *Vide* Danv. 510. 2 Co. 25. 9 Co. 20. 8 Co. 64. Vent. 99. Cro. Jac. 160. Dyer 280.

In an Avowry for a Diſtreſs for Rent, the Avowant was to ſhew a Seiſin, and ſuch Seiſin by the Statute 32 *H* 8. *c.* 2. muſt be *(a)* alledged within 40 Years next before the making of the Avowry or Conuſance. Co. Lit. 268.

(*a*) And tho' by the Statute of 21 H. 8. c. 19. the Lord need not avow upon any Perſon in certain, yet he muſt alledge Seiſin by the Hands of ſome Tenant in certain, within 40 Years. Co. Lit. 65.

If a Man makes a Gift in Tail, rendering Rent, he may avow without laying any Seiſin, becauſe the Reverſion gives him a ſufficient Privity, and he ſhall count upon the Reſervation, for that is his Title; and where the Commencement of the Rent appears, Seiſin is not material. Bro. *Avowry* 52. Rol. Abr. 314. 8 Co. 65.

If *A.* by Deed indented makes a Feoffment in Fee to *B.* and his Heirs, rendering 10*s. per Ann.* to *A.* and his Heirs, of which Rent *A.* or his Heirs have not been ſeiſed within 40 Years, yet the Heirs of *A.* may diſtrain, *&c.* for the Statute muſt be intended in ſuch Caſes only, where before the Statute the Avowant was obliged to alledge a Seiſin, and that was where the Seiſin was ſo material, and of ſuch Force, that though it was by Incroachment, yet it could not be avoided in an Avowry. 8 Co. 64. Brownl. 169. *Cooper* v. *Foſter.*

So this Statute extends not to a new Rent created by Act of Parliament. Cro. Car. 80. Jon. 233.

If Homage be done to the Lord, he may avow for all other Services ſuperior, as well as inferior, for in doing thereof the Tenant takes upon himſelf to do all other Services. 4 Co. 8.

Seiſin of Rent, Suit, *&c.* which is annual, is a ſufficient Seiſin of Eſcuage, Homage, Fealty, Heriot Service, Service to cover the Hall, and ſuch other Services as may not fall in 40 Years. 4 Co. 8. *Bevil's* Caſe. 3 Lev. 21. S. P.

But Seiſin of one annual Service is no Seiſin of another annual Service; for in that Caſe it is the Folly of the Lord if he hath not an actual Seiſin of the other Service itſelf, when it becomes due yearly. 4 Co. 9.

If the Avowant alledge a Seiſin of the Rent, this is a ſufficient Averment that he was ſeiſed of Homage. Winch 31. Hutt 50.

If there be Lord and Tenant by Fealty and Rent, and the Tenant makes a Leaſe for Years, and though the Leſſor hath done Fealty and conſtantly paid the Rent, yet the Lord diſtrains the Cattle of the Leſſee for Rent, (where in Truth none is due) and avows upon a meer Stranger that never had any Thing, as upon his very Tenant, for Rent arrear; upon the ſpecial Matter ſhewn the Leſſor may join in Aid to the Leſſee, and abate the Avowry, and compel the Lord to avow upon his Tenant in Right and in Law. 9 Co. 20, 21. 2 Mod. 103. S. C. cited.

If

*Page 390 Rol. Abr. 318. Cro. Jac. 442. *Wiſe* v. *Bennet*; & *vide* Mod. 273. 2 Saund. 197. 5 Mod. 73.

* If there be Leſſee for Years, and the Reverſion deſcends on a Feme Covert, and after the Rent is arrear, and the Baron diſtrains, and the Leſſee brings a Replevin, the Baron ought to avow in the Name of himſelf and his Wife, and not in the Name of himſelf only, for the Avowry is to be made according to the Reverſion which is in the Feme. This Caſe, as reported in *Roll*, a *Quære* is made how this could be made good; but in *Cro. Jac.* S. the Reaſon is given, becauſe he had ſhewed the Truth of the Matter as it was, and had averred the Life of the Feme, and ſo the Diſtreſs well taken, and the Rent due to him; it was adjudged that the Avowry was good.

Vide Title *Jointenants*, Ld. Raym. 64.

Coparceners are to join in an Avowry for Rent; ſo of Jointenants, but Tenants in Common are to ſever in their Avowries.

Rol. Abr. 320. Jon. 253. Cro. Eliz. 530.

So one Tenant in Common cannot avow the taking the Cattle of a Stranger upon the Land Damage-feaſant, without making himſelf Bailiff or Servant to his Companion.

Cro. Eliz. 530.

A Commoner may avow the taking the Cattle of a Stranger upon the Common Damage feaſant, though he can have no Action of Treſpaſs.

8 Co. 64. Sir *William Foſter*'s Caſe.

Executors and Adminiſtrators may diſtrain and avow in like Manner, as their Teſtators or Inteſtates might have done, by the Statute 32 *H.* 8. *c.* 37.

Cro Eliz 547. Co. Lit. 162.

If Executors by the 32 *H.* 8. *(c.* 37.) avow for the Arrears of a Rent in Fee accrued to their Teſtator, they muſt ſhew that the Land continues in the Seiſin of a Tenant who ought to have paid it, or in the Hands of ſome other who claims by or from him, according to the Statute.

5 Co. 19.

In Replevin againſt two they make ſeveral Avowries, *each in his own Right*, and both Avowries abated; for, if both the Iſſues ſhould be found for the Avowants, the Court could not give Judgment ſeverally for the ſame Thing.

Vent. 250.

If one diſtrain for Rent, and before the Avowry the Eſtate on which it is reſerved determines, the Avowry ſhall be as if the Eſtate on which it was reſerved had continued, for the Avowant is to have the Rent notwithſtanding; but if the Diſtreſs were for a Perſonal Service, then the Defendant muſt have a ſpecial Juſtification, for he cannot have the Service in *Specie* when the Eſtate is determined.

Cro. Car. 260. *Major* v. *Brandwood*. Hutt. 176.

Replevin of an Ox taken, *&c.* the Defendant makes Conuſance as Bailiff to *J. S.* for that he was ſeiſed in Fee of the Manor of *D.* and that one *D.* was ſeiſed in Fee of ſuch a Tenement holden of the ſaid Manor by Rent and Heriot Service, payable after the Death of the Tenant, and that *D.* died poſſeſſed *de animalibus et Cattallis*, and becauſe the Heriot was not paid, he, by the Command of the ſaid *J. S.* diſtrained, and ſo made Conuſance, and the Iſſue was upon the Tenure, and found for the Defendant; and an Exception was taken in Arreſt of Judgment, becauſe he does not ſhew what was the beſt Beaſt which he demanded, nor the Kind thereof, nor the Price of it. But *per Cur.* the Avowry was held to be good; for peradventure the Avowant does not know what was the beſt Beaſt; and when the Lord diſtrains it is becauſe the Heriot is eloigned, and the Plaintiff having done wrong by his Eloignment, he at his Peril ought to tender ſufficient Recompence.

Hob. 176.

But when the Defendant avowed for a Heriot Service, and the Plaintiff pleaded in Bar, that the Tenant at the Time of his Death *nulle habet animalia*; and on Demurrer it was adjudged for the Plaintiff, becauſe the Avowry was inſufficient, for that it did not alledge in certain what the Heriot ſhould be, *ſcil.* Beaſt or other Thing.

In

* In Replevin, and the Title was by a Leaſe made by a Parſon, and the Avowry was, that *A.* was ſeiſed of the Rectory of *H.* and made the Leaſe without ſhewing that he was Parſon; and by the Court that would have been a good Exception, had it not been ſaid in the Avowry, that he was ſeiſed *in Juræ Eccleſiæ*, which ſupplies all. *Page 391 Noy 70. *Bold* v. *Waters.*

If one avows for Parcel of a Rent, and does not ſhew how he was ſatisfied as to the Reſidue, this has been held to be ill; in like Manner it has been ſaid that an Avowry for Part of an Annuity, without ſhewing how the Reſt has been diſcharged, is ill. Cro. Car. 104. Comb. 346. & *vide* 1 Ld. Raym. 154, 644.

If *A.* holds Lands of *B.* by certain Rent, and of his Manor of *D.* and *A.* conveys thoſe Lands to the King, who grants them to *J. S.* in an Avowry for this Rent, *B.* muſt ſet forth the ſpecial Matter, and not avow generally, becauſe the Place where, *&c.* is held of him as of his Manor of *D. &c.* for this is no Rent-Service, but Rent diſtrainable of common Right; adjudged upon a Demurrer, and that ſuch general Avowry was naught in *(a)* Subſtance, and not to be amended. And. 159, 160. *Broker* v. *Smith.*

(a) For the ſeveral Forms of an Avowry, *vide* Co. Lit. 269.——*bene Advocat, &c.* for *bene Cognovit, &c.* but Matter of Form, Jenk. 338. Cro. Jac. 372.——*Adhuc aretro exiſtit*, but Matter of Form, Cro. Jac. 283. Dalſ. 72.—*bene Cognoſcit cap. pred. loco in quo, &c.* but *tempore in quo* omitted. 2 Mod. 4, 5.

In an Avowry for a Rent-Charge the Defendant made a Title to *Jane Stiles*, with whom he married *Anno* 1603. and becauſe at *Michaelmas*, 1597, 20 *l.* was arrear, and not paid to him and his Wife, he avowed; and this was adjudged a good Avowry; for the Saying it was arrear to him and his Wife, was but Surpluſage, when the contrary appears, he not being then married. Cro. Jac. 282. *Bowles* v. *Poor.* Bulſt. 135. S. C.

So where the Defendant made Conuſance as Bailiff to *A.* Adminiſtrator to *B.* and it appeared that *A.* had a Right but not as Adminiſtrator, and the Conuſance ſtood as Bailiff of *A.* and the reſt rejected as Surpluſage. Hob. 208. Mo. 887. *Brown* v. *Dunnery.*

Where an Avowry is made for ſeveral Rents, and it appears Part is not due, yet the whole Avowry ſhall not abate. 11 Co. 45.

In Avowry for Rent, and ſo many Hens for Quit-Rent, the Avowant had a Verdict for the whole; but it afterwards appearing upon the Face of the Avowry, that the Hens were not due at the Time of the Diſtreſs, the Avowant had Leave to releaſe his Damages as to them, and take Judgment for the Rent, with his Coſts. Ld. Raym. 317. Carth. 437. S. C. *Morris* v. *Gelder.*

An Avowant in Replevin may abate his own Avowry for Part of the Rent diſtrained for, but not after Judgment. Com. Rep. 42. pl. 26.

In Replevin *J. S.* avowed for a Rent-Charge, due *Anno* 1660, and afterwards he diſtrained and avowed for another Part of the ſame Rent-Charge, which became due before the ſaid Year, and which was againſt a different Tenant; and, in this Caſe it was held by three Judges againſt *Mallet*, that the Avowant was not eſtopped by his firſt Avowry in ſuch Manner, as a Leſſor is by giving an Acquittance for the laſt Gale of Rent, but that he may at his Pleaſure avow for Part of his Rent at one Time, and for Part at another, in the ſame Manner as the Lord may command his Bailiff to diſtrain for ſo much Rent, and afterwards for the Sum due before. Sid. 44. Raym. 21. *Pamer* v. *Stabick.*

In an Avowry the Defendant may ſay, that *B.* was ſeiſed of the Place where, *&c.* and held the ſame of *A.* by Fealty and Rent, and ſo for Rent arrear, as Bailiff to *A.* make Conuſance according to the Statute, as in Lands held of him; though it was objected, that when in the Beginning he names the Tenant, he ought to have gone on in the ſame Manner, and avowed upon him as at Common Law. ‖ Cro. Eliz. 146. *Lacy* v. *Fiſher.* Leon. 302. S. C.

‖ Thoſe who diſtrain for Rent or Services may avow generally. 11 Geo. 2. c. 19. ſ. 22. which *vide infra*, 395.

If

Co. Lit. 32. If *A.* holds one Acre by Knight-Service, and 12 *d.* Rent, and the other in Socage and 1 *d.* Rent, and makes a Gift in Tail of both Acres, without any expreſs Reſervation of any Tenure, the ſame Te-
*Page 392 * nures are by Law created between the Donor and Donee; and though there is but one Reverſion, yet, becauſe the Tenures are ſeveral, the Donor muſt make ſeveral Avowries, for the Avowry is made in Reſpect of the Tenures.

Rol Rep. 35. A Perſon cannot make one Avowry both for a Rent-Service and a Rent Charge, but he may avow the taking ſo many Cattle for a Rent-Service, and ſo many for a Rent-Charge †.

† He may now, if need require, avow double, by the ſtat. 4 *Ann.* c. 16.

Bulſt. 101, 202. And in a Replevin for a Colt and a Cow, the Defendant may avow for ſeveral Heriots, and ſhew that the Father of the Plaintiff was ſeiſed, *&c.* and ſhew the ſeveral Heriotable Tenures, and Death, *&c.* and that he took the Colt and Cow *nomine heriotorum*, without ſhewing which he took in Reſpect of the one Tenure, and which in Reſpect of the other.

Com. Rep. 78. Carth. 44. If a Man takes a Diſtreſs for a Thing for which he had not good Cauſe of Diſtreſs, but had good Cauſe of Diſtreſs for another Thing, if a Replevin is brought, and he comes into Court, he may avow for which Thing he pleaſes.

Cro. Eliz. 547. Co. Lit. 102. If Executors by 32 *H.* 8. *c.* 37. avow for the Arrears of a Rent in Fee accrued to their Teſtator, they muſt ſhew that the Land continues in the Seiſin of the Tenant who ought to have paid it, or in the Hands of ſome other who claims by or from him according to the Statute; but in this Caſe, becauſe the Avowant is a Stranger, he need not ſhew in particular how, but only ſhew it generally according to the Words of the Statute.

Ld. Raym. 173. 2 Lutw. 1227. S. C. *Hoel* v. *Bell.* An Executor of Tenant for Life of a Rent-Charge may, purſuant to the Statute of 32 *H.* 8. *cap.* 37. avow for the Arrearages incurred in the Life-time of the Teſtator, without averring that the Place where, *&c.* was in the Seiſin of the Plaintiff, or that he claims by, from or under him that was Tenant, and it will come more properly on the other Side to ſhew the contrary.

Winch 31. Hut. 50. In an Avowry for Homage, it need not be ſhewn whether the Tenancy came to the Tenant by Deſcent or Purchaſe

9 Co. 20. Mo. 870. A Stranger to an Avowry can plead nothing in Bar thereof but *Hors de ſon Fee*, or that which is tantamount; but the right Heir, though he be a Stranger to the Avowry, being made a Party by Aid *prier*, may plead Matter in Abatement of the Avowry.

Hob. 108, 109. But at Common Law, where the Avowry was made only on the Land, as in Caſe of cuſtomary Profits, as a Fine for Alienation, *&c.* ſo in Caſe of a Rent-Charge, the Plaintiff might have pleaded any Diſcharge, though he was a mere Stranger, and had nothing in the Land.

Co. Lit. 1. — 2 Mod 104. cited, and there ſaid by the Ch. J. that this If a Stranger claims a Seignory, and diſtrains, and avows for the Service, the Tenant may plead that the Tenancy is *extra feodum*, *&c.* of him, that is, out of the Seignory, or not holden of him; but he cannot plead *extra feodum*, *&c.* unleſs he takes the Tenancy upon himſelf.

Rule is to be intended in Caſes of an Aſſiſe, and that ſo were all the Books cited in Co. Lit. for Proof of this Opinion.

9 Co. 34. In an Avowry the Tenant cannot plead *ne unque ſeiſe* of ſuch Services generally, becauſe he leaves no Remedy for the Lord either by Avowry or by Writ of Cuſtoms and Services, and therefore if he is a Tenant in Fee-Simple, he ought either to diſclaim or plead *Hors de ſon Fee.*

If

If in (*a*) Treſpaſs for taking of Goods the Defendant juſtifies by the Command of the Lord of the Manor, of whom the Plaintiff held by Fealty and Rent, and that for Non-payment of the Rent, he took * them *nomine diſtrictionis*, the Plaintiff may reply, that the *locus in quo eſt extra, abſque hoc quod eſt infra fœdum, &c.* adjudged upon a ſpecial Demurrer, it being ſhewn for Cauſe, that the Plaintiff had not taken the Tenancy upon himſelf. 2 Mod. 103. *Sherrard* v. *Smith*. * Page 393

(*a*) So in an Avowry a Stranger may plead generally *Hors de ſon Fee*, and ſo may Tenant for Years. 2 Mod. 104.

By the 21 *H.* 8. *c.* 19. all Plaintiffs and Defendants ſhall have like Pleas and like Aid *Priers* in all ſuch Avowries, Conuſances and Juſtifications, (Pleas of Diſclaimer only excepted) as they might have had before the Act. Co. Lit. 268. Cro. Jac. 127. Mo. 870.

If the Defendant avows for, and alledges a Seiſin of Rent payable at two Feaſts, the Plaintiff may ſay that he holds by the ſame Rent payable at one, *abſque* that it is payable at the two Feaſts, for this is another Tenure. † 9 Co. 34.

† Suppoſe he traverſes the holding in Manner and Form, taking the Words of the Avowry.

If in an Avowry for Rent the Defendant alledges the Tenure to be by Fealty, Rent and Suit of Court, where the true Tenure is by Fealty and Rent only, the Seiſin of the Suit is not material; for the Tenancy was not originally charged with any Service of this Nature, and therefore in this Caſe the Tenure is traverſable. ‡ Keilw. 31. 9 Co. 36. Cro. Eliz. 799. ‡ *Vide infra* 394.

But when the Lord gets quiet and peaceable Seiſin of more Rent than is due, becauſe the Tenancy is charged with a Service of ſuch Nature, the Seiſin is traverſable, and not the Tenure. 9 Co. 36.

But unleſs the Tenant (*a*) confeſs a Tenure in Part, he cannot traverſe the Tenure; for he cannot ſay he holds of a Stranger, *abſque hoc*, that he holds of the Avowant; but in that Caſe he ought to diſclaim, or plead *Hors de ſon Fee*. 9 Co. 35.

(*a*) At Common Law he could not have pleaded *Non tenure* generally, and therefore he cannot, though the Avowry be on the Statute. Cro. Jac. 127.

But in a *Ne injuſt evexes*, *Ceſſavit*, Aſſiſe, Reſcous or Treſpaſs, ſuch Seiſin of more Rent ſhall be avoided, for the Tenure, and not the Seiſin, is traverſable. 9 Co. 34.

If the Lord avows for Services, and alledges Seiſin by the Hands of any one in certain, as by the Hand of his very Tenant, the Plaintiff may plead that the Avowant was never ſeiſed by his Hands. 9 Co. 35.

The Seiſin of that Service is only traverſable for which the Avowry is made, unleſs the Seiſin of a ſuperior Service is alledged, which in Law is a Seiſin of that. 9 Co. 35.

The Lord of a Copyhold may avow in *B. R.* for a Rent iſſuing out of a Copyhold, for this is a Duty due and payable at Common Law. Cro. Eliz. 524. *Laughter* v. *Humphry*.

In an Avowry for *Aid pur file Marrier*, or *faire fitz Chevalier*, it is a good Plea in Bar to ſay, that the Avowant had not ſuch a Son or ſuch a Daughter alive at the Time of the Aid levied. Dav. Rep. 2.

In Replevin of a Cow the Defendant avows Damage-feaſant; the Plaintiff preſcribes for Common for four Cows and Half a Cow; Iſſue on the Preſcription, and found for the Plaintiff; it was moved in Arreſt, that the Iſſue was ſenſeleſs and void; but 'twas adjudged, that if in Replevin ſo much of the Preſcription be found as will ſerve the Party, tho' the Whole be not found, it is ſufficient; and here the Action is for one Cow only, Lev. 141.

only, and the Preſcription for four is a good Juſtification for putting in one Cow.

Hob. 73. Lev. 141. 2 Lev. 11. In Replevin the Plaintiff intitles himſelf by a Leaſe of the 3d of *March*; the Defendant traverſes the Leaſe *modo et forma*; the Jury find a Leaſe of another Date, yet Judgment was given for the Plaintiff; for the Subſtance of the Iſſue is, whether he has a Leaſe or no; yet if they had found a Leaſe from another, it would not do; but if he had declared thus in Ejectment it had been againſt him, for there he is to recover the Term, and is to make his Title truly.

Mod. 63. Where there is a Cuſtom for the Lord to ſeiſe the beſt Beaſt for an Heriot, the Lord in his Avowry need not alledge that the Beaſt ſeiſed *Page 394* * by him was the beſt; but this is a Matter that muſt be ſhewn by the other Side, and pleaded to the Avowry.

Mod. 63. So though the Cattle of a Stranger cannot be diſtrained unleſs they were *Levant* and *Couchant*, yet it muſt come on the other Side to ſhew that they were not ſo.

4 Mod. 402. *Hunt.* v. *Brains.* In Replevin for taking *Bona, Catalla et Averia, &c.* the Defendant made Conuſance for the taking *Averia* only, for that a Rent-Charge of 100 *l. per Annum* was granted out of the Lands, *&c.* payable half-yearly at *Michaelmas* and *Lady-day*; that the 33 *l.* Parcel of 50 *l.* for Half a Year's Rent being behind and unpaid, he diſtrained, and ſo juſtifies the Taking, *et petit Judicium, &c.* and upon Demurrer to this Avowry it was held to be inſufficient, becauſe it did not ſhew when the other 17 *l.* was paid to make up the Half-year's Rent; beſides, the Action was brought for taking *Bona, Catalla et Averia*; and the Defendant avowed the Taking *Averia* only, which is an Anſwer only for the live Cattle, and not for the Whole; ſo that for theſe Reaſons the Plaintiff had Judgment.

5 Mod. 77. *Johnſon* v. *Adams et al'.* In Replevin for taking live Cattle and ſeveral Stacks of Hay, *&c.* Defendants plead *bene cognoſcunt captionem Averiorum et Catallorum in loco præd. quia dicunt quod Averia præd. &c.* but ſay nothing as to the Chattels; but they conclude, and pray Judgment *Averiorum et Catallorum*; and this was held ill; for when they acknowledge the Taking the Whole, a Juſtification as to a Part cannot be a full and ſufficient Anſwer.

Cro. Jac. 611. The Defendant in Replevin cannot have a Return of more Cattle than he avows for.

Cro. Eliz. 524. *Bonner* v. *Walker.* In an Avowry the Iſſue was, whether the Place where, *&c.* was the Freehold of the Avowant or not; and it was found by the Verdict, that it was the Freehold of the Avowant's Wife; *et per Cur.* it is found againſt the Avowant; for when he ſaith *his* Freehold, it is to be intended his ſole Freehold, and in his own Right.

Cro. Eliz. 799. *Lewes* v. *Bucknall.* In Replevin the Iſſue was, whether the Plaintiff held of the Defendant ſuch Land by Fealty of Rent of 3 *s.* and 4 *d.* and Suit of Court, and the Avowry was for the Rent. The Jury found a ſpecial Verdict, that the Plaintiff held by Fealty and Rent only, and not by Suit of Court, *&c.* and if by this Verdict the Defendant ſhall have Return, was the Queſtion; and the Court held that it was found againſt the Avowant, for in an Avowry all the Tenure alledged is material; but in Treſpaſs or Reſcous, if any Part of the Tenure be found, it is ſufficient. †

† *Vide ante* 393.

Winch 49. *Chiwerthy* v. *Mitchell.* In Replevin the Defendant avowed for Rent, and ſhewed that his Father was ſeiſed, and leaſed for Years, *&c.* and that on his Death the Lands deſcended to him. The Plaintiff in Bar ſaid, that the Father deviſed the Lands to *J. S.* and Iſſue being joined herein, it was found by ſpecial Verdict that the Lands were holden by Knight-Service, ſo that the Deviſe was only of two Parts, and that the third deſcended to the Heir at Law, the Avowant; and on (*a*) this finding it was held, that the Avowant ſhould have Judgment. An

(*a*) Where there were two Iſſues, and one only found for the Avowant, he had Judgment. Cro. Jac. 442.—Where the Parties agree in the Facts, the Jury's finding otherwiſe, not material. 2 Lutw. 1216. 2 Mod. 45.

An (*a*) Avowry is in Nature of a Declaration, and it ſufficeth if it be good to a common Intent. Ley 77.

(*a*) It muſt ſhew the Certainty of the Place, Day and Cattle, to intitle the Avowant to a Writ of Inquiry of Damages. Dyer 280.

The Claim of Right to diſtrain muſt be made out by the Avowant againſt the Plaintiff, who claims Property in the Diſtreſs. 6 Mod. 103.

And there is no Difference between an Avowry and Juſtification, for whatever is ſet forth in either muſt be maintained. 6 Mod. 159.

* The Defendant in Replevin, to intitle himſelf to a Return of the Goods diſtrained, muſt make his Avowry, unleſs it be in ſuch Caſe in which he claims Property; ſo that though the Plaintiff's Writ abates, yet the Defendant is not intitled to a *Return habend*, unleſs he had made his Avowry. *Page 395 Show. 402. Comb. 196. 3 Lev. 204. Ld. Raym. 217.

The Bailiff, who diſtrains for Damage-feaſant in Right of a Deviſee, muſt ſet forth what Eſtate the Deviſor had; and it is not ſufficient to ſay in general, that he was ſeiſed. Cro. Eliz. 530.

Seiſitus fuit non ſufficient in an Avowry, but the Party muſt ſet forth in Fee, Tail, for Life, &c. Carth. 9.—That the general Rule of Pleading is, that where a Title is made under a particular Eſtate, the Commencement of that Eſtate muſt be ſhewn, but that an Eſtate in Fee may be alledged generally. Carth. 445. Ld. Raym. 332. 2 Salk. 562. 6 Mod. 223. 2 Lutw. 1217, 1231. Comb. 27, 473, 476.

If one avow for Rent, he muſt ſhew his Title and Tenure in particular, and the Defendant may traverſe any Part which he ſets forth: *ſecus* for Damage-feaſant. 6 Mod. 158.

But now by the 11 *Geo.* 2. *c.* 19. "It ſhall be lawful for all Defendants "in Replevin, to avow or make Conuſance generally, that the Plaintiff "in Replevin, or other Tenant of the Lands whereon ſuch Diſtreſs was "made, enjoyed the ſame under a Grant or Demiſe at ſuch a certain "Rent during the Time wherein the Rent diſtrained for incurred, which "Rent was then and ſtill remains due, or that the Place where the Diſtreſs "was taken was Parcel of ſuch certain Tenements held of ſuch Honour, "Lordſhip or Manor, for which Tenements the Rent, Relief, Heriot or "other Service diſtrained for, was at the Time of ſuch Diſtreſs and ſtill re-"mains due, without further ſetting forth the Grant, Tenure, Demiſe or "Title of ſuch Leſſors or Owners of ſuch Manor; and if the Plaintiff in "ſuch Action ſhall become nonſuit, &c. the Defendant ſhall recover double "Coſts.

[By 17 *Car.* 2. *cap.* 7. On the Nonſuit of the Plaintiff the Defendant may have a Writ of Inquiry.———The Avowant may have Judgment to recover his Arrears to the Value of the Diſtreſs, on Nonſuit of the Plaintiff or Verdict or Judgment on Demurrer againſt him. *Id. ſect.* 3. This Statute is extended to *Wales* and the Counties Palatine.]

*Page 396 * RESCUE.

(A) What it is, and of what Things it may be. 396.
(B) In what Cases a Reſcue may be juſtified. 397.
(C) Of the Offence of making a Reſcue, and how the Offenders are to be proceeded againſt. 397.
(D) The Form of the Proceedings on a Reſcous. 400.
(E) Of the Return of a Reſcous. 401.

And herein,

1. In what Caſes the Sheriff may return a Reſcous; and therein of the Difference between a Reſcous on meſne Proceſs and Execution. 401.
2. Of the Form of the Return, and for what Defects it may be quaſhed. 402.
3. Whether the Sheriff's Return of a Reſcue be traverſable. 404.

(A) Reſcue, what it is, and of what Things it may be.

Co Lit. 160. F.N.B. 226. RESCUE is the Taking away and Setting at Liberty againſt Law a Diſtreſs taken for Rent, or Services, or Damage-feaſant; but the more general Notion of a Reſcous is, the forcibly Freeing another from an Arreſt or ſome legal Commitment, which being a high Offence, ſubjects the Offender not only to an Action at the Suit of the Party injured, but likewiſe to Fine and Impriſonment at the Suit of the King.

Co.Lit. 161. If a Man diſtrain Cattle, and as he is driving them to the Pound they go into the Owner's Houſe, and he refuſe to deliver them, this is a Reſcue in Law.

Co.Lit. 161. a. Lit.Rep.296. Hetl. 145. But here we muſt obſerve, that there can be no Reſcous but where the Party has had the (*a*) actual Poſſeſſion of the Cattle or other Things whereof the Reſcous is ſuppoſed to be made; for if a Man come to arreſt another, or to diſtrain, and is diſturbed (*b*), regularly his Remedy is by Action on the Caſe.

(*a*) A Reſcue was returned *quod arreſtavit*, and quaſhed, becauſe not ſaid *et in cuſtodia habuit.* Sid. 332. (*b*) That it is a Contempt of the Court, and puniſhable as a Miſdemeanor. 6 Mod. 210.

Hetl. 145. Lit.Rep.296. *Sheriff of* If upon a *Fieri facias* the Sheriff ſeizes Goods which are taken away by a Stranger, this is not properly a Reſcue; for by the Seizure of the Goods,

Goods, by virtue of the *Fieri facias*, the Sheriff has a Property in them, and (*c*) may maintain Treſpaſs or Trover for them; alſo the Party injured may have an Action on the Caſe againſt the Wrong-doer.

Surry v. *Alderton.*

(*c*) For this *vide* Cro. Eliz. 639. 2 Saund. 411. Vent. 52.

* If upon a *Fieri facias* the Sheriff return that he had ſeiſed the Goods, but that they were reſcued by *B.* and *C.* &c. this is not a good Return, but he ſhall be amerced; the Party alſo, at whoſe Suit the Execution iſſued, may charge him by *Scire facias* for the Value of the Goods. †

*Page 397 Vent. 21. 2 Saund. 343. Show. 180.

†This is not like meſne Proceſs, becauſe in Caſes of Executions the Sheriff may take the *poſſe Comitatus*.

(B) In what Caſes a Reſcue may be juſtified.

IF the Lord diſtrain for Rent when none is due, the Tenant may lawfully make Reſcue; ſo may a Stranger, if his Beaſts be diſtrained when no Rent is due. So if the Tenant tender the Rent when the Lord comes to diſtrain, and yet he does diſtrain, or if he diſtrain any Thing not diſtrainable, as Beaſts of the Plough, when other ſufficient Diſtreſs may be taken, the Tenant may make Reſcous; ſo may he if the Lord diſtrain in the Highway or out of his Fee.

Co. Lit. 47, 160. b. 161. a.

But though there muſt be Reaſon for the Diſtreſs, and that otherwiſe the Reſcue cannot be unlawful; yet it hath been held in a *Parco fracto*, that the Defendant cannot juſtify breaking the Pound and taking out the Cattle, though the Diſtreſs was without Cauſe, becauſe they are now in the actual Cuſtody of the Law.

Salk. 247. pl. 2. Ld. Raym. 104. *Cotſworth* v. *Bettiſon.*

There is a Difference between a Man's being arreſted by a Warrant on Record, and by a general Authority in Law; for, if a *Capias* be awarded to the Sheriff to arreſt a Man for Felony, though he be innocent, he cannot make Reſcue; but, if a Sheriff will by the general Authority committed to him by Law arreſt any Man for Felony, if he be innocent he may reſcue himſelf.

Co. Lit. 161. *Vide* 5 Co. 68. *Mackalley's* Caſe. 6 Co. 54. Cro. Jac. 486.

(C) The Offence of making a Reſcue, and how the Offenders are to be proceeded againſt.

IT ſeems agreed, that the reſcuing a Perſon impriſoned for Felony is alſo Felony by the Common Law.

Hal. Hiſt. P. C. 606.

Alſo it is agreed, that a Stranger who reſcues a Perſon committed for, and guilty of High Treaſon (*d*), knowing him to be ſo committed, is in all Caſes guilty of High Treaſon.

Stamf. P. C. 11. Jon. 455.

(*d*) Whether he knew that the Priſoners were ſo committed or not. Cro. Car. 583.

To make a Reſcue Felony, the following Rules are laid down by Lord Chief Juſtice *Hale*; 1ſt, That it is neceſſary that the Felon be in Cuſtody or under Arreſt for Felony; and therefore if *A.* hinder an Arreſt, whereby the Felon eſcapes, the Townſhip ſhall be amerced for the Eſcape,

Hal. Hiſt. P. C. 606. 3 E. 3. *Coron.* 333. Stamf. 31.

Eſcape, and *A.* ſhall be fined for the Hinderance of his Taking; but it is not Felony in *A.* becauſe the Felon was not taken.

Hal. Hiſt. P. C. 606. So to make a Reſcue Felony, the Party reſcued muſt be under Cuſtody for Felony or Suſpicion of Felony; and it is all one whether he be in Cuſtody for that Account by a private Perſon or by an Officer, or Warrant of a Juſtice; for, where the Arreſt of a Felon is lawful, the Reſcue of him is Felony; but it ſeems neceſſary that he ſhould * have Knowledge that the Perſon is under Arreſt for Felony, if he be in the Cuſtody of a private Perſon.

*Page 398

Hal. Hiſt. P. C. 606. Cro. Car. 583. But if he be in Cuſtody of an Officer, as Conſtable or Sheriff, there, at his Peril, he is to take Notice of it; and ſo it is if there be Felons in a Priſon, and *A.* not knowing of it, breaks the Priſon and lets out the Priſoners, though he knew not that there were Felons there, it is Felony.

2 Hawk. P. C. 140. A Perſon committed for High Treaſon, who breaks the Priſon and eſcapes, is guilty of Felony only, unleſs he lets others alſo eſcape whom he knows to be committed for High Treaſon; in which Caſe he is guilty of High Treaſon, not in Reſpect of his own Breaking of Priſon, but of the Reſcous of the others.

Hal. Hiſt. P. C. 599. If the Perſon reſcued were indicted or attainted of ſeveral Felonies, yet the Eſcape or Reſcue of ſuch Perſon makes but one Felony.

2 Hawk. P. C. 139. Wherever the Impriſonment is ſo far groundleſs or irregular, or the Breaking of a Priſon is occaſioned by ſuch a Neceſſity, *&c.* that the Party himſelf breaking Priſon is either by the Common Law, or by the Statute *de frangentibus Priſonam*, ſaved from the Penalty of a capital Offence, a Stranger who reſcues him from ſuch an Impriſonment is in like Manner alſo excuſed; *et ſic e converſo.*

Hal. Hiſt. P. C. 606. A Return of a Reſcue of a Felon by the Sheriff againſt *A.* is not ſufficient to put him to anſwer for it as a Felony, without Indictment or Preſentment, by the Statute 25 *E.* 3. *c.* 4.

Hal. Hiſt. P. C. 607. As in Caſe of an Eſcape, ſo in Caſe of a Reſcue, if the Party reſcued be impriſoned for Felony, and be reſcued before Indictment, the Indictment muſt ſurmiſe a Felony done, as well as an Impriſonment for Felony or Suſpicion thereof; but if the Party be indicted, and taken by a *Capias*, and reſcued, then there needs only a Recital that he was indicted *prout* and taken and reſcued.

Hal. Hiſt. P. C 607. (*a*) 2 Hawk. P. C. 140. But though the Reſcuer may be indicted before the Principal be convicted and attainted, yet he ſhall not be arraigned or tried before the Principal be attaint; but *(a)* if the Perſon reſcued were impriſoned for High Treaſon, the Reſcuer may immediately be arraigned, for that in High Treaſon all are Principals; alſo it ſeems that he may be immediately proceeded againſt for a Miſpriſion only, if the King pleaſe.

Hal. Hiſt. P. C. 607. The Reſcuer of a Priſoner for Felony, though not within Clergy, yet ſhall have his Clergy.

As thoſe who break Priſon are puniſhable, as for a high Miſpriſion by Fine and Impriſonment in thoſe Caſes, wherein they are ſaved from Judgment of Death by the Statute *de frangentibus Priſonam*; ſo alſo are thoſe who reſcue ſuch Priſoners in the like Caſes, in the ſame Manner puniſhable. 2 Hawk. P. C. 140.

See alſo 9 G. 1. c. 28. by which the Reſcuing Perſons arreſted in the Mint, *&c.* is made Felony. ‡ By the 6 *Geo.* 1. *c.* 23. *ſect.* 5. it is enacted, That if any Perſon ſhall reſcue Felons ordered for Tranſportation, or aſſiſt them in making their Eſcape,

‡ Reſcuing the Body of Offender executed for Murder from the Sheriff or Surgeons, Felony within Clergy, by 25 Geo. 2. c. 37. ſ. 10.——But it is Felony without Clergy to reſcue any Perſon committed for

Eſcape, he ſhall be guilty of Felony, and ſuffer Death without Benefit of Clergy.

As the Offence of reſcuing Perſons in Caſes of Treaſon and Felony is uſually puniſhed by Indictment, ſo the Offence of reſcuing a Perſon arreſted on meſne Proceſs, or in Execution after Judgment, ſubjects the Offender to a *(a)* Writ of Reſcous or a general Action of Treſpaſs *vi et armis*, or (*b*) an Action on the Caſe, in all which Damages are recoverable. Alſo it is the frequent Practice of the Courts to grant an * *(c)* Attachment againſt ſuch wrong Doers, it being the higheſt Violence and Contempt that can be offered to the Proceſs of the Court. Co. Lit. 161. Co. Ent. 614. Raſt. Ent. 577. * Page 399

(*a*) For this *vide* F. N. B. 226.——

A Writ of Reſcous againſt the Father and Son, the Father for reſcuing the Son, and the Son for reſcuing himſelf. 2 Bulſt. 137.—In Reſcous the Writ is conceived on the ſpecial Matter. 9 Co. 12. b. (*b*) On a Motion for an Information againſt one for reſcuing a Perſon from the Sheriff in the Temple, the Court adviſed them to get the Reſcous returned, and to bring an Action on the Caſe againſt him as the better Way. *Caſes in B. R.* 556. (*c*) A Reſcuer ſhall be doubly puniſhed, for upon the Return of the Sheriff he ſhall be fined to the King, and an Attachment ſhall iſſue out againſt him. 3 Bulſt. 201. †—On all Returns of a Reſcous, Proceſs of Outlawry lies. 13 H. 7. 21. pl. 5. 2 Inſt. 665. *cont.* Fitz. Proceſs 56, 213. 29 E. 3. 18.

† *Vide* Stra. 531. 6 Com. Dig. 541.

He who reſcues a Priſoner from any of the Courts of *Weſtminſter-Hall* without ſtriking a Blow, ſhall forfeit his Goods and the Profits of his Lands, and ſuffer Impriſonment during Life; but not loſe his Hand, becauſe he did not ſtrike. 22 E. 3. 13. 3 Inſt. 141.

It is clearly agreed, that for a Reſcous on meſne Proceſs the Party injured may have either an Action of Treſpaſs *vi et Armis*, or an Action on the Caſe, in which he ſhall recover his Debt and Damages againſt the wrong Doer; and the rather, becauſe on *(d)* meſne Proceſs he can have no Remedy againſt the Sheriff. Cro. Jac. 486. Hob. 180. (*d*) *Vide poſtea.*

Alſo it hath been adjudged, that for the Reſcous of a Perſon in Execution on a *Capias Satis.* or *Capias Utla.* an Action will lie againſt the Reſcuer, though the Party injured hath his Remedy againſt the Sheriff, and the Sheriff hath his Remedy over againſt the Wrong Doer; for perhaps the Sheriff may be dead or inſolvent; but herein it hath been held, that if he bring his Action againſt the Party who made the Reſcue, he may plead it in Bar to an Action brought by the Sheriff; ſo if againſt the Sheriff or his Bailiff, they may plead that he had Satisfaction from the Party, ſo that if he recovers againſt one, the other is diſcharged. Hetl. 95. Cro. Car. 109. Hutt. 98. Hob. 180.

By the Statute 2 *W. & M. Stat.* 1. *cap.* 5. *ſect.* 5. it is enacted, "That "upon Pound-breach or Reſcous of Goods diſtrained for Rent, the "Perſon grieved ſhall in a ſpecial Action on the Caſe recover treble Da- "mages and Coſts againſt the Offenders, or againſt the Owner of the "Goods if they come to his Uſe."

In an Action upon the Caſe for a Reſcous, upon this Statute it hath been held, that the Plaintiff ſhall recover treble Coſts as well as treble Damages, for the Damages are not given by the Statute but increaſed; an Action on the Caſe lying for a Reſcous at Common Law. Salk. 205. pl. 2. Ld Raym. 19. Skin. 555. pl. 4. Carth. 321. *Lawſon* v. *Storie*

An Attachment will be granted not only againſt a common Perſon, but even againſt a Peer of the Realm, for reſcuing a Perſon arreſted Dyer 212. 2 Jan. 39.

for or found guilty of Murder, or going to Execution, or during Execution. *Id.* ſ. 9.——So as to Perſons tranſported, for reſcuing the Body, returning, *Id.* ſ. 10.—So reſcuing Offenders, under the Act called the *Black Act*, ſee 9 Geo. 1. c. 22.

by due Courſe of Law; ſo that if the Sheriff ſhall in any Caſe return to the Court, that the Perſon arreſted, or Goods ſeiſed, or Poſſeſſion of Lands delivered by him, by Virtue of the King's Writ, were reſcued or violently taken from him, *&c.* they will award an Attachment againſt the Reſcuers.

2 Hawk. P. C. 153. (*a*) A Diſtinction between a Reſcous on meſne Proceſs and upon a Writ of Execution; in which laſt it was ſaid by *Holt* Ch. J. the Sheriff could not return a Reſcous, and therefore the Court can have no other Ground for an Attachment but Affidavits, and ought to be contented therewith; but on meſne Proceſs a Reſcous might be returned, which being Matter of Record, and by Conſequence a better Motive, ought to be given to the Court. 6 Mod. 141.

But herein it ſeems to be the Practice of late, not to grant an Attachment in any Caſe for a Reſcous, unleſs the Officer will (*a*) return it, for that it hath been found by Experience, that Officers will often take upon them to ſwear a Reſcous where they will not venture to return one.

Trin. 5 G. 2. in B. R. *Young* v. *Payne*. [*Vide* 6 Com. Dig. 541, 2. and *poſt*, 400. n.]

In a late Caſe, a Diſtinction was taken where an Attachment is prayed for a Reſcous in the firſt Inſtance, and where a Rule to ſhew Cauſe is only aſked; in this Affidavits of the Fact are ſufficient; in the other Caſe the Sheriff's Return is requiſite.

*Page 400 2 Salk. 586. pl. 1. *Rex* v. *Belt*. —Said by Sir *Sam. Aſtry* to be the conſtant Courſe upon the Return of a Reſcue, to ſet four Nobles Fine upon each Offender. 2 Salk. 586 pl. 3. 2 Jon. 198. *accord* ‡.

* Where, upon the Return of a Reſcue, an Attachment is granted, and the Party examined upon Interrogatories, upon anſwering them, he ſhall be diſcharged; but if the Reſcous is returned to the Philazer, and Proceſs of Outlawry iſſues, and the Reſcuer is brought into Court, he ſhall not be diſcharged upon Affidavits.

‡ The Attachment muſt be returnable at a general Return. *Rex* v. *Wilkins*, P. 11 Geo. Stra. 624.——The Reſcuers on ſubmitting to a Fine, may be permitted to read Affidavits to ſhew, there was not any real Arreſt. *Rex* v. *Minify*, M. 12 Geo. Stra. 642.——The Sheriff's Return of a Reſcue, is of itſelf a Conviction of a Reſcue, and Proceſs immediately iſſues from the Crown-Office againſt the Reſcuer. *Rex* v. *Pember*, P. 8 Geo. 2. *Rep. Temp.* Hardw. 112.——Return of *Reſcous* is not traverſable, and the Reſcuer muſt be brought into Court to be fined. Barnes 429.——The Reſcuer may be admitted to give Recognizance, to try falſe Return againſt the Sheriff. Barnes 430.——If there is a Verdict for the Plaintiff the Recognizance ſhall be diſcharged. *Ibid.*

(D) The Form of the Proceedings on a Reſcous.

Dyer 164.—That no Defect can be aided by the Verdict. Rol. Abr. 781.

AN Indictment of a Reſcous ought to ſet forth the ſpecial Circumſtances of the Fact with ſuch Certainty, as to enable the Defendant to make a proper Defence.

Moor 555. Raſt. Ent. 263.

And therefore, if an Indictment lay the Offence on an uncertain or impoſſible Day, as where it lays it on a future Day, or lays one and the ſame Offence at different Days, or lays it on ſuch a Day which makes the Indictment repugnant to itſelf, it is void.

Where

Where an Indictment of Reſcous ſet forth that *J. S.* committed ſuch a Felony, ſuch a Day and Year and Place, *per quod* A. B. *prædictum* J. S. *cepit et arreſtavit, et in ſalva Cuſtodia ſua ad tunc et ibidem eundem* J. S. *habuit et cuſtodivit*, it is made a *Quære* whether the Indictment be not inſufficient, becauſe no Time of the Arreſt is alledged in the ſame Sentence with it; and it is doubtful whether the Time of the Cuſtody, which is alledged in the next Sentence by Force of the Copulative, be applied alſo to the Arreſt or not; and *Dyer* ſeems rather to incline to the contrary Opinion. Dyer 164. pl. 60.

Alſo it is held in *Dyer*, that an Indictment of a Reſcous is not good without expreſly ſhewing the Day and Year both of the Arreſt and alſo of the Reſcous, and that the Time of the latter is not ſufficiently ſhewn by ſhewing that of the former. Dyer 164.

But it hath been ſince adjudged, upon Exceptions taken to an Indictment for a Reſcous, that it was not neceſſary to alledge the Place where the Reſcue was made, and that it ſhould be intended, that where the Arreſt was, there alſo was the Reſcue without the Word *Ibidem*. Cro Jac. 345. 2 Bulſt. 208. S. C. *Cramlington's* Caſe.

An Exception taken to an Indictment of Reſcous, that it wanted the Words *Vi et Armis* or *Manu forti*, but over-ruled, it being held by the Court that the Word *recuſſit* implies it to be done by Force. Cro. Jac. 345.—The ſame Exception taken in Cro. Jac. 473. over-ruled, and there held, that though it were Error at Common Law, yet it is made good by the Statute 37 H. 8. c. 8.

An Exception taken to an Indictment of a Reſcous from a Serjeant at Mace, who had taken a Man on a Plaint in *London*, becauſe it did not ſet forth that the Perſon was taken by Virtue of any Warrant; but it being alledged that he was lawfully arreſted, it ſhall be intended by a good Warrant. Cro. Jac. 472. *Hart's* Caſe.

It is ſaid that an Indictment of Reſcous is not within the Statute of Additions, and that the naming the Perſon indicted of ſuch a Pariſh, without giving him any Title, is ſufficient †. 2 Inſt. 665. 2 Show. 84. pl. 72.

† In an Indictment for a Reſcue from the Houſe of Correction, it muſt appear for what the Priſoner was committed there. *Rex* v. *Freeman*, P. 18 Geo. 2. Stra. 1226.

Note; Upon an Indictment of Reſcous, if it were upon an Arreſt upon meſne Proceſs, and the Party has appeared, the Court will be * eaſily induced to quaſh it; ſo if it be on Proceſs out of an inferior Court, though the Party has not appeared; for no Aid is given to inferior Juriſdictions. *Page 401

In an Action for a Reſcue the Plaintiff muſt alledge in his Declaration all the material Circumſtances; as that ſuch a Writ iſſued, that he was arreſted and in Cuſtody, and that he was reſcued, *&c.* Godb. 125. Lutw. 130.

In an Action on the Caſe for a Reſcous on meſne Proceſs, the Evidence was, the Bailiff ſtood at the Street Door, and ſent his Follower up three Pair of Stairs in Diſguiſe with the Warrant, who laid Hands on the Party, and told him that he arreſted him; but he with the Help of ſome Women got from the Follower and ran down Stairs, and the Defendant hearing a Noiſe ran up, and put the Party into a Room, locked the Door, and would not ſuffer the Bailiff to enter. *Holt* C. J. doubted whether this was a lawful Arreſt, being by the Bailiff's Servant, and not in his Preſence; but ſaid, that the Plaintiff muſt prove his Cauſe of Action againſt the Party, that he muſt prove the Writ and Warrant by producing ſworn Copies of them; he muſt prove the Manner of the Arreſt, that it may appear to the Court to be legal, and, in Point of Damage he muſt prove the Loſs of his Debt, *viz.* that the Party became inſolvent, and could not be retaken. 6 Mod. 211. *Wilſon* v. *Gary.*

(E) Of the Return of a Reſcous: And herein,

1. In what Caſes the Sheriff may return a Reſcous; and therein of the Difference between a Reſcous on meſne Proceſs and Execution.

Cro. Eliz. 868. March 1. Jon. 201. 3 Bulſt. 198. Rol. Rep. 389.

THE Diſtinction herein laid down in Variety of Books and Caſes is, that on a Reſcue on meſne Proceſs the Sheriff may return the Reſcue, and is ſubject to no Action; for that on a meſne Proceſs he was not (*a*) obliged to raiſe his *Poſſe Comitatus*, nor would it be convenient ſo to do on the Execution of every meſne Proceſs.

Noy 40. Moor 852. 2 Lev. 144. 6 Mod. 141 Lutw. 130, 131. (*a*) But the Sheriff may, if he pleaſes, take his *Poſſe* to arreſt one on meſne Proceſs. Noy 40.

Cro. Jac. 419. Rol. Rep. 388, 440. 3 Bulſt. 198. Moor 852. S. C. *Probey* v. *Lumley*. (*b*) Or upon a *Capias Utlagatum* after Judgment. Cro. Jac. 419. Rol. Rep. 389.

But if the Sheriff takes a Man upon an Execution, as upon (*b*) a *Capias ad Satisfaciend.* and he is reſcued from him, before he can bring him to Priſon, though he returns the Reſcue, yet this ſhall not ‖ excuſe him; for when Judgment is paſſed, and he and his Bail do not ſurrender him, nor pay the Condemnation Money, and then a *Capias* iſſues, to which there can be no Bail, there it is preſumed that he will not be forth-coming, becauſe neither he nor his Bail have ſatisfied the Judgment, and therefore the Sheriff ought to take the *Poſſe Comitatus*; and conſequently it cannot be a good Return, that he took the Body, but that it was reſcued; and the Party may have an Action of Eſcape againſt the Sheriff on his Return; and this is provided by the Statute *Weſtm.* 2. (13 *Ed.* 1. *ſt.* 1.) *cap.* 39. which was made to prevent Sheriffs from returning Reſcues to the King's Writ.

‖ So in Caſe of a *Fieri Facias*. Barnes 430.

3 Lev. 46. Lord *Gorges* v. *Gore*, adjudged.

In an Action on the Caſe againſt the Sheriff for an Eſcape upon meſne Proceſs, the Defendant pleaded a Reſcue, which on Demurrer was held a good Plea, though he did not ſhew that the Reſcue was returned.

*Page 402 Rol. Rep. 441. 3 Bulſt. 198. Cro. Jac. 419. 4 Co. 84.

* But if one taken on meſne Proceſs be once in Priſon, the Sheriff cannot return a Reſcous, for the Law preſumes that he hath (*c*) Power to keep him there.

(*c*) But if the Priſon is broke by the King's Enemies, this ſhall excuſe the Sheriff; Vent. 239.——but not if broke by Rebels and Traitors, for the Sheriff or Gaoler hath his Remedy over againſt them. 4 Co. 84. Cro. Eliz. 815. 2 Mod. 28. Vent. 239.

Hal. Hiſt. P. C. 602. and there ſaid that a Reſcue is no Excuſe in Felony.

If a Felon be attaint, and in carrying him to Execution he is reſcued from the Sheriff, the Sheriff is puniſhable notwithſtanding the Reſcue; for there is Judgment given, and the Sheriff ſhould have taken ſufficient Power with him; and therefore in that Caſe the Townſhip is not finable.

2. Of the Form of the Return, and for what Defects it may be quaſhed.

3. H. 7. 11. pl. 3. Bro *Return de Brief* 97. Fitz. *Coro.* 45. *Attach.* 1.

It hath been adjudged, that the Return of a Reſcue by a Sheriff muſt ſhew the Year and Day on which it was made, ſuch Return being in Lieu of an Indictment.

But it hath been held, that the Sheriff's Return of a Reſcue on a *Latitat*, without mentioning the Day of the Caption, was ſufficient, all the Clerks in Court affirming the Precedents to have been ſo. Palm. 532.

The Sheriff's Return of a Reſcue, without mentioning the Place where it was made, was held naught, and the Party diſcharged. Moor 422. pl. 585.

So where upon a *Latitat* awarded againſt *J. S.* the Sheriff returned a Reſcous on ſuch a Day, but did not mention any Place where the Reſcous was made; and adjudged a void Return, becauſe it doth not appear that either the Arreſt or Reſcous were within his Juriſdiction; but if it had appeared to have been done in the County, it ſhould be intended within his Bailiwick tho' it was within a Liberty in the ſame County; and even in ſuch Caſe the Reſcous had been unlawful becauſe the Arreſt was good, nobody being prejudiced thereby but the Lord of the Liberty. Yelv. 51. *Wolfreſton's* Caſe.

But where the Return of a Reſcous recited that a *Latitat* was directed to him, *&c.* and that he made his Warrant to his Bailiffs, who arreſted *A.* and that he was reſcued by *J. S.* this was held good, though it did not ſhew the Time or Place where the Reſcue was made. ‡ 2 Rol. Rep. 255. *Webb* v. *Withers.*

‡ *Sed qu.*
Vide the Caſes *ſupra.*

Upon reading the Sheriff's Return of a Reſcous, theſe Exceptions were taken to it; 1ſt, It is ſaid *feci Warrantum meum Thomæ Taylor*, and doth not ſay that *Thomas Taylor* was his Bailiff. 2dly, He doth not ſay for what Cauſe he made his Warrant, and ſo it appears not whether it was lawful or not; and upon theſe Exceptions it was quaſhed. Stil. 155.

Exception to a Sheriff's Return of a Reſcue, that it was not alledged that the Party was in Cuſtody, it being only by Implication that he was reſcued out of the Bailiff's Cuſtody; and for this it was quaſhed; ſo that it was not returned who reſcued, or that the Party reſcued himſelf. Sid. 332. Lev. 214.

The Sheriff returned a Reſcous on a ſpecial Bailiff, *viz.* that *Cook* and ſeven others made an Aſſault on the Bailiff, *&c.* and the Party arreſted *cepit et abduxit*, when it ought to have been *ceperunt et abduxerunt*; and the Court held the Return good as to *Cook*, but void as to the * others; and he was admitted to make his Fine by (*a*) Attorney, which was 6*s.* 8*d.* Lit. Rep. 2. *Page 403

(*a*) An Indictment for a Reſcous returned againſt one into *B. R* ought not to be quaſhed, although it be erroneous, except the Party that is indicted for it do appear Perſonally in Court; for he cannot in ſuch Caſe appear by Attorney, becauſe the Offence was criminal and perſonal, for which he muſt anſwer in Perſon. 2 Lil. Reg. 468.

A Reſcue of a Perſon arreſted on meſne Proceſs was returned againſt divers particularly named, and the Return was that they *reſcuſſerunt*, without ſaying *et quilibet eorem reſcuſſit*; and held well enough, it being in the Affirmative. Vent. 2. 2 Keb. 436.

Exception taken to the Return of a Reſcue, that it was *feci Warrant'* without ſaying *ſub ſigillo Officii*, but over-ruled; for it cannot be a Warrant unleſs it be under Seal, and the ſaying *feci Warrant' direct'* implies it was ſo. 2 Jon. 197.

The Sheriff returned a Reſcous thus; 1ſt, *Non eſt inventus in ball' mea*, and *Executio reſidui iſtius brevis patet in Schedula huic brevi annex'*, and that was of a Taking and Reſcous; and the Return of the Reſcous was quaſhed for the Repugnancy? for *per Cur.* after *Non eſt inventus* all the reſt is idle, and there remain no more for the Sheriff to do. But Note; Upon the Return of a Reſcous the Sheriff always concludes, that after the Reſcous made the Defendant *Non eſt invent. in Balliva.* 6 Mod. 220. *Rex* v. *Weekes.*

The

5 Mod. 218. The Return of a Reſcue was, that the Party was in Cuſtody of three of the Bailiffs, and that the Defendants *inſultum fecerunt* upon one, which the Sheriff called *Ballivos meos*; and for that Reaſon it was quaſhed.

Palm. 532. 2 Jon. 197. Cro. Eliz. 780. Lev. 214. 2 Lev. 28. Raym. 161. 4 Mod. 293. 5 Mod. 217. Sid. 332. Stil. 417. (*b*) 2 Rol. Rep. 263. Stil. 417. Lev. 214. (*c*) Cro. Jac. 242. Raym. 161. 5 Mod. 217.

It hath been a great Queſtion, and much debated in Variety of Caſes, whether upon a Reſcue of a Perſon out of the Cuſtody of a Sheriff's Bailiff, the Sheriff is to Return the Reſcue *ſecundum veritatem facti*, or *ſecundum veritatem in lege*, that is, that he was reſcued out of the Cuſtody of the Bailiff, being the Truth in Fact, or out of his own Cuſtody, being the Truth in Law; the Bailiff's Cuſtody being in Law the Cuſtody of the Sheriff himſelf; and it ſeems now agreed that a Return either Way is good; and herein ſome Books diſtinguiſh between a Bailiff of a (*b*) Liberty and a common Bailiff, and ſay that the Return of a Reſcue out of the Cuſtody of a Bailiff of a Liberty ought to be ſo expreſſed, becauſe he is ſuch a public Officer of whom the Court takes Notice. Others diſtinguiſh (*c*) between an Action on the Caſe and an Indictment for a Reſcous, for that in the firſt the Plaintiff muſt declare as the Truth is, *viz.* that he was reſcued being in the Cuſtody of the Bailiff, but that in an Indictment it muſt be according to the Operation it hath in Law.

Salk. 586. pl. 2.

But where the Sheriff returned *Virtute brevis mihi direct' feci Warrant'* A. & B *Ballivis meis qui virtute inde ceperunt* the Defendant, *et in Cuſtodia mea habuerunt quoſque* ſuch and ſuch *recuſſerunt* him *ex Cuſtodia ballivorum meorum*; and this Return was on Motion quaſhed; for *per Holt* Ch. J. when the Bailiffs have arreſted the Party, he is in Fact and in Truth in their Cuſtody, but in Law he is in the Cuſtody of the Sheriff; an Anſwer either Way is good, *viz.* that he was reſcued out of the Bailiffs Cuſtody, or that he was reſcued out of the Sheriff's Cuſtody; but to ſay that he was in the Cuſtody of the Sheriff, and yet reſcued out of the Cuſtody of the Bailiffs, is repugnant †.

†If it appear on the Return, that the Warrant was to two, and the Arreſt by one only, yet the Return is good; for it is no Exception in what relates to public Juſtice. *Rex* v *Roe*, M. 5 Geo. Stra. 117.——If on a Return of a *Reſcous* of two Perſons, it is only ſaid, they could not afterwards be found, (without ſaying, *nec eorum aliquis*,) it is ill. *Rex* v. *Tucker*, M. 6 Geo. Stra. 225. *Fort.* 362.——That the Bailiff arreſted the Defendant is good. *Ibid.*——That the Defendant *being* in my Cuſtody is ſufficient. *Ibid.*

*Page 404

* 3. Whether the Sheriff's Return of Reſcue be traverſable.

Cro. Eliz. 781. Dyer 212. 2 Jon. 39. Vent. 224. 2 Vent. 175. Comb. 295. Barnes 429.

It ſeems that antiently, when the Sheriff returned a Reſcue, the Party was admitted to plead to it as to an Indictment; but the Courſe of late has been not to admit any Plea to it, but drive the Party to his Action againſt the Sheriff in caſe the Return were falſe; and hence it is now ſettled that the Return of a Reſcue is not traverſable, but yet it hath been held that the Submiſſion to the Fine doth not conclude the Party grieved from bringing his Action for the falſe Return, if it were ſo.

Scandalum Magnatum.

AT the Time of making the Law, on which this Action is founded, the Conſtitution of this Kingdom was Martial and given to Arms; the very Tenures were Military, and ſo were the Services; as Knights-Service, Caſtle-Guard and Eſcuage; ſo that all Provocations by vilifying Words were revenged by the Sword, which often created Factions in the Commonwealth, and endangered even the Government itſelf; for in theſe Kind of Quarrels the great Men, or Peers of the Realm, uſually engaged their Vaſſals, Tenants and Friends; ſo that Laws were then made againſt wearing of Liveries or Badges, and againſt riding armed; ſo the *Stat. Weſtm.* 2. 13 *Ed.* 1. *Stat.* 1. appoints, that the Offender ſhall ſuffer Impriſonment, until he produces the Author of a falſe Report. 2 Mod. 156.

The Law on which this Action is grounded, is the 2 *R.* 2. *Stat.* 1 *cap.* 5. which enacts, "That of Counterfeiters of falſe News, and horrible "Lies, of Prelates, Dukes, Earls, Barons, and other Nobles and great "Men of the Realm, and alſo of the Chancellor, Treaſurer, Clerk of the "Privy Seal, Steward of the King's Houſe, Juſtices of the one Bench or "of the other, and other great Officers of the Realm, it is defended that "none contrive or tell any falſe Things of Prelates, Lords, and of others "aforeſaid, whereof Diſcord or Slander might riſe within the Realm, and "he who doth the ſame ſhall be impriſoned 'till he have brought him forth "that did ſpeak the ſame." This Statute is recited by the 12 R. 2. c. 11. and thereby it is further provided that the Offender ſhall be puniſhed by the Advice of the Council. 4 Inſt. 51. 4 Co. 12. b.

For the better underſtanding of this Statute we ſhall conſider,

(A) The Perſons who may bring this Action. 405.
(B) For what Words it lies. 405.
(C) The Proceedings in this Action. 407.

---

*(A) The Perſons who may bring this Action. *Page 405

IT hath been held, that the King is not included in the Words *Great Men of the Realm*, as the Statute begins with an Enumeration of Perſons of an inferior Rank, as Prelates, Dukes, &c. Cromp. Jur. 19, 35.

Alſo it is held, that a Woman noble by Birth is not intitled to this Action. Cromp. Jur. 34.

It hath been adjudged, that though there was no Viſcount at the Time of making this Statute, (the firſt Viſcount being *John Beaumont*, who was created Viſcount 18 *H.* 6.) yet when created Noble, though by a new Title, he was intitled to his Action on this Statute. Cro. Car. 136. Palm. 565. *Viſcount Say and Seal* v. *Stephens.* Alſo Ley 82.

Com. Rep. 439 pl. 202. *Lord Viſcount Falkland* v. *Phipps.*

Alſo it hath been adjudged, that ſince the Union a Peer of *Scotland* may have an Action on this Statute, and that it is not neceſſary for him to alledge that he hath a Seat and Voice in Parliament; for by the 5 *Ann.* 8. *Art.* 23. all Peers of *Scotland* after the Union ſhall be Peers of *Great Britain*, and have Rank and Precedency, *&c.* be tried, *&c.* and enjoy all Privileges of Peers as fully as the Peers of *England* now do or hereafter may enjoy, except the Right and Privilege of ſitting in the Houſe of Lords, and the Privileges depending thereon, and particularly the Right of ſitting upon the Trial of Peers. †

† A Baron of the Exchequer may have this Action. Palm. 565. *Semb.* 12. Co. 134.——It does not lie for a Peer if he was not ſo at the Time of Speaking the Words. Palm. 566.

(B) For what Words it lies.

2 Mod. 161. Sir *Robert Atkins* in his Argument. Freem. 222. pl. 229.

IT hath been contended for, that no Words of Slander are puniſhable by this Statute, unleſs they are actionable at Common Law, and that they are only aggravated by the Statute, which in this reſpect is like the King's Proclamation.

2 Mod. 156.

But the contrary hereof ſeems to have been holden in moſt of the Caſes on this Head, and not without Reaſon, as it would be to no Purpoſe to make a Law, and thereby to give a Peer an Action for ſuch Words as a common Perſon might have before the making of the Statute, and for which the Peer himſelf had equally a Remedy by the Common Law; and therefore the Deſign of the Statute muſt be, not only to puniſh ſuch Things as import a great Scandal in themſelves, or ſuch for which an Action lay at the Common Law, but alſo ſuch Things as ſavoured of any Contempt of the Perſons of the Peers or great Men, and brought them into Diſgrace with the Commons, whereby they took Occaſion of Provocation and Revenge.

2 Mod. 156. Sir *Fran. Pemberton*'s Argument.

It hath been obſerved, that no Action had been brought on this Statute 'till 100 Years after the making thereof, the Lords ſtill continuing the military Way of Revenge to which they had been accuſtomed.

—It is ſaid by my Lord *Coke*, that, at Common Law, Scandal of a Peer might be puniſhed by Pillory and Loſs of Ears, and that this Offence is now aggravated by the Statute. 5 Co. 125. *De Libellis famoſis.* 12 Co. 37. 9 Co. 59. 2 Mod. 162.———That it was uſual to puniſh Offenders of this Kind in the Star-Chamber. 2 Mod. 152.

Keilw. 26, 27. 2 Mod. 164. cited.

The firſt Caſe on this Statute, ſaid to be reported, is in *Keilw.* where the Lord *Beauchamp* brought an Action of *Scan. Mag.* againſt Sir *Richard Crofts*, for that the ſaid Sir *Richard* had ſued out a Writ of Forgery of falſe Deeds againſt him; and it was held, that the taking out *Page 406 * the Writ being done in a legal Way, and in a Courſe of Juſtice, the Action did not lie. ‡

‡ The Action does not lie for a judicial Proceeding, againſt a Peer by Action, Appeal, Indictment, *&c.* though he be aquitted. 2 Inſt. 228. Hob. 266. R. Kel. 26, 27. Dyer 285. a.

Cromp. Jur. 13. *Duke of Buckingham*'s Caſe.

Scan. Mag. was brought for theſe Words, *You have no more Conſcience than a Dog; ſo that you have Goods, you care not how you come by them*; and held actionable.

—So in the ſame Book *You ſaid you would wind my Guts about your Neck*, held actionable. Lord *Abergeny*'s Caſe. Cromp. Jur. 13.

So

So for saying of a Judge, *You are a corrupt Judge.* Cromp. Jur. 35. *Lord Ch. Just. Dyer's* Case.

So for these Words, *J. S. is a covetous and malicious Bishop.* Hetl. 55. *Bishop of Winton* v. *Markham*; but *vide* Dalf. 38. S. C. *contra*.

So for these Words, *He imprisoned me till I gave a Release.* 3 Leon. 376. *Lord Winchester's* Case cited. Freem. 221.

So these Words, *You have writ a Letter to me, which I have to shew, which is against the Word of God, against the Queen's Authority, and to the Maintenance of Superstition, and that I will stand to prove against you,* were held actionable, and 500 Marks Damages given. Cro Eliz. 1. *Bishop of Norwich* v. *Prickett.*

So of these Words, *My Lord* Mordant *did know that* Prude *robbed* Shotbolt, *and bid me compound with* Shotbolt *for the same, and said he would see me satisfied for the same though it cost him* 100 *l. which I did for him, being my Master, otherwise the Evidence I could have given would have hanged* Prude. Cro. Eliz. 67. *Lord Mordant* v. *Bridges.*

Scan. Mag. was brought for speaking these Words, *You like not of me since you like those that maintain Sedition against the Queen's Proceeding*; the Defendant justifies by shewing the Occasion of speaking the Words, and that the Plaintiff encouraging Men to preach against the Common Prayer, he only meant that he liked of those who maintained Sedition (*innuendo Seditiosam illam doctrinam*) against the Queen's Proceedings; and this was held a sufficient Extenuation of the Words. 4 Co. 14. *Lord Cromwell's* Case. Q.

In *Scan. Mag.* for these Words, *My Lord* L. *is a base Earl and paltry Lord, and keeps none but Rogues and Rascals like himself. Williams* and *Croke* Justices held, the Action lay, for the Words touch him in his Honour and Dignity, and may raise Contempt from the People, and that in Case of Nobility general Words will maintain an Action. But *Yelverton* and *Fleming* seemed to incline to the contrary, and said the Words touched not his Life, Loyalty or Dignity, but were only Words of Spleen; *et adjornatur*; and after the Defendant died, and the Writ abated. Cro. Jac. 196. *Earl of Lincoln* v. *Broughton.*

For these Words wrote (*a*) in a Letter, *I have heard that your Lordship hath sought by uncharitable Means to bereft me of my Life, Lands and Liberty,* an Action lies. Moor 142. *Lord Lumley* v. *Fox.* 4 Co. 16. S. C.

(*a*) That the Action as well lies for Words written as those spoken. 2 Show. 505. pl. 467.

So where one, on hearing that his Barns were burnt down, said, *I can't imagine who it should be but Lord* Sturton. Moor 142. *Lord Sturton* v. *Chaffin.*

It hath been held that for these Words, *The Earl of* L.*'s Men by his Command took the Goods of* H. *by a forged Warrant*, an Action of *Scan. Mag.* does not lie, because not said the Earl knew the Warrant to be forged. Q. Goulf. 115.

An Action of *Scan. Mag.* was brought for these Words, *There are more Jesuits come into* England *since the Earl of* Northampton *was Lord of the* Cinque-Ports *than ever there were before*, and held actionable. 12 Co. *Earl of Northampton's* Case.

* In *Scan. Mag.* for these Words spoken by a Parson in the Pulpit, *The Lord of* Leicester *is a wicked and cruel Man, and an Enemy to the Reformation in* England, adjudged actionable, and 500 *l.* Damages given. *Page 407 Vent. 60. 2 Sid. 21. *Lord Leicester* v. *Mandy.* Freem. 49. pl. 58.

So for these Words, *The Earl of* Pembroke *is of so little Esteem in the Country, that no Man of Reputation hath any Esteem for him, and no Man will* *Earl of Pem-*

broke v. *Staniel.* *will take his Word for* 2 d. *and no Man of Reputation values him more than I do the Dirt under my Feet*; and held actionable, though ſaid they would not be ſo in the Caſe of a common Perſon.

Lev. 277. Sid. 434. 2 Keb. 537. *Earl of Peterborough* v. *Sir John Mordant.* If one ſays, *I met* J. S. *whom I do not know, but my Lord* P. *ſent after me to take my Purſe*, an Action of *Scandalum Magnatum* lies, tho' not poſitively ſaid my Lord *P.* ſent him, or that it was to take the Purſe feloniouſly; which laſt, in Caſe of an Action by a common Perſon might be a good Exception.

Vent. 59. S. C. adjudged, and there ſaid that in theſe Actions the Words ſhall not be taken *in Mitiori ſenſu.*—[*Vide* the laſt Paragraph under this Diviſion.]

Sid. 233. Keb. 813. Lev. 148. *Marquis of Dorcheſter* v. *proby.* So theſe Words, *I value my Lord Marquis of* D. *no more than I value the Dog that lies there*, were without Debate adjudged for the Plaintiff, but a Writ of Error was brought, pending which *Proby* was killed, but his Executors after paid the Money.

Paſch. 27. Car. 2. in *B. R. Lord Saliſbury* v. *Charles Arthur.* So of theſe Words, *My Lord* S. *may kiſs my A.*——, *I care not a T*—— *for him, he keeps none but a Company of Rogues about him*; On Not guilty pleaded, and a Trial at Bar, the Plaintiff had a Verdict and 100*l.* Damages.

2 Mod. 151, *&c.* Mod. 232. Freem. 220. pl. 227. *Lord Townſend* v. *Dr. Hughes.* If one ſays of a Peer, *He is an unworthy Man, and acts againſt Law and Reaſon*, an Action of *Scandalum Magnatum* lies notwithſtanding the Words are general and charge him with nothing certain; and ſo adjudged by *North*, *Wyndham*, and *Scrogs* againſt the Opinion of *Atkins*, who ſaid the Statute extended not to Words of ſo ſmall and trivial a Nature, but to ſuch only which were of greater Magnitude, by which Diſcord might ariſe, *&c.* and therefore the Words *horrible Lies* were inſerted in the Statute. *Note*; the Rule laid down by the Court in this Caſe was, that Words ſhould not be conſtrued either in a rigid or mild Senſe, but according to the genuine and natural Meaning, and agreeable to the common Underſtanding of all Men.

(C) The Proceedings in this Action.

2 Mod. 152. HERE I ſhall take Notice of the following Particulars:

That it is now clearly agreed, that though there be no expreſs Words in the Statute which give an Action, yet the Party injured may maintain one on this Principle of Law, that when a Statute prohibits the doing of a Thing, which if done might be prejudicial to another, in ſuch Caſe he may have an Action on that very Statute for his Damages.

Wil. Rep. 690. That though the Action is to be brought *tam pro domino rege quam pro ſe ipſo*, yet the Party is to recover all the Damages.

Freem. 49. pl. 58. That if the Words are actionable at Common Law, the Peer hath his Election to proceed on the Statute or at Common Law.

*Page 408 Cro. Car. 136. 2 Sid. 21. Freem. 425. pl. 572. * It hath been held, that this being a general Law the Plaintiff need not recite it particularly, and that if he ſets forth ſo much thereof as ſhews his Caſe to be within the Statute, it is ſufficient.

2 Mod. 151. Mod. 231. That it is now ſettled that no new Trial is to be granted in *Scan. Mag.* for exceſſive Damages; which Point ſeems to have been determined in the

the before mentioned Case of Lord *Townsend* v. Dr. *Hughes*, where the Jury gave 4000*l.* Damages.

In *Scan. Mag.* the Plaintiff declared that the Defendant spake these Words of him, *My Lord of* London *is a bold, daring, impudent Man for sending Heads of Divinity to his Clergy in these Parts contrary to Law*, ad damnum 2000*l.* which Sum the Jury gave in Damages. *Wallop* and *Williams* for the Defendant moved for a new Trial, in regard there was no Proportion betwixt the Scandal and the Damages, and likewise because there was no particular Damage proved at the Trial; the Defendant also had made an Affidavit that he was not worth 2000*l.* at the Time of the Action brought, nor since; but notwithstanding the Court refused to grant a new Trial. Hil. 33-4. Car. 2. in *C. B. Bishop of London* v. *Edmond Hickeringhill.*

It has been ruled, that in *Scan. Mag.* the Defendant cannot justify, let the Words be ever so true, because the Action is brought *qui tam*, in which the King is concerned; but it has been held that the Defendant may explain the Words by shewing the Occasion of speaking of them, and thereby extenuate the Meaning of them, as was done in Lord (*a*) *Cromwell*'s Case.§ 2 Mod. 166. Freem. 221. Poph. 67. (*a*) 4 Co. 14. §Which *vide ante*, 406.

In *Scan. Mag.* the Court will never change the Venue on the common Affidavit that the Words were spoken in another County, because a Scandal raised on a Peer of the Realm reflects on him through the whole Kingdom, and he is a Person of so great Notoriety, that there is no Necessity of his being tied down to try his Cause among his Neighbourhood. Carth. 400. 2 Salk. 668. pl. 3.

As in the Case of Viscount *Stamford* v. *Nedham*, where the Action was laid in *London*, and the Defendant moved to change the Venue, for that he was prohibited to stay in *London* having been in Arms against the King; but the Motion was denied; the Plaintiff being a Peer of Parliament then (*b*) sitting at *Westminster*, and has Election to lay his Action where it is most convenient for himself; and there is the less Reason for removing it because the Action is as well on Behalf of the King as himself. Lev. 56. Keb. 514. (*b*) *Vide* 1 Sid. 185. 2 Mod. 216.

But in the Case of Lord *Shaftesbury* v. *Graham*, the Court in *Scan. Mag.* on a Special Affidavit of the Plaintiff's Power and Interest in the County where the Action was laid, made a Rule for changing the Venue; but Note, that the Books which report and cite this Case, mention it as a Case of the Times, and that it was owing to the great Influence that Lord had in the City of *London*, that the Court varied from the general Rule, and which Rule hath ever since, and notwithstanding this Case, been adhered to.† 2 Jon. 198. Vent. 363. Skin. 40. pl. 9. 2 Show. 197. pl. 200.

† In the Case of *Lord Sandwich* v. *Miller*, in *B. R.* the Court refused to change the *Venue*, after solemn Argument, though a Rule to shew Cause was granted.

It hath been held, that the Statute which appoints that Actions for Words shall be commenced within two Years, does not extend to *Scan. Mag.* Cro. Car. 535.

Also it hath been held, that the Statute 27 *Eliz. c.* 8. for bringing a Writ of Error into the Exchequer Chamber does not extend to this Action. Cro. Car. 535. Sid. 143.

It hath been held, that in an Action of *Scan. Mag.* Special Bail is not required. 3 Mod. 41.

It hath been held, that no Costs are to be given the Plaintiff on his obtaining a Verdict.* 2 Show. 506.

* *Sed qu.* of this, for, if the Editor does not mistake, Costs were lately given in *B. R.* on a Case of Lord *Bolingbroke*'s? And I should suppose in all Cases of *Scan. Mag.* where the Words are actionable, and the Plaintiff recovers, he is intitled to Costs, if he is not intitled to them in Cases where they are not actionable.—As to the Proceeding in *Scan. Mag.* see 1 Com. Dig. 188.

SCIRE

*Page 409 * # SCIRE FACIAS.

(A) The Nature of the Writ. 409.
(B) In what Cases it is a proper Remedy. 410.
(C) In what Cases neceſſary, and herein who are to be Parties to it, and of the Privity required herein. 411.

And herein,

1. Of the *Sci. Fa.* to revive Judgments, and after what Time neceſſary. 411.
2. Of the *Sci. Fa.* on Recognizances and Statutes. 413.
3. Of the *Sci. Fa.* on Letters Patent. 415.
4. *Sci. Fa.* by and againſt Executors and Adminiſtrators. 416.
5. By and againſt Heirs and Tertenants. 417.
6. By and againſt Huſband and Wife. 419.
7. *Sci. Fa.* againſt Bail. 420.

(D) The Form of the Writ and Proceedings, and how far it muſt purſue the Nature of the original Action. 421.
(E) Pleadings to a Sci. Fa. 423.

(A) The Nature of the Writ.

Lit. Sect. 505. Co. Lit. 290. b. 291. a. F.N.B. 267.

A *Scire Facias* is deemed a (*a*) judicial Writ, and founded on ſome Matter of (*b*) Record, as Judgments, Recognizances, and Letters Patent on which it lies to inforce the Execution of them, or to vacate or ſet them aſide; and though it be a judicial Writ of Execution, yet it is ſo far in (*c*) Nature of an Original, that the Defendant may plead

(*a*) Upon a Fine *Sur Grant et Render* of an Advowſon a *Sci. Fa.* ſhall be granted; for this is a Judicial and no Original. 2 Inſt. 470. (*b*) That in many Caſes a *Sci. Fa.* is granted partly upon a Record, and partly upon ſuch a Suggeſtion, without which no Proceeding could be on the Record. 2 Inſt. 470.—That the Rule holds not always good. That where one comes in by Matter of Record, he ought not to be ouſted without a *Sci. Fa.* for he, whoſe Lands are extended upon an *Elegit*, upon a Recognizance, after the Debt be ſatisfied, may enter without a *Sci. Fa.* but the Conuſee of a Statute, becauſe he is to have Coſt or Damages which be not known, cannot be ouſted without a *Sci. Fa.* Cro. Car. 589. 4 Co. 67. 2 Rol. Abr 497.—*Sci. Fa.* lies in Chancery on a Patent; for the Patent being inrolled is a Record of that Court; but where *Sci. Fa.* is brought for the Forfeiture of a Patent or other Thing in another Court, there ought to be an Office found in ſuch other Court before the *Sci. Fa.* iſſues, except the Forfeiture appears of Record in the ſame Court, whereupon to found the *Sci. Fa.* 3 Lev. 223. [*Vide poſt.* 416.] (*c*) In Nature of an Original. Skin. 682. Comb. 455.—There are many *Sci. Fa.* in the Regiſter among the original Writs. Lucas 258.

plead to it, and it is in that Reſpect conſidered as an (*a*) Action; and therefore it is held, that a Releaſe of all Actions, or a Releaſe of all Executions, is a good Bar to a *Sci. Fa.*

(*a*) Is in Nature of a Declaration, Sid. 406.—and may be formed according to the ſubject Matter. Carth. 107.

* But though it be held that a *Sci. Fa.* is in Nature of an Original, yet it hath been adjuded, that no Writ of Error lies into the Exchequer Chamber on a Judgment given in *B. R.* on a *Sci. Fa.* the Statute 27 *Eliz. cap.* 8. which gives the Writ of Error, mentioning only Suits or Actions of Debt, Detinue, Covenant, Account, Actions upon the Caſe, *Ejectione Firmæ*, or Treſpaſs.

*Page 410 pl. 4. Cro. Car. 286, 300, 464. Rol. Rep. 264. Vent. 38. Salk. 263. Ld. Raym. 97. See 5 Mod. 228. 12 Mod. 105. Comb. 393.

Alſo it was formerly held, that the Plaintiff could not in a *Sci. Fa.* recover Coſts; but this is now remedied by the Statute 8 & 9 *W.* 3. *cap.* 11. *ſect.* 3. Dalſ. 95. 3 Bulſ. 322.

(B) In what Caſes it is a proper Remedy.

IF a Bill of Exceptions be tendered to a Judge, and he ſigns it and dies, a *Sci. Fa.* lies againſt his Executors or Adminiſtrators to certify it. 2 Inſt. 438.

So if a Man be outlawed, who at the Time of the Outlawry was beyond Sea in the King's Service, and he brings a Writ of Error to reverſe this Outlawry, and obtains a Certificate of the Marſhal of the King's Hoſt, (as he ought to do) in this Caſe, notwithſtanding the Marſhal dies, yet may he aſſign the ſame for Error, and upon ſhewing the Certificate have a *Sci. Fa.* to the Executors or Adminiſtrators of the Marſhal. 2 Inſt. 428. *vide* Title *Outlawry*.

A *Sci. Fa.* lies againſt a Sheriff who levies Money on a *Fi. Fa.* and retains it in his Hands. Hutt. 32. Cro. Jac. 514. And. 247. Godb. 276.

So a *Sci. Fa.* will lie for a Fine aſſeſſed on the Party at the Juſtice Seat of a Foreſt. Cro. Car. 409.—Lies to have Execution of Damages recovered in an Appeal. Cro. Jac. 549.

Upon an *Elongavit* returned by the Sheriff, a *Sci. Fa.* lies againſt the Pledges in a Replevin, by Plaint in the Sheriff's Court tranſmitted to the *Huſtings*, and ſo to *B. R.* by *Certiorari*. Comb. 1.—That a *Sci. Fa.* lies againſt the Sheriff for taking of inſufficient Pledges in Replevin. Hutt. 77. §

§ *Scire Facias* in Replevin will lie on Plaint, or on Writ. One may be Bail with others for himſelf; if *elongat.* is returned for the Principal, the Pledges may be ſued; if the Writ of Inquiry is reducible to a Certainty, it is enough; and Diſcontinuance is nothing in this Suit, unleſs it had been void or a Nullity. *Mulſo* v. *Shere*, T. 4 Geo. Fort. 330.

If one hath Judgment in a *Quare Impedit*, and after, and before Execution, the Party is outlawed, the King may have a *Sci. Fa.* to execute the Judgment, the King having Privity enough in this Caſe to ſue Execution, becauſe the Thing (*b*) as it was in the Plaintiff veſted in the King. Moor 241. Cro. Eliz. 44, 325.

(*b*) Where having the Thing gives a ſufficient Privity to maintain a *Sci. Fa.* Keilw. 168, 169.

On

Stil. 348. On Motion for a *Sci. Fa* to avoid a Judgment, made void by *Sci. Fa.* or *Audita Querela.*

On a Motion to diſcharge an Outlawry which was pardoned by the Act of Oblivion, the Court held that it could not be done on Motion, but that the Party muſt bring a *Sci. Fa.* on the Act.

by the general Act of Pardon, 12 Car. 2. the Court doubted whether this was to be done Sid. 231.

5 Mod. 88.

Where one obtained Judgment, and after had Judgment in a *Sci. Fa.* thereupon, and then became a Bankrupt, and the Original Judgment was aſſigned by the Commiſſioners to *S. S.* upon Motion it was entered to intitle him to the Benefit of the Judgment in the *Sci. Fa.* without bringing a new one.

*Page 411 Cro. Jac. 159. *Dr. Atkins* v. *Gardener.*

* A *Sci. Fa.* brought by the Succeſſor of a Preſident of the College of Phyſicians in *London*, upon a Judgment in Debt obtained by him upon the Statute 14 *H.* 8. *cap.* 5. againſt practiſing Phyſick in *London* without a Licence, he having died before Execution; it was objected on Demurrer, that the *Sci. Fa.* ought to have been brought by the Executor or Adminiſtrator of him who recovered; but without Argument the Court held that the Succeſſor might well maintain the Action, for the Suit is given to the College by a private Statute, and the Suit is to be brought by the Preſident for the Time being; and he having recovered in Right of the Corporation, the Law ſhall transfer that Duty to the Succeſſor of him who recovered.

Mich. 7. W. 3. in C. B. *Zouch* v. *Thompſon.*

A *Sci. Fa.* was brought in the Court of *C. B.* to reverſe a Fine in Antient Demeſne, and it was ruled that no ſuch Writ lay, but that the Party ought to bring his Writ of Deceit.

(C) In what Caſes neceſſary; and herein who are to be Parties to it, and of the Privity required herein: And therein,

1. Of the *Sci. Fa.* to revive Judgments, and after what Time neceſſary.

2 Inſt. 469.

THERE have been different Opinions whether a *Sci. Fa.* lay at Common Law; but this Doubt, ſays my Lord *Coke*, aroſe for want of diſtinguiſhing between Perſonal and Real Actions.

(*a*) In 2 Salk. 600. pl. 8. Ld Raym. 669. *Holt* Ch. J. ſaid he was not ſatisfied

At (*a*) Common Law, if after Judgment given, or Recognizance acknowledged, the Plaintiff ſued out no Execution within the Year, the Plaintiff or his Conuſee was driven to his Original upon the Judgment, and the *Scire Facias* in Perſonal Actions was given by the Statute of (*b*) *Weſtm.* 2. 13 *Ed.* 1. *ſtat.* 1. *cap.* 45.

that no *Sci. Fa.* lay at Common Law upon a Judgment in a Perſonal Action; for the Words *ſive alia quæcunque irrotulata*, in the Statute of *Weſtm.* 2. 13 Ed. 1. ſtat. 1. c. 45. came after *Contractus et Conventiones*, and therefore could not be conſtrued of Judgments, but that the Law had been taken to be otherwiſe, and therefore he muſt ſubmit. (*b*) Which ſee explained, 2 Inſt. 469, 470. and that this Statute gave the *Sci. Fa.* in Perſonal Actions. Co. Lit. 290. b. Sid. 351. 3 Co. 12. 4 Mod. 248. 3 Mod. 189.

2 Inſt. 470.

But in Real Actions, or upon a Fine, though no Execution was ſued out within a Year after the Judgment given or Fine levied, yet after the Year

Year a *Sci. Fa.* lay for the Land, &c. (*a*) becauſe no new Original lay upon the Judgment or Fine.

(*a*) The Reaſon why it lay in this Caſe was, for that in a Real Action one could have no other Advantage of his Judgment; but in a Perſonal Action, Debt would lie on the Judgment. 7 Mod. 64, 66. 2 Ld. Raym. 806. 2 Salk. 600. pl. 9.

A *Sci. Fa.* lay as well in Mixed as Real Actions, as upon a Judgment in an Aſſiſe. So it lay upon a Judgment in a Writ of Annuity. Salk. 258. pl. 11.

It hath been adjudged, that if there be Judgment in Ejectment, and no Execution ſued thereon in a Year and a Day, an *Habere facias poſſeſſionem* cannot be ſued out after without a *Sci. Fa.* and *Holt* Ch. J. ſaid, that as to the Poſſeſſion of the Land an Ejectment was real, and the only Remedy a Termor for Years had, and that a Recovery therein bound the Right of Inheritance. 2 Salk. 600. pl. 9. Salk. 258. pl. 11. 2 Salk. 600. pl. 9. Comb. 250. 7 Mod. 64.

et vid. Sid. 317, 351. 2 Keb. 307. Skin. 161. pl. 10. 3 Lev. 100. Lutw. 1268.

* But though after a Year and a Day there can be no Execution of a Judgment without a *Sci. Fa.* yet if the Plaintiff hath been delayed by a Writ of Error, he may take out Execution within a Year and a Day after the Judgment affirmed. *Page 412 5 Co. 88. Moor 566. pl. 772. Cro. Eliz. 706. Godb. 372. Palm. 448. and 2 Inſt. 471. where it is ſaid, that though it had been otherwiſe holden, yet common Experience and later Reſolutions are ſo.

And therefore it hath been adjudged, that if a Man recovers Debt or Damages in *B. R.* and after within the Year the Defendant brings a Writ of Error in the Exchequer Chamber, where the firſt Judgment is affirmed after the Year expired, yet the Recoverer may have Execution by *Capias* or *Fi. Fa.* within the Year after the Affirmance, without a *Sci. Fa.* for the Affirmance is a new Judgment. Rol. Abr. 899. Lan. 20. *Dennis* v. *Drake.* Cro. Eliz. 416. S. P.

So if after the Year after the Recovery the Defendant brings a Writ of Error, and the Judgment is affirmed, though before the Writ of Error brought the Recoverer was put to his *Sci. Fa.* yet this Affirmance is a new Judgment, and the Recoverer may have within the Year after the Affirmance a *Fi. Fa.* or *Capias* without a *Scire Facias.* Rol. Abr. 899. *et vide* Palm. 449. Latch 193.

So if he be Nonſuit in the Writ of Error, or if the Writ of Error be diſcontinued; for though in theſe Caſes there is not any new Judgment given, yet the bringing of the Writ of Error revives the firſt Judgment. Cro. Jac. 364. Rol. Rep. 104, 133.

If *A.* recovers againſt *B.* in *B. R.* Damages and Coſts, and thereupon hath Judgment againſt the Bail after a *Sci. Fa.* &c. and after *B.* and the Bail join in a Writ of Error upon the Statute in the Exchequer Chamber, and after the Year and Day paſſes, in this Caſe, notwithſtanding this Writ of Error, the Court of *B. R.* may grant Execution, for this is a void Writ of Error, and as if no Writ of Error had been brought, and therefore it ſhall be no Continuance of the firſt Judgment; but the Year and Day being paſt, the Plaintiff cannot have Execution without a *Sci. Fa.* though the Year paſſed after the Writ brought. Rol. Abr. 899. Trin. 9 Car. 1. *Barnſv. Hill.*

If upon a Judgment there be a *Ceſſat executio* for a Year after the Judgment, the Plaintiff within the Year may take out Execution without a *Sci. Fa.* 6 Mod. 14, 288. 7 Mod. 64. 2 Salk. 600. pl. 9. 2 Ld. Raym. 806.

Alſo it hath been held, that where Execution hath been taken out after the Year and Day, it is not void, but voidable only. 3 Lev 404. Salk. 273. pl. 4.

But

Salk. 322. pl. 9. *et vide* Tit. *Injunction.* But though it ſeems agreed that the Execution being ſtaid by the Act of the Defendant, the Plaintiff may after the Year and Day take out Execution without a *Sci. Fa.* yet it hath been held, that if the Execution is ſtaid by Injunction, though by the Act of the Defendant, yet the Court will not take Notice thereof.

Carth. 283. *Seymour* v. *Greenvil.* 2 Show. 235. pl. 233. S. P. Comb. 232. S. P. where it was ſaid by Sir *Sam. Aſtry*, that it was not the Practice to award an *Elegit* on the Roll, becauſe Attornies think they can have no Execution after; but it was ſaid by the Court to be a miſchievous Practice. If Judgment be given in Debt, and no Execution ſued out within the Year, yet the Plaintiff may after have an Award of an *Elegit* on the Roll of the Judgment as of the ſame Term with the Judgment, and thence continue it by *Vicecomes non miſit breve*; ſo held on a Motion to ſet aſide the Execution; and though the Court ſaid that an *Elegit* ought to be actually taken out within the Year, yet being informed by the Clerks of the Court, that it had been the Practice for many Years to make ſuch Entry, *&c.* it was ſaid to be the Law of the Court, and they ordered the Execution to ſtand.

*Page 413 2 Inſt. 471. Co. Lit. 290. b. *et vide* *If the Demandant or Plaintiff take his Proceſs of Execution within the Year, though it be not ſerved within the Year, yet if he continue the ſame, he may have Execution at any Time after the Year.

2 Leon. 77, 78, 87. 3 Leon. 259. 4 Leon. 44. Sid. 59. Keb. 159. 6 Mod. 288.

Caſes in *B. R.* Paſch. 13 W. 3. *Haw* v. *Cuton.* If the Plaintiff delay the executing a Writ of Inquiry, 'till a Year after the interlocutory Judgment, he cannot do it after without a *Sci. Fa.*

2 Salk. 603. pl. 13. Ld. Raym. 328, 553. In the Caſe of the King there need not be any *Sci. Fa.* after the Year and Day.

Salk. 89. pl. 11. 402. pl. 10. 7 Mod. 3. See 5 Mod. 396. Carth. 447. 3 Salk. 369. pl. 6.

2 Salk. 598. pl. 3. *Hardiſty* v. *Barny.* If a Judgment be above ten Years ſtanding, the Plaintiff cannot ſue a *Sci. Fa.* without a Motion in Court; if under ten, but above ſeven, he cannot have a *Sci. Fa.* without a Motion at Side Bar. *Note*; if after ſuch Motion, and Judgment revived by *Sci. Fa* the Defendant dies before Execution, the Plaintiff muſt ſue a new *Sci. Fa.* but may have it without Motion, for the Judgment was revived before.

Rol. Abr. 900. Trin. 13 Car. 1. *Roberts* v. *Piſing.* After a Judgment, if the Plaintiff within the Year ſues a *Sci. Fa.* he cannot after have a *Capias* within the Year 'till he hath a new Judgment in the *Sci. Fa.* ‡

2. Of

† If a *Sci. Fa.* has lain four Days in the Office, Summons upon it may be made any Time before the Court is up, on the Return-Day. *Obrian* v. *Frazier*, M. 12 Geo. Stra. 644.——If Defendant dies after Writ of Inquiry executed, and before the Return, and the *Sci. Fa.* is to ſhew Cauſe why a new Writ of Inquiry ſhould not be awarded, it ſhall be quaſhed; for it ſhould be to ſhew Cauſe why the Damages aſſeſſed ſhould not be recovered. *R.* on Demurrer, *Compton* v. *Leeds*, 13 Geo. 1. *C. B. Goldſworthy* v. *Southcott*, H. 22. Geo. 2. *B. R.* 1 Wilſ. 243.——If Defendant pleads to *Sci. Fa. quare, &c.* that Plaintiff ſhould not have his *Action*, (inſtead of Execution,) it is well enough. *Grey* v. *Jones*, T. 4. Geo. 3. 2 Wilſ. 251.——The Term of the Recovery need not be inſerted. Barnes 431.——It may be quaſhed on Plaintiff's Motion, after Appearance, without Coſts. Barnes 431.——On Judgment *Mic.* Term, Execution was ſtopped by Injunction, and afterwards taken out teſted the laſt Day of the ſubſequent *Mic.* Term: but it was held irregular, without *Sci. Fa.* A Writ of Error is Matter of Record, which the Court can take Notice of, but an Injunction is not. *Winter* v. *Lightbound*, P. 6 Geo. Stra. 301.——If a Delay of Execution for a Year has ariſen from the Defendants by Bills for Injunctions, and by obtaining Time for Payment, Execution may be ſued out without a *Sci. Fa.*; and if a Rule to ſhew Cauſe why it ſhould not be ſet aſide is obtained, the Court will diſcharge it with Coſts. *Mickel* v. *Cue*, M. 32. Geo. 2. 2 Burr. 660.——After two *Nihils*, and *Scire Fieri* Inquiry, *Devaſtavit* returned, and traverſed; if the Defendant does not apply in

2. Of the *Sci. Fa.* on Recognizances and Statutes.

Recognizances and Statutes are conſidered as Judgments, being Obligations ſolemnly acknowledged, and entered of Record, and the *Sci. Fa.* on thoſe is the Judicial Writ, and (*a*) the proper Remedy the Conuſee hath; but herein we muſt diſtinguiſh (*b*) between Recognizances at Common Law and Statutes Merchant, &c. for upon the former, if the Conuſee did not take out Execution within a Year after the Day of Payment aſſigned in the Recognizance, he was obliged to commence the Suit again by Original; the Law preſuming the Debt might have been paid, if they did not ſue Execution within the Year after the Money became payable; but this Law is altered by *Weſtm.* 2. 13 *Ed.* 1. *ſtat.* 1. *cap.* 49. by which the Conuſee hath a *Sci. Fa.* given him to revive the Judgment and put it in Execution, if the Conuſor cannot ſtop it by pleading ſuch Matters as the Law judges ſufficient for that End, ſuch as a Releaſe, &c. but the Conuſee of a Statute Merchant, &c. may at any Time ſue Execution on them without the Delay or Charge of a *Sci. Fa.*

Lit. Rep. 89.

(*a*) That a *Capias* lies not on a Recognizance, but only a *Sci. Fa.* Brown. 83.

(*b*) Co. Lit. 291. 2 Inſt. 469. F. N. B. 296. Bro. *Recog.* 17.

Alſo as to Recognizances at Common Law, and Statutes and Recognizances introduced by Statute Law, we muſt further diſtinguiſh, that if on the firſt the Conuſee dies before Execution ſued, his Executor ſhall not ſue it, even within the Year, without bringing a *Sci. Fa.* againſt the Conuſor; the Reaſon is, becauſe the Law preſumes the Debt might have been paid to the Teſtator, and therefore will not ſuffer the Debtor to be moleſted, unleſs it appear that he hath omitted to perform the Judgment; and this is to be done by *Sci. Fa.* brought by the Executor, for the Alteration of the Perſon altereth the Proceſs at Common Law; but this tending to delay, the *Sci. Fa.* is taken away in Statutes and Recognizances by Statute Law by the ſeveral Acts of Parliament which introduceth them; and therefore upon the Death of the Conuſee of a Statute Merchant, &c. his Executors may come into Chancery, and upon their producing the Teſtament and the Statute, ſhall have Execution without a *Sci. Fa.* as the Teſtator himſelf might.

2 Inſt. 395, 471. Bro. *Stat. March.* 16, 43, 50.

* If a Man be bound in a Recognizance to the King, upon Condition to be of good Behaviour, &c. he cannot be indicted for (*a*) Breach of the good Behaviour, by which he forfeits his Recognizance, without a *Sci. Fa.* for if a *Sci. Fa.* had been brought, he might have pleaded ſome Matter in Diſcharge thereof.

*Page 414

4 Inſt. 181. Rol. Abr. 900.

(*a*) What ſhall be ſaid a Breach, *vide* Cro. Car. 498.——And how to be aſſigned, *vide* 3 Bulſt. 220. Cro. Jac. 412. Stil. 369.

If a Man acknowledge a Recognizance, to be paid at a Day within the Year after the Date of the Recognizance, in this Caſe he may have Execution by *Fi. Fa.* or *Elegit* within the Year after the Day of Payment, though the Year be paſt from the Date of the Recognizance.

21 E. 3. 22. b. Rol. Abr. 899, 900. 2 Inſt. 471.

If *A.* enters into a Recognizance or Statute, &c. to *B.* and the Sum is made payable at three ſeveral Days, as 20*l.* at each Day, the whole Debt being 60*l.* when the firſt Day of Payment is elapſed, the Conuſee may have

2 Rol. Abr. 468. Co. Lit. 292. 2 Inſt. 395, 471. 5 Co. 81.

---

ih a reaſonable Time, the Court will not relieve on Motion. *Wharton* v. *Richardſon*, T. 11 Geo. 2. Stra. 1075.——The Defendant cannot plead that the Warrant of Attorney was given on an uſurious Contract. *Buſh* v. *Gower*, P. 9 Geo. 2. Stra. 1043. *Rep. Temp. Hardw.* 233.——Where an Executor or Adminiſtrator has obtained Judgment after Verdict, the Adminiſtrator *de bonis non*, may have a *Sci. Fa.* 17 Car. 2. c. 8. ſ. 2.

have Execution for 20 *l.* immediately, and ſo for the Reſt as it becomes due, without waiting for the laſt Day of Payment, as he muſt have done if the Debt had been due by Bond; and this holds as well on Recognizances at Common Law as upon Statutes; and the Reaſon is becauſe theſe are in Nature of three ſeveral Judgments.

Rol. Abr. 900. 2 Inſt. 471. Salk. 258. pl. 11. 2 Ld. Raym. 806. 2 Salk. 600. pl. 9.

If a Man recovers an Annuity, he ſhall have Execution for every Time that occurs after by *Fi. Fa.* or *Elegit* within the Year after the Time incurred, though the Year be paſt from the Judgment, but not after the Year without a *Sci. Fa.*

2 Inſt. 395.

If two acknowledge a Recognizance of 100 *l. quilibet eorum in ſolido*, that is jointly and ſeverally, the Conuſee may ſue ſeveral *Sci. Fa.* againſt the Conuſors upon this Recognizance.

2 Rol. Abr. 468.

So if *A. B.* and *C.* bind themſelves jointly and ſeverally in a Statute, the Conuſee may have Execution againſt one of them alone, or againſt all together; but he cannot have Execution againſt two only, for the Execution muſt purſue the Statute which is joint or ſeveral, but Execution againſt two is neither one nor the other.

Co. Lit. 290. 2 Inſt. 678. 4 Co. 67.

By the Statute 32 *H.* 8. *cap.* 5. it is enacted, That if Lands delivered in Execution on juſt Cauſe be recovered from the Tenant by Execution before he hath received his whole Debt, the Conuſee (and, by a favourable Conſtruction of the Statute, his Executors) may have a *Sci. Fa.* out of that Court where the Execution is firſt awarded, or out of any Court where the Record ſhall be moved by Writ of Error and affirmed; but this Statute is to be conſtrued under theſe Reſtrictions, that where the Conuſee hath Remedy for Part of his Debt *in preſenti*, or *futuro* for the Whole or for Part, there he can have no Aid nor Benefit of this Statute.

2 Rol. Abr. 480.

Herein likewiſe we may conſider that a *Sci. Fa. ad rehabendum terram* lies for avoiding Executions on theſe Statutes, which differs from the Writ of *Audita Querela*, for that avoids an Execution unjuſtly obtained at firſt; but the *Sci. Fa.* allows the Execution juſt at firſt, but ſhews that the End for which it was granted being obtained, it ought of Conſequence to ceaſe.

4 Co 67. 2 Inſt 398. 2 Rol. Abr. 480, 497.

And therefore if the Conuſor, after his Land is extended, tenders the Money to the Conuſee, who refuſes it, or if the Debt, with all Coſts and Damages, which the Statute *de Mercatoribus* allows, be ſatisfied from any caſual Profit ariſing from the Land, in theſe Caſes the Conuſor is put to his *Sci. Fa.* and cannot enter; but in Caſe of an *Elegit* on a Recognizance at Common Law, when the Conuſee is anſwered his Debt by the Perception of the certain and uſual Profits of the Land, the Debtor may enter, and is not put to his *Sci. Fa.* yet in this Caſe, if the Creditor be ſatisfied by an accidental Perquiſite, there

*Page 415

* the Debtor cannot enter, but muſt have a *Sci. Fa. ad rehabendum terram*; and the Reaſon of theſe Diſtinctions is, becauſe in the firſt Caſe the Execution iſſues according to the Direction of the Statute, not only 'till the principal Debt be levied, but all Coſts and Damages ariſing by Reaſon thereof; and therefore, ſince the Damages are not aſcertained, the Record will always oppoſe an Entry, which is but an Act in *Pais*, and cannot be turned into a Defeaſance of a Matter of Record 'till ſuch Damages are ſettled on Record in the *Sci. Fa.* But in the ſecond Caſe, when the Debt is certain, and the Value of the Land aſcertained in the Extent, there, when ſuch Debt is paid by Perception of ſuch ſettled Profits, there is no Act on Record to oppoſe an Entry, and therefore an Entry is lawful; but where the Satisfaction ariſes from accidental

cidental Profits which do not appear in the Extent, this then is ſtill Matter of Record in Oppoſition to the Entry, ſince ſuch accidental Profits do not appear in the Valuation of the Land ſettled by the Extent on Record.

So if Lands be extended on a Statute, and the Time of the Extent expired, the Conuſor is put to his *Sci. Fa.* becauſe the Conuſee may have Cauſe to hold the Land longer than the Time of Extent, for he may retain it 'till he has received his Coſts of Suit and reaſonable Expences. 4 Co. 67. 2 Rol. Abr. 497.

But no *Sci. Fa.* lies upon a general Averment that the Conuſee has levied the Debt before the Time of the Extent expired, becauſe this may happen by the Conuſee's Induſtry in improving the Land, which the Debtor can take no Advantage of. So if the Land taken in Execution be really worth 20 *l. per Ann.* but it is extended only at 10 *l.* though by this Computation 'tis evident the Conuſee might levy the Debt before the Time of the Extent is ended, yet the Conuſor, upon an Averment that the Debt is levied, ſhall have no *Sci. Fa.* becauſe that would be contrary to the Record, and the Court is to judge of the Value according to the Extent; by which it appears that the Debt is not levied; but, if the Conuſee has levied Part by cutting of Wood, and has received the Reſidue, as appears by an Acquittance, in this Caſe he ſhall have a *Sci. Fa.* The Reaſon is, becauſe the End of the Extent being only to ſatisfy the Conuſee his reaſonable Demands, whenever it appears to the Court that they are anſwered, whether it be by the Perception of the Profits or otherwiſe, they grant a *Sci. Fa.* to avoid the Extent. 2 Rol. Abr. 482.

If the Conuſee has levied Part of the Debt according to the Extent, the Conuſor, upon Tender of the Reſidue in Court, ſhall have a *Sci. Fa.* to recover the Lands within the Time of the Extent; for here it appears on Record how much was due at firſt, how much was paid, and what remains due and in Arrear; but, if the Conuſor had tendred the Remainder of the Debt out of Court or if in Court he had only offered to come to an Agreement with the Conuſee, in neither of theſe Caſes ſhall the *Sci. Fa.* be granted, becauſe it does not appear on Record that the Debt is paid. 2 Rol. Abr. 482.

The Grantee of a Reverſion may bring a *Sci. Fa.* againſt him who hath Execution of the Lands on a Statute Merchant, on alledging that he hath Satisfaction by ſome caſual Profits, though he was not Party or Privy. † Dyer 1. pl. 6.

† *Scire Facias* in the Petty-Bag will lie on a Bond given to the late King, his Executors and Adminiſtrators, as within 33 H. 8. c. 39. *Rex* v. *Bradford*, H. 1 Geo. 2 Ld. Raym. 1327. in Chancery.——*Sci. Fa.* cannot be teſted the ſame Day the Party makes Default. *Rex* v. *White*, H. 18 Geo. 2. Stra. 1220.

3. Of the *Sci. Fa.* on Letters Patent.

The Writ of *Sci. Fa.* to repeal Letters Patent lieth in three Caſes; 1ſt, When the King by his Letters Patent doth grant by ſeveral Letters Patent one and the ſelf ſame Thing to ſeveral Perſons, the firſt Patentee ſhall have a *Sci. Fa.* to repeal the ſecond; 2dly, When the King doth grant a Thing upon a falſe Suggeſtion, he *Prærogativâ Regis* may by *Sci. Fa.* repeal his own Grant; 3dly, When the King doth grant any Thing which by Law he cannot grant, he *Jure Regis*, and for the Advancement of Juſtice and Right, may have a *Sci. Fa.* to repeal his own Letters Patent; and the Judgment in all theſe Caſes is, *Quod Prædictæ Literæ Patentes dicti Domini Regis revocentur, cancellentur, evacuentur, adnullentur, et vacuæ et invalidæ pro nullo penitus habeantur* 4 Inſt. 88. * Page 416

antur et teneantur, ac etiam quod irrotulamentum eorundem cancelletur, caſſetur et adnihiletur.

2 Vent 344. *The King* v. *Sir Oliver Butler.* 3 Lev. 220, 221. S. C. 6 Mod. 229. S. P.

Where a Patent is granted to the Prejudice of the Subject, the King of Right is to permit him upon his Petition to uſe his Name for the Repeal of it in *Sci. Fa.* at the King's Suit; and to prevent Multiplicity of Actions; for ſuch Actions will lie notwithſtanding ſuch void Patent; as where the King grants a Patent for holding a Fair or a Market without a Writ of *Ad quod damnum*, or where ſuch Writ hath been deceitfully executed, in ſuch Caſe a *Sci. Fa.* lies to repeal the Patent.

3 Lev. 221. (*a*) For this *vide* Dyer 197. 11 Co. 74. 8 Co. *Prince's* Caſe.

And though in the above Caſe it was urged that a *Sci. Fa.* did not lie to repeal ſuch Patents, becauſe there is (*a*) another Remedy by the Common Law, *i. e.* by Aſſiſe of Nuſance, *Quod permittat, &c.* where the Matter ſhall be tried by a Jury and ſeveral Judges, and not by one Judge only, as it is in (*b*) Chancery; yet it was reſolved that the King has an undoubted Right to repeal a Patent wherein he is deceived, or his Subjects prejudiced, and that by *Sci. Fa.*

(*b*) It is the higheſt Point of the Lord Chancellor's Juriſdiction to cancel the King's Letters Patent under the Great Seal. 4 Inſt. 88. *vide* Title *Juriſdiction of the Court of Chancery.*

3 Lev. 223.

It was likewiſe objected in the above Caſe, that there ought to have been an Office found before the *Sci. Fa.* iſſued, for that a *Sci. Fa.* is a Judicial Writ, and ought to be founded on a Record; to which it was anſwered and reſolved, that true it is, a *Sci. Fa.* ought to be founded on a Record; and ſo 'tis here, for the Patent is a Record in Chancery upon which this *Sci. Fa.* iſſued, and it is a ſufficient Record whereon to found it; but where the *Sci. Fa.* is brought for the Forfeiture of a Patent or other Thing in another Court, there ought to be found an Office in ſuch other Court before the *Sci. Fa.* iſſues, except the Forfeiture appears of Record in the ſame Court whereupon to found the *Sci. Fa.* and where the Office is found, the King ſhall ſeiſe (*c*) preſently upon the Office found; but where the Office is founded upon the Office itſelf, as here, the King cannot ſeiſe 'till the Forfeiture, or other Defect of the Patent be tried upon the *Sci. Fa.*

(*c*) 9 Co. 96.

4. *Sci. Fa.* by and againſt Executors and Adminiſtrators.

2 Inſt. 471. Godb. 83. Cart. 112, 193.

One that is no Party to the Record, Recognizance, Fine or Judgment, as the Heir, Executor or Adminiſtrator, though they be privy, and it be within the Year, ſhall have no Writ of Execution, but a *Sci. Fa.* to enable themſelves to the Suit; and ſo of the Tenant or Defendant, for the Alteration of the Perſon altereth the Proceſs; otherwiſe in the Caſe of a Statute Staple or Merchant, becauſe the Proceſs is given by other Acts of Parliament.

7 Mod. 68. *per Holt*, who ſaid that it had been ſo lately adjudged; for this *vide* Moor 367. pl. 503. Noy 150. Carter 112, 122, 180, 193.

But if there be two Plaintiffs in a Perſonal Action, and one of them dies, that ſhall not put the other to a *Sci. Fa.* So (*d*) if one of the Defendants die, becauſe the ſame Party ſtill remains on Record.

(*d*) 5 Mod. 339. S. P. Reſolved, if a Suggeſtion of his Death be made on the Record, but not otherwiſe, becauſe then it would not be agreeable with the Record Salk. 319. pl. 3. Ld. Raym. 244. Comb. 441. 5 Mod. 338. Carth. 404. 6 Mod. 108. *et vide* ſtat. 8 & 9 W. 3. c. 11. ſ. 7.—[Death of one Plaintiff or Defendant, where there is another ſurviving, not to abate the Suit.]

*Page 417 Mod. 188. *Farrer* v. *Brooks.*

* So if there be Judgment againſt *A.* and thereupon a *Fi. Fa.* is ſued out, but before Execution *A.* dies inteſtate, there needs no *Sci. Fa.* to renew this Judgment, but Execution of the Goods may be made in the Hands

Hands of the Administrator; for, as the Party himself could not have made any Defence to the Writ of Execution, there is no Reason that his Representative should be in a better Condition. & *vide* Tit. *Execution.*

It was formerly held, that if an Administrator, having obtained Judgment against a Creditor of the Intestate's, died, the Administrator *de bonis non* could not have a *Sci. Fa.* on this Judgment for Want of Privity, but must begin anew. Cro. Jac. 4. *Yale* v *Gough* adjudged by three Judges against one.

Yelv. 33. S. C. But for this *vide* Cro. Car. 167. Latch 40. Palm. 443. 5 Co. 9. And. 23. Moor 40. 2 Saund. 149. Sid. 29. 2 Sid. 122.

But now by the 17 *Car.* 2. *cap.* 8. it is enacted, "That where any *(a)* "Judgment after Verdict shall be had, by or in the Name of any Execu- "tor or Administrator, in such Case an Administrator *de bonis non* may "sue forth a *Sci. Fa.* and take Execution upon such Judgment." For which *vide* Salk. 322. pl. 10. 2 Ld Raym. 1072.

6 Mod. 290. 11 Mod. 34. pl. 6. *(a)* If an Administrator obtains a Decree, but dies before Inrolment, the Administrator *de bonis non* may revive this Decree within the Equity of this Statute. 2 Vern. 237.

If an Administrator *durante Minoritate* brings an Action and recovers, and then his Time determines, the Executor may have a *Sci. Fa.* upon that Judgment. Rol. Abr. 888. Cro. Car. 227. 2 Brownl. 83. Godb. 104. Lev. 181. Keb. 750. 1 Vern. 25.

So if such an Administrator obtains Judgment, he may bring a *Sci. Fa.* against the Bail, and they cannot object that the Infant is of full Age, for the Recognizance being to the Administrator himself by Name, tho' he be Administrator *durante Minori ætate tantum*, yet he may have a *Sci. Fa.* against the Bail. 2 Lev. 37. *Enbrin* v. *Mompesson.*

5. By and against Heirs and Tertenants.

It is clearly agreed, that in all real Actions a *Sci. Fa.* lay at the Common Law, and consequently that an Heir may by such Writ revive and inforce the Execution of a Judgment obtained by his Ancestor. 2 Inst. 469. 3 Co. 12. 2 Salk. 600. pl. 9. Ld. Raym. 806. Salk. 258. pl. 11. 7 Mod. 50, 64. 4 Mod. 248.

Also it is held, that if the Demandant in a Writ of Cousenage, or other *(b)* Real Action, in which Land and Damages are recovered, has Judgment, and dies, the Heir shall take out Execution as to the Land, and the Executor as to the Damages. 19 E. 4. 5. b. 43 E. 3. 2. Rol. Abr. 889.

(b) So of a Recovery in Waste, the Heir shall have Execution of the Land, and the Executor of Damages. 43 E. 3. 2. 1 Rol. Abr. 889.

And as a *Sci. Fa.* lies for the Heir, so it lies against *(c)* him on a Judgment obtained against his Ancestor; but this is to be understood where Lands in Fee-Simple * descend to the Heir, for it would be unreasonable to subject the Heir to the Payment of his Ancestor's Debts any further than the Value of the Assets descended. Also if the Heir be within Age, he is not liable to Execution during his Minority, but in such Case the Parol must demur. Dyer 81. Co. Lit. 103. 290. *(c)* Against the Heir of an Heir. Cro. Jac. 186.

* Suppose the Ancestor is seised in Fee, and makes a Settlement, and thereby makes his Heir Tenant in Tail, shall not the Debtor have Relief against the Heir, by virtue of the Statute 3 & 4 W. & M. c. 14. whereby all Disposition of Lands, &c. by any seised in Fee in Possession, &c. as to Creditors, shall be void, unless made for Payment of a real Debt, or for Portions of younger Children, in pursuance of an Agreement before Marriage? *Vide* the Statute.

And

Sid. 54. Raym. 19. And though an Heir only, who hath Lands in Fee-Simple descended, is bound, yet if *A.* be Tenant for Life, Remainder to *B.* his Son in Tail, and *A.* enters into a Recognizance and dies, *C.* brings a *Sci. Fa.* and *B.* is returned Heir and Tertenant, and warned, but makes * Default, he can have no *Audita Querela* to avoid this Execution, because he had a Day given in Court to set aside the Recognizance, and it was his Folly not to appear when warned. ‖

*Page 418

‖ As to Tenant in Tail, see the Note, *ante* 417.

Vern. 143. 2 Vern. 37, 88, 89. 3 Lev. 355. If there be a Sequestration for a Personal Duty against the Ancestor where the Heir is not bound, and the Defendant dies, there is an End of the Sequestration; and it cannot be revived against the Heir, because neither the Heir nor the Lands are bound by such Decree; but if the Decree was upon a Covenant that bound the Heir, and the Defendant died, such Decree might be revived by *Subpœna Sci. Fa.* against the Heir, to shew Cause against the Decree, if the Decree be inrolled of Record, or if not, by Bill of Revivor; and when revived against the Heir and Executor, (which is the usual and regular Way) the Sequestration also will be revived on Motion, if, upon coming into Court, Cause is not shewn why the Decree should not be revived.

Carth. 107. Where a Judgment is had against one who dies before Execution, a *Sci. Fa.* will not lie against his Heir and Tertenants until a *Nihil* is returned against his Executor.

And. 161. It is laid down as a general Rule, that in all Cases where the *(a)* Inheritance or Freehold is affected, the Tenant of the Freehold is to be made a Party.

(a) On a Motion to reverse an Outlawry in Treason it was objected, that there ought to be a *Sci. Fa.* to the Lords mediate and immediate before the Outlawry shall be reversed; but held not to be necessary, the Forfeitures in Treason belonging to the King, and not to them. 4 Mod. 366.

Salk. 339. pl. 4. 2 Salk. 598. pl. 2. Comb. 318. Dyer 321. Co. Ent. 233. Cro. Eliz. 474, 739. Bridgm. 69. Moor 524. Hence it hath become a settled Point, not to reverse a Fine without a *Sci. Fa.* returned against the Tertenants; for the Conusees are but nominal Persons, and the Tertenants ought not to be put out of Possession without Warning to defend themselves, for they may have a Release to plead, or some other Defence to make.

Carth 111. 3 Mod 119. Skin. 273. pl. 1 *Earl of Pembroke's* Case. So upon a Writ of Error to reverse a Common Recovery, it was said by *Holt* Ch. J. that though the granting a *Sci. Fa.* in such Cases against the Tertenants is discretionary, and not *stricti Juris*, yet that it being the constant Course of the Court to grant it, he was of Opinion not to depart from that which had been the usual Course of the Court, and therefore awarded a *Sci. Fa.* though the Case was of a hard Nature, and attended with extraordinary Circumstances.

27 H. 6. 135. 1 R. 2. 242. 3 Co. 13. a. Cro. Car. 205, 313. Regularly the *Sci. Fa.* is to be awarded to the *(b)* Heir and Tertenants; and it seems to be the better Opinion, that the Tertenant alone is not to be charged, and that therefore until the Heir be summoned, or that it be returned, that there is not any Heir to be summoned, or that the Heir hath not any Lands to be charged, the Tertenant ought not to be charged, for the Heir may have a Release to plead, or other Matter to bar the Execution; and his Land is rather to be charged than the Land of the Tertenant, for the Heir shall not have Contribution against the Tertenant, as the Tertenant shall have; also if the Heir be

(b) A *Sci. Fa.* may be against the Heir and Tertenants, and the Heir cannot object that a *Sci. Fa.* ought first to issue against him. Cro. Eliz. 896. *Sir Christopher Heyden's* Case.

within

within Age, the Parol ſhall demur, and the Tertenant ſhall have Advantage thereof.

All the Tertenants are to be ſummoned, and therefore in a *Sci. Fa.* againſt ſome of them they may (*a*) plead, that there are other (*b*) Ter- * tenants not named, and pray Judgment if they ought to anſwer *quouſque* the others are ſummoned. * Page 419

Salk. 40. pl. 9.

2 Salk. 679 pl. 7. 601. pl. 11. See 6 Mod. 134, 199, 226. (*a*) But when a Tertenant is ſummoned, and he doth not plead, that there are other Tertenants not ſummoned, he ſhall never afterwards have a *Sci. Fa.* or *Audita Querela* to compel the others to contribute. Moor 524. (*b*) Where Plea, that another was jointly ſeiſed with him, *vide* Rol. Rep. 57. 2 Jon. 122. Comb. 185.

But it hath been doubted whether ſuch Tertenants could plead other Tertenants not warned in another County, which is now held that they may; and accordingly it hath been determined, that when one Tertenant is returned ſummoned upon a *Sci. Fa.* he may plead that there are other Tertenants though in another County, and that this is not within the Statute 16 & 17 *Car.* 2. *cap.* 5. which relates to an Extent executed.

2 Vent. 104. *Prynne* v. *Slaughter.*

Upon a Judgment in Debt a *Sci. Fa.* iſſued againſt the Tertenants, and *A.* was returned Tenant, who pleaded that *J. S.* was ſeiſed of 20 Acres of Land, which were the Defendant's at the Time of the Judgment given, and prayed Judgment if he ſhould be put to anſwer 'till *J. S.* was warned; and on Demurrer this was held a good Plea; but it was ſaid that the Writ ſhould not abate, but that the Defendant ſhould not anſwer till the other was warned. And it was ſaid by *Houghton* Juſtice, that there was a Diverſity between a *Sci. Fa.* to have Execution on a Judgment in Debt, and to have Execution on a Judgment in a real Action; for in the laſt Caſe it is no Plea, for every Tenant ſhall anſwer for himſelf, and one may loſe, and the other not; but in the firſt Caſe each ought to be contributory for his Part.

Cro. Jac. 506. *Mitchell* v. *Sir John Croſts.*

If there be Judgment in Debt againſt two, and one dies, a *Sci. Fa.* lies againſt the other alone, reciting the Death; and he cannot plead that the Heir of him that is dead has Aſſets by Deſcent, and demand Judgment if he ought to be charged alone; for at (*c*) Common Law the Charge upon a Judgment being (*d*) perſonal, ſurvived; and the Statute *Weſtm.* 2. (13 *Ed.* 1. *ſt* 1.) that gives the *Elegit* does not take away the Remedy of the Plaintiff at the Common Law, and therefore the Party may take out his Execution which Way he pleaſes, for the Words of the Statute are *ſit in Electione*; but if he ſhould, after the Allowance of this Writ, and Revival of Judgment, take out an *Elegit* to charge the Land, the Party may have Remedy by (*e*) Suggeſtion, or elſe by *Audita Querela.*

Lev. 30. Raym. 26. Keb. 92. *Edſar* v. *Smart.*

(*c*) 1 E. 3. 13. pl. 41. 3 E. 3. pl. 37. 29 Aſſ. pl. 37. 29 E. 3. 29.

(*d*) For the Difference between a Real and a Perſonal Execution, and that a perſonal Execution will ſurvive, though a real one will not, *vide* 3 Co. 14. Yelv. 209. Raym 253. 2 Keb. 3, 331. 4 Mod. 315. 3 Keb. 295. Salk. 319. pl. 3. Holt 1. pl. 2. Carth. 236. Ld. Raym. 244. Comb. 441. 5 Mod. 338. Carth. 404. Show. 402. (*e*) For this *vide* F. N. B. 166. 44 E. 3. 10.

The *Sci. Fa.* may either be (*f*) general againſt all Tertenants, or againſt the Tertenants naming them; but it is (*g*) ſaid, that if a Perſon undertakes to name them, he muſt be ſure to name them all.

2 Salk. 600. pl. 8. Ld. Raym. 669.

(*f*) Whether to be directed to all the Executors generally, or to them by their Names. 2 Bulſ. 231. (*g*) Comb. 282.

To a *Sci. Fa.* againſt the Heirs and Tertenants, the Sheriff muſt return that they are Tenants of all the Lands *in Balliva ſua*, and not that they are Tenants of Lands in *Balliva ſua.*

2 Salk. 598. pl. 1.

6. By

6. By and againſt Huſband and Wife.

If a Woman, Executrix to *J. S.* marries, and the Huſband and Wife bring an Action of Debt upon an Obligation in the Right of the Wife as Executrix to *J. S.* againſt *J. D.* and have Judgment againſt him to recover the Debt with Damages and Coſts, and after the Wife dies before Execution ſued, the Huſband ſhall not have a *Sci. Fa.* upon this Judgment; for that he, though he was privy to the Judgment, ſhall not have the Thing recovered, but it belongs to the ſucceeding Executor or Adminiſtrator.

Page 420

Cro. Car. 207, 227. *Beaumont* v. *Long*, adjudged; tho' objected the Judgment was for the Coſts and Damages which belonged to the Huſband, tho' the Debt did not, and therefore the *Sci. Fa.* ſhould be maintained for the Damages; but a *Sci. Fa.* being as well for the Debt as Damages, it was held not maintainable; and whether he might maintain a *Sci. Fa.* for the Damages and Coſts, they would give no Opinion. Jon. 248. S. C. adjudged, and ſaid this Recovery does not turn it to the proper Debt of the Huſband, as it would if the Baron and Feme recovered the proper Debt of the Feme.

But if Huſband and Wife obtain Judgment in Debt, and the Wife dies, the Huſband, without taking out Adminiſtration to her, may have a *Sci. Fa.* for by the Judgment it is become a Debt to him.

Sid. 377. Cro. Eliz. 844. 3 Mod. 188. 2 Leon. 14. 4 Leon. 186.

If a Woman obtains a Judgment in Debt and after marries, and the Huſband and Wife ſue out a *Sci. Fa.* and thereupon have an Award of Execution, though the Wife dies, yet the Huſband (without taking out Adminiſtration) may have Execution upon the Judgment, for the Award upon the *Sci. Fa.* attached in the Huſband, and ſhall ſurvive, though objected, the Award on the *Sci. Fa.* made no Alteration, becauſe the Execution muſt be on the firſt Judgment.

Salk. 116. pl. 7. *Woodier* v. *Greſham*, adjudged. Comb. 455. S C. by which it appears the Year expired before the *Sci. Fa.* taken out, and ſaid by *Holt* Ch. J. that the Debt was attached to him jointly with his Wife: So that although the Award of the Execution did not alter the Nature of the Debt, yet it altered the Property. Carth. 415. Skin. 682. pl. 2. S. C.

If a Judgment in Debt is obtained againſt a Feme Sole, who afterwards marries, and then a *Sci. Fa.* is thereupon brought againſt Huſband and Wife, and after two *Nihils* returned, Judgment is given that the Plaintiff ſhall have Judgment againſt them, and the Wife dies, the Huſband ſhall be liable to this Execution.

Carth. 30. Salk. 116. pl. 7. 3 Mod. 186. Comb. 103. Skin. 682. pl. 2. *Obrien* v. *Ram.*

7. *Sci. Fa.* againſt Bail.

A *Sci. Fa.* is the uſual and proper Remedy againſt the Bail when Judgment hath been obtained againſt the Principal, and no Satisfaction made by him; and this is founded on a Record, to wit, the Act of the Court in admitting the Party to Bail, and the Judgment againſt him; but it muſt appear that the Party himſelf hath not ſatisfied the Judgment; and hence it hath become a ſettled Rule that there muſt be (*a*) a *Capias* returned againſt the Principal before the *Sci. Fa.* is to iſſue againſt the Bail. ‖

Moor 432. Cro Eliz. 597. Lev. 225. *&wide* Title *Bail*, Letter (D).

(*a*) That it muſt be awarded within the Year, elſe not till a *Sci. Fa.* againſt the Principal. 2 Jon. 96.——Not neceſſary to recite it in the *Sci. Fa.* Cro. Jac. 97.

‖ And the Courſe is, to get the Sheriff to return *Non eſt inventus* on the *Ca. Sa.*

Sid. 105. If there is Judgment againſt *A.* to account, and Manucaptors found by him to appear before Auditors aſſigned, no *Sci. Fa.* lies againſt the Manu-

Manucaptors or Bail without a Certificate from the Auditors to the Court, that he hath not conformed; for the Auditors are Judges of the Cauſe, and may excuſe the Non-appearance, and may appoint a ſhorter or longer Day for the Party to appear, as they think fit.

In a *Sci. Fa.* againſt Bail, they cannot plead, that the Principal died before the *Sci. Fa.* iſſued (*b*), but they may plead, that the Principal died (*c*) before the Return of the *Capias* againſt him; ſo they may plead, that the Principal died before any Judgment againſt him, becauſe they cannot have a Writ of Error to reverſe that Judgment. Cro. Jac. 163. Hutt. 47. (*b*) Cro. Jac. 97. Moor 175. Poph. 186.

Winch 61. Stil. 324. 2 Mod. 28, 308. (*c*) But if he dies after the Return of the *Capias*, this will not excuſe the Bail. Rol. Abr. 336.

If the Principal ſurrenders himſelf, or the Bail render him up, this will diſcharge the Bail, and may be pleaded to the *Sci. Fa.* but ſuch Surrender or Render are not ſufficient, unleſs the Plaintiff or his * Attorney have Notice of it; and this is required, that the Plaintiff may, if he pleaſes, charge him in Execution; alſo that he may not be at any further Trouble or Charge in proceeding againſt the Bail. Moor 888. Leon. 58. 2 Bulſ. 260. *Page 421

In a *Sci. Fa.* by the Executor of the Plaintiff, upon a Judgment againſt the Principal, the Defendant pleaded that the Teſtator ſued Execution by *Sci. Fa.* againſt the Bail, and had Judgment and Execution awarded againſt them; and it was held no Plea, becauſe not ſhewed the Plaintiff was ſatisfied by the Execution againſt the Bail; for otherwiſe, without Satisfaction, he may always charge the Bail. Cro. Jac. 545. *Freeman* v. *Freeman.*

If one be Bail for *A. B. C.* and *D.* and before the Return of the ſecond *Sci. Fa.* the Plaintiff takes *A.* in Execution, yet the Bail are not diſcharged as to the other three, for they undertook to bring in all four †. 1 Lev. 195. Vent. 315. 2 Mod. 312. 2 Jon. 75. *Aſtry* v. *Balard.*

† *Scire Facias* againſt Bail in Error, on a Judgment for Damages muſt be to ſhew cauſe why Plaintiff ſhould not have Execution of the *Debt* aforeſaid (the ſpecific Sum in the Recognizance) not of the Damages. *Barlow* v. *Evans*, T. 18 Geo. 2. Wilſ. 98.

(D) The Form of the Writ and Proceedings, and how far it muſt purſue the Nature of the original Action.

IT is ſaid that a *Sci. Fa.* being a Judicial Writ, ſhall not abate for want of (*d*) Form; and that therefore where the Words (*e*) *Si ſibi viderit expedire* were left out in a *Sci. Fa.* yet the Writ was held ſufficient. Lucas 270. (*d*) *Sciri Facias* for *Scire Facias* held naught. Sid. 406. (*e*) 3 Keb. 190. *cont.* 2 Lutw. 1281.

Alſo it hath been agreed, that wherever an Original was amendable, there a *Sci. Fa.* would be ſo too, and that a Diſcontinuance herein by the Demiſe of the King is aided by the Statute 1 *Ann. cap.* 8. 6 Mod. 263. Lucas 258, 354.

If the Bail ſues an *Audita Querela*, and a *Sci. Fa.* thereupon, which recites the *Audita Querela* and the *Capias* againſt the Principal, and the Return thereupon, which *Capias* was awarded *tempore reginæ Eliz.* and the *Sci. Fa.* is recited to be *per breve dominæ Reginæ Angliæ vicecomiti noſtro de* S. *direct'*, Rol. Abr. 199, 797. *Barns* v. *Woolrich.*

6. By and againſt Huſband and Wife.

If a Woman, Executrix to *J. S.* marries, and the Huſband and Wife bring an Action of Debt upon an Obligation in the Right of the Wife as Executrix to *J. S.* againſt *J. D.* and have Judgment againſt him to recover the Debt with Damages and Coſts, and after the Wife dies before Execution ſued, the Huſband ſhall not have a *Sci. Fa.* upon this Judgment; for that he, though he was privy to the Judgment, ſhall not have the Thing recovered, but it belongs to the ſucceeding Executor or Adminiſtrator.

Page 420

Cro. Car. 207, 227. *Beaumont* v. *Long*, adjudged; tho' objected the Judgment was for the Coſts and Damages which belonged to the Huſband, tho' the Debt did not, and therefore the *Sci. Fa.* ſhould be maintained for the Damages; but a *Sci. Fa.* being as well for the Debt as Damages, it was held not maintainable; and whether he might maintain a *Sci. Fa.* for the Damages and Coſts, they would give no Opinion. Jon. 248. S. C. adjudged, and ſaid this Recovery does not turn it to the proper Debt of the Huſband, as it would if the Baron and Feme recovered the proper Debt of the Feme.

But if Huſband and Wife obtain Judgment in Debt, and the Wife dies, the Huſband, without taking out Adminiſtration to her, may have a *Sci. Fa.* for by the Judgment it is become a Debt to him.

Sid. 377. Cro. Eliz. 844. 3 Mod. 188. 2 Leon. 14. 4 Leon. 186.

If a Woman obtains a Judgment in Debt and after marries, and the Huſband and Wife ſue out a *Sci. Fa.* and thereupon have an Award of Execution, though the Wife dies, yet the Huſband (without taking out Adminiſtration) may have Execution upon the Judgment, for the Award upon the *Sci. Fa.* attached in the Huſband, and ſhall ſurvive, though objected, the Award on the *Sci. Fa.* made no Alteration, becauſe the Execution muſt be on the firſt Judgment.

Salk. 116. pl. 7. *Woodier* v. *Greſham*, adjudged. Comb. 455. S C. by which it appears the Year expired before the *Sci. Fa.* taken out, and ſaid by *Holt* Ch. J. that the Debt was attached to him jointly with his Wife: So that although the Award of the Execution did not alter the Nature of the Debt, yet it altered the Property. Carth. 415. Skin. 682. pl. 2. S. C.

If a Judgment in Debt is obtained againſt a Feme Sole, who afterwards marries, and then a *Sci. Fa.* is thereupon brought againſt Huſband and Wife, and after two *Nihils* returned, Judgment is given that the Plaintiff ſhall have Judgment againſt them, and the Wife dies, the Huſband ſhall be liable to this Execution.

Carth. 30. Salk. 116. pl. 7. 3 Mod. 186. Comb. 103. Skin. 682. pl. 2. *Obrien* v. *Ram.*

7. *Sci. Fa.* againſt Bail.

A *Sci Fa.* is the uſual and proper Remedy againſt the Bail when Judgment hath been obtained againſt the Principal, and no Satisfaction made by him; and this is founded on a Record, to wit, the Act of the Court in admitting the Party to Bail, and the Judgment againſt him; but it muſt appear that the Party himſelf hath not ſatisfied the Judgment; and hence it hath become a ſettled Rule that there muſt be (*a*) a *Capias* returned againſt the Principal before the *Sci. Fa.* is to iſſue againſt the Bail. ‖

Moor 432. Cro Eliz. 597. Lev. 225. *&vide* Title *Bail*, Letter (D).

(*a*) That it muſt be awarded within the Year, elſe not till a *Sci. Fa.* againſt the Principal. 2 Jon. 96.——Not neceſſary to recite it in the *Sci. Fa.* Cro. Jac. 97.

‖ And the Courſe is, to get the Sheriff to return *Non eſt inventus* on the *Ca. Sa.*

If there is Judgment againſt *A.* to account, and Manucaptors found by him to appear before Auditors aſſigned, no *Sci. Fa.* lies againſt the Manu-

Stil. 105.

Manucaptors or Bail without a Certificate from the Auditors to the Court, that he hath not conformed; for the Auditors are Judges of the Cauſe, and may excuſe the Non-appearance, and may appoint a ſhorter or longer Day for the Party to appear, as they think fit.

In a *Sci. Fa.* againſt Bail, they cannot plead, that the Principal died before the *Sci. Fa.* iſſued (*b*), but they may plead, that the Principal died (*c*) before the Return of the *Capias* againſt him; ſo they may plead, that the Principal died before any Judgment againſt him, becauſe they cannot have a Writ of Error to reverſe that Judgment. Cro. Jac. 163. Hutt. 47. (*b*) Cro. Jac. 97. Moor 175. Poph. 186.

Winch 61. Stil. 324. 2 Mod. 28, 308. (*c*) But if he dies after the Return of the *Capias*, this will not excuſe the Bail. Rol. Abr. 336.

If the Principal ſurrenders himſelf, or the Bail render him up, this will diſcharge the Bail, and may be pleaded to the *Sci. Fa.* but ſuch Surrender or Render are not ſufficient, unleſs the Plaintiff or his * Attorney have Notice of it; and this is required, that the Plaintiff may, if he pleaſes, charge him in Execution; alſo that he may not be at any further Trouble or Charge in proceeding againſt the Bail. Moor 888. Leon. 58. 2 Bulſ. 260. *Page 421

In a *Sci. Fa.* by the Executor of the Plaintiff, upon a Judgment againſt the Principal, the Defendant pleaded that the Teſtator ſued Execution by *Sci. Fa.* againſt the Bail, and had Judgment and Execution awarded againſt them; and it was held no Plea, becauſe not ſhewed the Plaintiff was ſatisfied by the Execution againſt the Bail; for otherwiſe, without Satisfaction, he may always charge the Bail. Cro. Jac. 545. *Freeman* v. *Freeman.*

If one be Bail for *A. B. C.* and *D.* and before the Return of the ſecond *Sci. Fa.* the Plaintiff takes *A.* in Execution, yet the Bail are not diſcharged as to the other three, for they undertook to bring in all four †. 1 Lev. 195. Vent. 315. 2 Mod. 312. 2 Jon. 75. *Aſtry* v. *Balard.*

† *Scire Facias* againſt Bail in Error, on a Judgment for Damages muſt be to ſhew cauſe why Plaintiff ſhould not have Execution of the *Debt* aforeſaid (the ſpecific Sum in the Recognizance) not of the Damages. *Barlow* v. *Evans*, T. 18 Geo. 2. Wilſ. 98.

(D) The Form of the Writ and Proceedings, and how far it muſt purſue the Nature of the original Action.

IT is ſaid that a *Sci. Fa.* being a Judicial Writ, ſhall not abate for want of (*d*) Form; and that therefore where the Words (*e*) *Si ſibi viderit expedire* were left out in a *Sci. Fa.* yet the Writ was held ſufficient. Lucas 270. (*d*) *Sciri Facias* for *Scire Facias* held naught. Sid. 406. (*e*) 3 Keb. 190. *cont.* 2 Lutw. 1281.

Alſo it hath been agreed, that wherever an Original was amendable, there a *Sci. Fa.* would be ſo too, and that a Diſcontinuance herein by the Demiſe of the King is aided by the Statute 1 *Ann. cap.* 8. 6 Mod. 263. Lucas 258, 354.

If the Bail ſues an *Audita Querela*, and a *Sci. Fa.* thereupon, which recites the *Audita Querela* and the *Capias* againſt the Principal, and the Return thereupon, which *Capias* was awarded *tempore reginæ Eliz.* and the *Sci. Fa.* is recited to be *per breve dominæ Reginæ Angliæ vicecomiti noſtro de* S. *directi*', Rol. Abr. 199, 797. *Barns* v. *Woolrich.*

S. *direct'*, which is to the Sheriff of the King that now is, this is Error by the Common Law, but is (*a*) now amendable.

(*a*) By the 18 Eliz. cap. 14. no Judgment to be ſtaid or reverſed after Verdict for want of Form in any Judicial Writ; for which *vide* Cro. Jac. 89, 162, 372. 2 Sid. 7. 12. Vent. 105.

6 Mod. 263, 310. *Williams* v. *Hoſkins.* But where in Ejectment there was Judgment for two Meſſuages, and after a Year a *Sci. Fa.* upon it recited a Judgment of one Meſſuage only; and *Nul tiel record* being pleaded, it was moved to amend it, but denied; for the Court held, that the Writ was good, for aught appeared on the Face of it, and that if there were a Judgment for one Meſſuage, this would be a good Writ to revive it; ſo being good in itſelf, though not appoſite to this Purpoſe, to amend would be to make a new Writ, or to alter a good Writ, and fit it to another Purpoſe; and to amend this Writ would falſify the Defendant's Plea, which was good at the Time when pleaded; but if the Fault had appeared in the very Writ, it might be amended; and for his Expedition the Plaintiff took another Writ, which the Court held he might do without getting this quaſhed; for if this Writ abates, then it is not the ſame Cauſe.

Salk. 52. pl. 17. *Vavaſor* v. *Baile.* So in a *Sci. Fa.* on a Judgment, and by Miſtake in the *Sci. Fa.* the Plaintiff's Name was put for the Defendant's, *Sir Rhadulphus* for *Jacobus*; and it was moved to amend it, being the Fault of the Clerk, but de-
Page 422 * nied *per Cur.* for the Writ does not appear to us to be wrong, and there may be ſuch a Judgment for aught we know.

Latch 112. It is ſaid that a *Sci. Fa.* is in Nature of a Bill in Chancery, and that the ſame Certainty is not required therein as by the Common Law.

Hill. 15 & 16 Car. 2. *in B. R. Duaby* v. *Lord Byron.* Sid. 173. Keb. 648. S. C. In a *Sci. Fa.* upon a Judgment in the Upper Bench before *Oliver* Lord Protector of the Commonwealth of *England*, *Scotland* and *Ireland*, and the Dominions thereunto belonging, &c. the *Sci. Fa.* was *Coram Olivero domino nuper protectore* only; *Nul tiel record* was pleaded; and if this was a Variance between the *Sci. Fa.* and the Record, was the Queſtion. *Twiſden* held it variant, in that there might have been another Judgment *Coram domino protectore* only; and ſaid, the Act for Confirmation of Judicial Proceedings confirms them, and makes them Records only under that Stile; but the other Judges held that this was no material Variance; and that in a *Sci. Fa.* it was not neceſſary to ſet forth the Stile of the King at large.

2 Inſt. 470. By the Statute *Weſtm.* 2. 13 *Ed.* 1. *ſtat* 1. *cap.* 45. there ſhall be no Eſſoin nor Protection in a *Sci. Fa.* but Aid, Age and Receit ſhall be granted; for the Words *Solemnitates curiæ* are to be underſtood the ſolemn Judicial Proceedings of the Court, but extend not to the Right of the Party to have his Age, or to be received, or to have Aid of another.

6 Mod. 68. *Jewon* v. *Turner.* A *Sci. Fa.* to revive a Judgment againſt an Executor, mentioned firſt a Day of Appearance *Coram nobis ubicunque*, but after gave a Day to the Party to appear *ad præd. diem apud Weſtm.* and it was moved to amend it; but the Court ſaid, that it being in the Writ they could not do it of Grace or Favour, but would give Day to ſhew Cauſe why it ſhould not be amended *ex merito juſtitiæ*; but the Plaintiff for his Expedition moved to quaſh it.

If two *Nihils* are returned on a *Sci. Fa.* this amounts to a Warning.

Yelv. 112. Yelv. 88. *et vid.* Skin. 633. [where There muſt be two *Nihils* or a *Scire Feci* returned upon a *Sci. Fa.* for two *Nihils* amount to a Garniſhment. It

it is ſaid, to be the conſtant Practice of *B. R.* to ſue both the *Scire Facias*'s at once, in regard that there ought to be a full Time between the Date of the ſecond *Scire Facias*, and the Return of it; but by a Rule of Court E. 5. Geo. 2. Every *Scire Facias*, of which Notice ſhall be given to the Defendant or Defendants named in ſuch Writ, ſhall be delivered to the Sheriff to whom directed, or left

at

It hath been adjudged, that in a *Scire Fa.* it is ſufficient that there be (*a*) 15 Days incluſive between the Teſte of the Writ of the firſt *Sci. Fa.* and the Return of the ſecond. Carth. 468. 2 Salk. 599. pl. 7. *et vide* 2 Jon. 228. Cro. Eliz. 738.

(*a*) Where there was but 14 Days between the Teſte and Return of the *Sci. Fa.* and the Court held it aided by the Statute 17 Car. 2. c. 8. Lutw. 26.

But where two *Sci. Fa.* were taken out with the ſame Teſte, but different Returns, the one returnable *in Quinden. Hill.* and another *Craſtin. Pur.* though there were different Returns and at convenient Diſtances, yet becauſe they were actually taken out at one Time, it was adjudged wrong; for thus the Party would loſe the Benefit of two *Sci. Fa.* which the Law gives him. 6 Mod. 86. *per Cur.*

It is a general Rule, that the *Sci. Fa.* muſt purſue the firſt Action; and therefore where an Action of Debt was brought in *Cumberland*, and Judgment had by Confeſſion, and a *Sci. Fa.* brought thereon againſt the Executor in *Middleſex*, this was held to be erroneous, though the Confeſſion was at *Weſtminſter*, and that the *Sci. Fa.* ought to have been brought in *Cumberland.* Cro. Jac. 331. Yelv. 218. Hob. 4. S.C. *Wharton* v. *Sir Edward Muſgrave.*

On a Recognizance taken in *B. R.* the *Sci. Fa.* muſt be brought in *Middleſex*, for the Recognizances there are not obligatory by the Caption, but by their being entered of Record in the Court. So it is of Debt †. 2 Salk. 600. pl. 10.

† *Vide Harriſon's Practice* of *K. B.* 283, *&c.*

But on a Recognizance in *C. B.* the *Sci. Fa.* may be laid in the County where the Captain was, or in *Middleſex* where 'tis filed; for 'tis a Record by the Caption, and becomes immediately obligatory, and therefore may be brought there; and 'tis alſo filed at *Weſtminſter* in *C. B.* and there remains of Record ‡. 2 Salk. 600. pl. 10. But for this Diverſity *vide* Stil. 9. All. 12. Hob. 195.

‡ *Vide Harriſon's Practice* of *C. P.* 371, *&c.*

* Alſo though regularly the firſt *Sci. Fa.* upon a Recognizance to have Execution, ought to be in the County where it was acknowledged; yet, if it be returned that he hath no Lands there, that no Heir can be found, or that the Party is dead, a *Teſtatum Sci. Fa.* may iſſue to any other County where the Party ſurmiſeth that there are Lands. *Page 423 Cro. Car. 313.

It hath been reſolved that a *Sci. Fa.* on a Recognizance of Bail taken by Commiſſioners in the County of *York*, may be brought in *Middleſex* or *York*, at the Election of the Party. 2 Lutw. 1287 *Redman* v. *Winford.*

If there be a Judgment in Debt again *A.* and *B.* one *Sci. Fa.* will not lie thereon againſt the Heir of *B.* and another againſt *A.* for the *Sci. Fa.* ought to purſue the Judgment, and that being joint, ſo ought the *Sci. Fa.* to be, for otherwiſe there would be ſeveral independent Suits. 2 Salk. 598. pl. 1. Carth 105. S. C. *et vide* Skin. 82. pl. 24.

---

at his Office *four* Days before the Return of ſuch Writ *excluſive* of the Day on which ſuch Writ is returnable.—By the ſame Rule every *firſt* Writ of *Scire Facias* on which a *Nichil* ſhall be returned, ſhall be delivered to the Sheriff, or left in his Office *ſometime* before the Return of ſuch Writ.—Alſo every Writ of *alias Scire Facias* ſhall be delivered to the Sheriff, or left in his Office *four* Days excluſive before the Return of ſuch Writ. *Vide Harriſon's Practice of K. B.* 258, *&c.*]

(E) Pleadings to a Sci. Fa.

Lit. Sect. 506. Co. Lit. 291.

A *Sci. Fa.* whether conſidered as an Original or Judicial Writ, is an Action, and ſuch as the Defendant may (*a*) plead to; and therefore it is held, that a Releaſe of all Actions, or all Executions, is a good Bar to a *Sci. Fa.* So in a *Sci. Fa.* on a Fine, a Releaſe of all Actions is good Plea in Bar.

(*a*) A Man may plead in Bar or Abatement to a *Sci. Fa.* as well as to other Actions. The Plea in Bar is always concluded by an *Executio non*, as in other Caſes by an *Actio non*. Lucas 112. Yelv. 218.

Cro. Eliz. 283. *Allen* v. *Andrews.*

But the Defendant cannot regularly to a *Sci. Fa.* to have Execution of a Judgment, plead that which might have been pleaded to the original Action; as where *A.* as Adminiſtrator to *J. S.* by Virtue of Adminiſtration granted to him by the Archbiſhop of *Canterbury*, brought Debt againſt *B.* and had Judgment to recover, and after the Year brought a *Sci. Fa.* on the Judgment; the Defendant pleaded, that the Inteſtate died in *London*, and had not *bona notabilia* in divers Dioceſes, and that after the Judgment the Biſhop of *London* committed Adminiſtration to the Wife; and upon Demurrer it was held, that this was a Matter he could have pleaded before, and that it was annulling the Record, which is not ſufferable.

Sid. 182.

So where in a *Sci. Fa.* on a Judgment the Defendant pleaded the Statute of Uſury, and it was held no Plea, becauſe he ſhould have pleaded it to the original Action.

Salk. 2. pl. 5. 2 Ld. Raym. 853. *Weſt* v. *Sutton.*

So if a *Sci. Fa.* be brought on a Judgment in Aſſiſe for the Office of Marſhal, the Defendant cannot plead, that the Plaintiff was an alien Enemy, for this was pleadable to the Aſſiſe; and as he admitted the Plaintiff able to have Judgment, he cannot now diſable him from having Execution.

Salk. 600. 12 Mod. 499.

But a Diverſity is held between a *Sci. Fa.* upon a Judgment in Debt and in Ejectment, and that in the laſt a Stranger may controvert the original Title, but thoſe that claim under the Judgment are eſtopped and bound by it.

Dyer 377. a.

In a Writ of Annuity for an Annuity granted to a Seneſchal for holding Courts, there was Judgment for the Annuitant, who brought a *Sci. Fa.* for Arrearages incurred *after* the Judgment; to which the Defendant pleaded, that the Seneſchal, though often requeſted, refuſed to hold any Court, and this was held a good Plea.

*Page 424 Golds. 170. *Foe* v. *Bolton*, vide Title *Execution.*

* The Sheriff levied the Debt on the Defendant's Goods, but did not return the Writ; whereupon the Plaintiff brought a *Sci. Fa.* againſt the Defendant to ſhew Cauſe why he ſhould not have Execution on the ſame Judgment; to which the Defendant pleaded, that the Sheriff had levied the Debt on his Goods, *&c.* and this was held a good Plea.

3 Lev. 119. *Kettleby* v. *Hales.*

But where to a *Sci. Fa.* on a Judgment the Defendant pleaded, that the Sheriff had levied Part upon a *Fi. Fa.* and that after it was agreed between the Plaintiff and Defendant, that the Defendant ſhould pay the Under Sheriff 10 *l.* in full Satisfaction for the Reſidue, and that he paid it accordingly; and on Demurrer the Plea was held inſufficient, Payment being no Plea in Debt upon a Bill obligatory; *a fortiori* not in Debt upon a Judgment of Record.

But now by the 4 & 5 *Ann. cap.* 16. *ſect.* 12. it is enacted, "That where "an Action of Debt ſhall be brought upon any ſingle Bill, or where "Debt or *Sci. Fa.* ſhall be brought on any Judgment, if the Defendant "hath paid the Money, ſuch Payment may be pleaded in Bar."

It

It ſeems agreed, that a general *Non-tenure* is not a good Plea to a *Sci. Fa.* upon a Judgment in a Perſonal Action, becauſe it falſifies the Sheriff's Return; but that in a *Sci. Fa.* to have Execution of a Judgment in a Real Action, one may plead *Non-tenure* againſt the Return of the Sheriff, becauſe of the high Regard the Law has to the Freehold. 2 Rol. Rep. 54. Cro. Eliz. 872. 6 Mod. 134. 226. 2 Ld. Raym. 854. Salk. 40. pl. 9. 2 Salk. 679. pl. 7.

But a ſpecial *Non-tenure* may be pleaded to a *Sci. Fa.* upon a Judgment in a Perſonal Action; as to a *Sci. Fa.* on a Judgment for Debt or Damages againſt Tenant for Years, he may plead that he has only a Term for Years. Owen 134. 3 Lev. 205.

If one Jointenant is returned, he may plead that another is Tenant of a Moiety. § 2 Rol. Rep. 54. *vide ſupra.*

§ Judgment on a *Scire facias* cannot give Damages for Delay of Execution; but if it does, it may be reverſed for that, and affirmed *pro reſiduo*. *Henriques* v. *Dutch Weſt-India Company*; on Error in *B. R.* T. 2 Geo. 2.——*Affirmed in Parliament, Anno* 1730. Stra. 807. Ld. Raym. 1532.——But if it is found that Plaintiff is *damnified*, and put to Coſts to 6 *d.* it is well; for it is only meant as a Foundation for the Coſts *de incremento*. Damages may mean Coſts. *Knox* v. *Caſtello*, M. 6 Geo. 3. 3 Burr. 1789.

SEQUESTRATION.

(A) The Nature and firſt Introduction of ſuch Proceſs. 425.
(B) In what Caſes to be awarded. 426.

And herein,

1. Againſt what Perſons. 426.
2. To what Places. 426.
3. What Eſtate or Intereſt ſhall be liable to a Sequeſtration, and for what Time. 426.

(C) Of the Power and Duty of the Sequeſtrators. 427.
(D) Sequeſtration, when determined. 428.

(A) The

Page 425 (A) The Nature and first Introduction of such Proceſs.

A Sequeſtration out of Chancery is grounded on the Return of the *(a)* Serjeant at Arms, wherein it is certified that the Defendant had ſecreted himſelf; and therefore this Proceſs iſſues, and gives Authority and Power to the Sequeſtrators (who are Perſons of the Plaintiff's own naming) to enter upon and ſeiſe his, the Defendant's, Real and Perſonal Eſtate.

(a) There muſt be a Serjeant at Arms after the Return of the Commiſſion of Rebellion before a Sequeſtration can iſſue; and the Reaſon hereof is, that the Court will not iſſue Proceſs upon the whole Lands and Goods of the Defendant, 'till one of its own Officers ſee that the Defendant do totally diſappear. *Vide* Preced. Chan. 549, *&c.*

Cro. Eliz. 651. *Brograve* v. *Watts.* (b) Mod. 259.— But 2 Mod. 258, That the Chancellor having iſſued ſuch Sequeſtration, it will be as binding as any other Proceſs according to the Rules of the Common Law. (c) 2 Chan. Ca. 44.

It appears that there were great Struggles between the Common Law Courts and Courts of Equity before this Proceſs came to be eſtabliſhed; the former holding that a Court of Conſcience could only give Remedy *in Perſonam*, and not *in Rem* (*b*); that Sequeſtrators were Treſpaſſers, againſt whom an Action lay; and in the Caſe of (*c*) *Colſton* v. *Gardener* the Chancellor cites a Caſe, where they ruled, that if a Man killed a Sequeſtrator in the Execution of ſuch Proceſs, it was no Murther.

Will. Rep. (621.) 2 Chan. Ca. 44.

But theſe were ſuch bloody and deſperate Reſolutions, and ſo much againſt common Juſtice and Honeſty, which requires that the Decrees of this Court, which preſerved Men from Deceit, ſhould not be rendered illuſory, that they could not long ſtand; but this Proceſs got the better of theſe Reſolutions on this Ground; 1ſt, That the extraordinary Juriſdiction might puniſh Contempts by the Loſs of Eſtate as well as Impriſonment of the Perſon, becauſe that Liberty being a greater Benefit than Property, if they had a Power to commit the Perſon, they might take from him his Eſtate, 'till he had anſwered his Contempts, 2dly, To ſay that a Court ſhould have Power to decree about Things, and yet ſhould have no Juriſdiction *in rem*, is a perfect Soleciſm in the Conſtitution of the Court itſelf.

Chan. Ca. 92. 2Ch. Ca. 44.

It has been ſaid, that the firſt Inſtance of a Sequeſtration after a Decree was Sir *Thomas Read*'s Caſe in Lord *Coventry*'s Time, and that it was afterwards awarded in Chancery in the Caſe of *Hyde* v. *Pitt*, 1666, and affirmed in Parliament, and by the Court of Exchequer, *Gnavus* v. *Fountaine*, 1687, and ſince, without Scruple; the Doubt formerly was, that Lands were not liable to Execution before the Statute *Weſtm.* 2. (13 *Ed.* 1. *ſt.* 1.) *cap.* 18.

Vern. 421.

In *Vernon*'s *Reports* it is ſaid that Sequeſtrations were firſt introduced in Lord *Bacon*'s Time, and then but ſparingly uſed in Proceſs, and after a Decree to ſequeſter the Thing in Demand only.

(B) In

* (B) In what Caſes to be awarded: And herein, *Page 426

1. Againſt what Perſons.

A Sequeſtration *niſi* is the firſt Proceſs againſt a Peer or Member of the Houſe of Commons. Will Rep. 385. pl. 117. Chan. Ca. 61, 138. S. P.—A Sequeſtration granted againſt an Infant Peer. 2 Chan. Ca. 163.—That formerly an Attachment lay. Comb. 62.—That it muſt be founded upon a proper Affidavit, being a Judicial Act of the Court. Eq. Rep. 178.

A Sequeſtration is alſo the firſt Proceſs againſt the menial Servant of a Peer, within the Words and Meaning of the Statute 12 & 13 *W.* 3. *cap.* 3. for that otherwiſe ſuch Servant would have greater Privilege than his Lord. Will. Rep. 535. pl. 155.

If there be a Sequeſtration *niſi* againſt a Peer for want of an Anſwer, and the Peer puts in an Anſwer, that is inſufficient, yet the Order for a Sequeſtration ſhall not be abſolute, but a new Sequeſtration *niſi*. Will. Rep. 385. pl. 117.

2. To what Places.

Notwithſtanding the ſuperintendant Power of the Courts in this Kingdom over thoſe in *Ireland*, and what is ſaid in ſome of our Books, it ſeems to be now the better Opinion, that the Court of Chancery here cannot award a Sequeſtration againſt Lands in *Ireland*. Vern. 76. 2 Chan. Ca. 189. Wil. Rep. 261. pl. 65.

It was ſaid that ſuch Proceſs had been awarded to the Governor of *North Carolina*; but herein it was doubted whether ſuch Sequeſtration ſhould not be directed by the King in Council, where alone an Appeal lies from the Decrees in the Plantations. Will. Rep. 261. pl. 65.

3. What Eſtate or Intereſt ſhall be liable to a Sequeſtration, and from what Time.

Copyholds may be ſequeſtered, though not extendible at Common Law or the Statute of *Weſtm.* 2. (13 *Ed. ſt.* 1.) for Courts of Equity have *poteſtatem extraordin' et abſolutam*; but it ſeems a Doubt whether ſuch a Sequeſtration can be revived againſt the Heir of the Copyholder, which ariſes from the Difficulty of obliging the Lord to admit, and depriving the Lord of his Fine, *&c.* upon the Death of his Tenant. 2 Chan. Ca. 46. *Vide* Bernd. 431.

A Sequeſtration out of Chancery is more effectual than an Execution by *Fieri Facias* at Law; for, a Sequeſtration may be againſt the Goods, though the Party is in Cuſtody upon the Attachment; whereas in Law, if a *Capias ad Satisfaciendum* is executed, there can no *Fi. Fa.* iſſue. Caſes in Lord *Talbot*'s Time 222.

Where the Sequeſtrators ſeiſe the Real Eſtate of the Party, any Tenant or other Perſon who claims Title to the Eſtate ſo ſequeſtered, either by Mortgage, Judgment, Leaſe or otherwiſe, who hath a Title Paramount to the Sequeſtration, ſhall not be obliged to bring a Bill to conteſt ſuch Title, but he ſhall be let in to conteſt ſuch a Title in a ſummary Way.

He

He may move by his Counſel as of Courſe to be examined *pro Intereſſe ſuo*; and in this Caſe the Plaintiff is to exhibit Interrogatories in order to examine him for a Diſcovery of his Title to the Eſtate, and he muſt be examined upon ſuch Interrogatories accordingly; and the Maſter muſt ſtate the Matter to the Court, and the Parties may enter into Proof touching the Title to the Eſtate in Queſtion; and when the Maſter hath ſtated the whole Matter, the Court proceeds to give Judgment therein upon the Report; and if it appears that the Party who is examined *pro Intereſſe ſuo* hath a plain Title to the Eſtate, and is not affected with the Sequeſtration, then it is to be diſcharged as againſt him, with or without Coſts, as the Court ſhall determine upon the Circumſtances of the Caſe, and ſo *vice verſa*.

*Page 427

Vide Com. 712. Will. Rep. 308.

Vern. 58. The Sequeſtration binds from the Time of awarding the Commiſſion, and not from the Time of executing it and its being laid on by the Commiſſioners only; for if that ſhould be admitted, then the inferior Officer would have *Ligandi et non Ligandi poteſtatem.*

(C) Of the Power and Duty of the Sequeſtrators.

THE Sequeſtrators are Officers of the Court, and as ſuch are demeanable to the Court, and are to act from Time to Time in the Execution of their Office as the Court ſhall direct; they are to account for what comes to their Hands, and are to bring the Money into Court as the Court ſhall direct, to be put out at Intereſt, or otherwiſe, as ſhall be found neceſſary; but this Money is not uſually paid to the Plaintiff, but is to remain in Court till the Defendant hath appeared or anſwered and cleared his Contempt, and then whatſoever hath been ſeiſed ſhall be accounted for and paid over to him; however the Court hath the whole under their Power, and may do therein as they pleaſe, and as ſhall be moſt agreeable to the Juſtice and Equity of the Caſe.

The Plaintiff's Counſel may move and obtain an Order for the Tenants to attorn and pay their Rents to the Sequeſtrators, or for the Sequeſtrators to ſell and diſpoſe of the Goods of the Party, and to keep the Money in their Hands, or to bring it into Court, as ſhall be moſt adviſeable and diſcretionary, and fitting for the Court to do.

Vern. 248. Sequeſtrators on meſne Proceſs are accountable for all the Profits, and can retain only ſo far as to ſatisfy for Contempt.

Vern. 161. If Sequeſtrators, having Power to ſell Timber, diſpoſe of 7000*l.* worth, and only bring 2000*l.* to Account, they, as Officers and Agents of the Court, are reſponſible, and not the Plaintiff.

Will. Rep. 307. A Sequeſtration is in Nature of a *Levari* at Common Law, and the Party ſequeſtering has neither *jus in rem vel in re*; the legal Eſtate of the Premiſſes remaining in every Reſpect as before.

3 Ch. Rep. 87. Sequeſtrators being in Poſſeſſion of a great Houſe in St. *James's-Square*, which was the Defendant's for Life, the Court ordered that the Maſter allow a Tenant for the Houſe, and the Sequeſtrators to make a Leaſe, and the Tenant to enjoy.

Barnard. Rep. 212. *in Scacc.* It was moved, that the Irregularity of a Sequeſtration might be referred to the Deputy, which was taken out againſt the Defendant for not appearing, by Reaſon of its being taken out ſooner than by the Courſe of the Court it could, and yet the Sequeſtrators had taken the Goods off the Premiſſes, and threatened to ſell them; the Chief Baron ſaid

ſaid, that as to the Carrying the Goods off the Premiſſes, it was clear *the Sequeſtrators could do that, becauſe a Sequeſtration upon meſne Proceſs anſwers to a *Diſtringas* at Law; but however, as to ſelling them, the Court agreed in the preſent Caſe it could not be lawful, and ſaid it had lately been ſettled on Debate; and obſerved further, that Courts of Equity could not authoriſe Sequeſtrators to ſell Goods even upon a Decree 'till Lord *Stamford*'s Caſe, which makes Decrees in this Reſpect equivalent to a Judgment; and even now, the Counſel ſaid, Sequeſtrators cannot ſell but by Leave of the Court; however, the Court ſaid this was a Matter proper for them to conſider upon another Occaſion, and therefore only referred the Irregularity of the Sequeſtration as to the Point of Time to the Deputy. *Page 428

Lands were decreed to be liable to 500*l. per Ann.* for the Life of *A.* and a Sequeſtration and Injunction for the Poſſeſſion to that Purpoſe; the Defendant againſt the Injunction enters upon the Lands, and receives the Profits to the Value of 1972*l.* and thereupon was decreed to pay it; and after the Death of *A.* it was decreed that the Sequeſtration ſhould continue againſt the Defendant for the Payment of that Money; and now the Defendant moved to have Liberty to ſell Timber to raiſe Money for his Subſiſtence, alledging that the Sequeſtrators had only the Poſſeſſion and the Perception of the annual Profits by the Courſe of the Court, and therefore it could be no Prejudice to have this granted: But Sir *H. Grimſton*, Maſter of the Rolls, refuſed; for 1ſt, This invades the Decree which is for the quiet Poſſeſſion, which will be diſturbed if the Defendant enters to cut down Timber; 2dly, The Defendant not having performed the Decree by the Payment of the Money, he ſhall not receive any Favour from the Court whilſt he ſtands in Contempt; 3dly, If he will with the Sale of this Timber pay the Plaintiff his Debt and ſo diſcharge the Sequeſtration, there might be ſome Reaſon for it; but for him to raiſe Monies to other Purpoſes, he ſhall not be favoured; and unleſs the Plaintiff will conſent, he ſhall not have Liberty to ſell. 4 *Feb* 16. & 17 Car. 2. *in Can. Sands* v. *Darrel.*

(D) Sequeſtration, when determined.

A Sequeſtration that iſſues as a meſne Proceſs of the Court will be diſcontinued and determined by the Death of the Party; but, where a Sequeſtration iſſues in Purſuance of a Decree, and to compel the Execution of it, there though the ſame be for a perſonal Duty, it ſhall not be determined by the Death of the Party. Vern. 58.

A Sequeſtration againſt the Father who appeared to be only Tenant for Life, and on his Death the Sequeſtration was diſcharged. Ch. Ca. 241. 2 Ch. Ca. 46.

The Bill was to revive a Sequeſtration obtained againſt the Defendant's Huſband for a perſonal Duty before his Intermarriage with the Defendant, and to avoid the Defendant's Eſtate in Dower in the Lands that were ſequeſtered before the Marriage, it being inſiſted that thoſe Lands were ſo bound by the Sequeſtration, and covered therewith, that the Defendant's Right of Dower could never attach them; but on a Demurrer to this Bill, the Demurrer was allowed; and it was ruled, that ſuch a Sequeſtration ſhould not bind the Feme who came in for her Jointure or Dower; but whether the Heir in Fee-Simple ſhould in ſuch Caſe have the Eſtate bound, and ſubject to ſuch a Sequeſtration, or not, was doubted; and the Caſe not being before my Lord Keeper, he refuſed giving any Opinion therein. Vern. 118.

*Page 429 Vern. 166. * Afterwards this laſt Point came before the ſame Lord Keeper in another Caſe, when his Lordſhip inclined to think that a Sequeſtration for a Perſonal Duty determined with the Death of the Party, and could not be revived againſt the Heir; but his Lordſhip took Time to conſider of it, and would be attended with Precedents.

2 Peer Will. (621.) It ſeems to be now ſettled, that a Sequeſtration is a perſonal Proceſs, which abates by the Death of the Party; ſo that ſuch Sequeſtration being grounded on a Decree for a Debt or Perſonal Duty, cannot be revived againſt the Heir of the Defendant; otherwiſe in thoſe Caſes in which the Heir is bound.

SHERIFF.

(A) The Nature of his Office. 430.
(B) Who are qualified or exempt from ſerving. 431.
(C) Manner of appointing him; and herein of his Oath. 432.
(D) That he muſt attend his Office ſingly, and cannot execute any other. 434.
(E) How long to continue in his Office, and by what determined. 434.
(F) That he muſt be reſident in his County, and whether he hath any Juriſdiction out of it. 435.
(G) Cannot diſpoſe of his Bailiwick. 436.
(H) Of the High Sheriff's Power and Duty in appointing an Under-Sheriff and other Deputies; 436.

And herein,

1. Of the Under Sheriff, and in what Manner appointed. 436.
2. Of Covenants between the High Sheriff, his Under Sheriff, and other Officers. 438.
3. Of Acts that may be done by either of them, or where the High Sheriff muſt himſelf be perſonally preſent. 440.
4. The Manner of approving Bailiffs and other Officers, and therein of his being anſwerable for their Acts, 441.
5. Of his Juriſdiction over Gaols and Gaolers. 443.

(I) Of the preceding and ſucceeding Sheriff, and herein of the Acts neceſſary to be done by each of them. 444.

(K) Where

(K) Where more than one Sheriff. 447.
(L) Of his Duty and Acts as a judicial Officer. 448.
(M) Of his Duty and Acts as a Miniſterial Officer: 449.

And herein,

1. That he is the proper Officer to execute all Writs, except in Caſe of Partiality. 449.
* 2. That he cannot diſpute the Authority by which they Iſſue, nor any Irregularity in them. 450. *Page 430

(N) How he is to exerciſe ſuch Writ: 452.

And herein,

1. That it muſt be without Favour or Oppreſſion, and after ſuch a Writ is actually taken out, and before it is returnable. 452.
2. Of his raiſing the *Poſſe Comitatus*. 453.
3. Of breaking open Doors. 454.
4. Whether he can execute his Writ on a *Sunday*. 456.
5. In what Manner he is to do Execution. 457.

(O) Of his Duty in admitting Perſons to Bail; and herein of Securities taken for Eaſe and Favour. 461.

(A) The Nature of his Office.

IT ſeems that antiently the Government of the County was by the King lodged in the Earl or Count, who was the immediate Officer to the Crown; and this high Office was granted by the King at Will, ſometimes for Life, and afterwards in Fee; but when it became too burthenſome, and could not be commodiouſly executed by a Perſon of ſo high Rank and Quality, it was thought neceſſary to conſtitute a Perſon duly qualified to officiate in his Room and Stead, who from hence is called in *Latin*, *Vicecomes*, and Sheriff from *Shire Reeve*, *i. e.* Governor of the Shire or County. He is likewiſe conſidered in our Books as Bailiff to the Crown; and his County of which he hath the Care, and in which he is to execute the King's Writs, is called his Bailiwick. Dav. 60. Savil 43. Rol. Rep. 274. Co. Lit. 168. *a.* *Vide Pref. to* 9 Rep. 7 Co. 33.

It is ſaid by Lord *Coke* and *Dalton*, that *Earls*, by Reaſon of their high Employments and Attendance upon the King, being not able to follow all the Buſineſs of the County, were delivered of all that Burthen, and only enjoyed the Honour as they now do, and that Labour was laid upon the Sheriff; ſo that now the Sheriff doth all the King's Buſineſs in the County; and the Sheriff, tho' he be ſtill called *Vicecomes*, yet all he doth, and all his Authority, is immediately from and under the King, and not from or under the Earl; ſo that at this Day the Sheriff hath all the Authority for the Adminiſtration and Execution of Juſtice which the 9 Co. 49. Dalt. Sh. 2.

Count or Earl had; the King by his Letters Patent now committing to the Sheriff *Cuſtodiam Com'*.

Co Lit. 168. Dalt. Sh. 5. He is therefore at this Day conſidered as an Officer of great Antiquity, Truſt and Authority, having, as Mr. *Dalton* obſerves, from the King the Cuſtody, Keeping, Command and Government (in ſome Sort) of the whole County committed to his Charge and Care, and, according to my Lord *Coke*, he is ſaid to have *triplicem Cuſtodiam, viz. Vitæ juſticiæ, vitæ legis, et vitæ reipublicæ, &c. Vitæ juſtitiæ* to ſerve Proceſs, and to return indifferent Juries for the Trial of Men's Lives, Liberties, Lands and Goods; *vitæ legis* to execute Proceſs and make Execution, which is the Life of the Law, and *vitæ republicæ* to keep the Peace.

*Page 431 2 Inſt. 558. 2 Brownl. 282. but ſee Death of the King. *It ſeems that antiently †, and before the Statute 9 *Ed. ſtat.* 2. Sheriffs were elected by the Freeholders of the County, as the Coroners are at this Day, and conſequently that their Office did not determine by the

† See *Art. ſuper Cartas*, 28 Ed. 1. ſtat. 3. c. 8. & c. 13.

(*a*) Dav. 60. (*b*) 4 Co. 33. *Mitton's* Caſe. Dalt. Sh. 6. Hob. 13. Raym. 363. And though at this Day the King hath the ſole Appointment of Sheriffs (*a*), except in Counties Palatine, and where there are *Jura regalia*, yet it hath been (*b*) adjudged, that the Office of Sheriff is an intire Thing, and that therefore the King cannot apportion or divide it, that is he cannot determine it in Part, as for one Town or one Hundred; neither can he abridge the Sheriff of any Thing incident to or belonging to his Office.

(B) Who are qualified or exempt from ſerving.

(*c*) 9 Ed. 2. ſtat. 2. 2 Ed. 3 c. 4. 4 Ed. 3. c. 9. 5 Ed. 3. c. 4. 14 Ed. 3. ſtat. 1. c. 7. IT is provided by ſeveral (*c*) Acts of Parliament, that no Man ſhall be Sheriff in any County, except he have ſufficient Lands within the ſame County where he ſhall be Sheriff, whereof to anſwer the King and his People in Caſe that any Perſon ſhall complain againſt them; and that none that is Steward or Bailiff to a great Lord ſhall be made Sheriff.

Sav. 43. 9 Co. 46. It is holden that the King hath an Intereſt in every Subject, and a Right to his Service, and that no Man can be exempt from the Office of Sheriff but by Act of Parliament or Letters Patent.

2 Mod. 299. *Attorney General* v. *Sir John Read.* And on this Foundation it was adjudged in Sir *John Read's* Caſe, who was made High Sheriff of *Hertfordſhire* at the Time he was excommunicated for Non-payment of Alimony, that an Information properly lay againſt him for not executing the Office; though it was objected on his Behalf, that the Oath and Sacrament injoined by Act of Parliament are neceſſary Qualifications for all Sheriffs, which he was diſabled to take by Reaſon of the Excommunication; but the Court held that he was puniſhable for not removing the Diſability, it being in his Power to get himſelf diſſolved from the Excommunication, and that therefore it could be no Excuſe.

2 Mod. 301. And though in the above Caſe it was admitted, that the Subject was bound to ſerve the King in ſuch Capacity as he is in at the Time of the Service commanded, yet it was inſiſted upon, that he was not obliged to qualify himſelf to ſerve in every Capacity; and that therefore a Priſoner for Debt is not bound or compellable to be Sheriff, no more than a Perſon is bound to purchaſe Lands to qualify himſelf to be either a Coroner

Coroner or Juſtice of the Peace; and it was likewiſe ſaid, that by the Statute 3 *Jac.* 1. *cap.* 5. every Recuſant is diſabled; and though he may conform, he is not bound to it; for if he ſubmits to the Penalty, it is as much as is required by Law.

An Information was exhibited againſt *L.* for refuſing to take upon him the Office of Sheriff of *Norwich*, who pleaded the Statute 13 *Car.* 2. *ſtat.* 2. *cap.* 1. *ſect.* 12. † by which it is enacted, that a Perſon elected to any Office in a Corporation, ſhall be ſuch as within one Year before hath taken the Sacrament according to the Church of *England*, or elſe the Election ſhall be void; and averred, that he had not taken the Sacrament, *&c.* at any Time within one Year next before the Election of him to be Sheriff, *&c.* wherefore the Election was void. The Attorney General replied, and ſet forth that Part of the Act of Uniformity, by which every Perſon is obliged to take the Sacrament three Times in the Year, accord- * ing to the Liturgy, *&c.* the Defendant rejoined, and ſet forth the Statute of 1 *W. & M. cap.* 18. for tolerating Diſſenters; and on Demurrer it was adjudged, that the Defendant's Rejoinder was a Departure from his Plea, and therefore he could have no Advantage of the Act of Toleration, ſuppoſing it was for his Purpoſe, it being a private Statute, and therefore to be pleaded; and though Judgment was given principally on this Point, yet all the Court, except Juſtice *Sam. Eyre*, held, that this Caſe was not within the Meaning of the Toleration Act, which was not made in Favour of Diſſenters, but the Contrary, and was rather to exclude them from Beneficial Offices, than to eaſe them of Offices of Charge ‡.

Carth. 306. Salk. 167. pl. 1. Ld. Raym. 29. Skin. 574. pl. 1. 4 Mod. 269. *The King and Queen* v. *Larwood*. † See now 5 Geo. 1. c. 6. ſ. 3. & 11 G. 1. c. 4. ſ. 6. * Page 432

‡ In the Caſe of *Evans* and the *Chamberlain* of *London* (if our Recollection is right) it was determined in the Houſe of Lords, that Diſſenters are not bound to take the Sacrament, *&c.* to qualify, and therefore not liable to *perſonal* Service.

If a Man is diſabled by a Judgment in Law to bear an Office, he is excuſed; *nam judicium redditur in invitum*; for though his Fault or Neglect was the Occaſion of ſuch Judgment, yet it is a Mark ſet upon him by the Government.

Salk. 168. 4 Mod. 273.

And as nothing but an invincible Neceſſity can exempt a Perſon from ſerving the Office of Sheriff, on this Foundation a By-Law made in *London*, that no Freeman choſen Sheriff, *&c.* ſhall be excuſed unleſs he voluntarily ſwears he is not worth 10,000*l.* *&c.* and if he openly refuſe to take the Office, then to forfeit the Sum of 400*l.* *&c.* was adjudged good.

Salk. 142. pl. 1. Ld. Raym. 496. See 12 Mod. 120. Carth. 480. 5 Mod. 43. *City of London* v. *Vanacre*.

(C) Manner of appointing him; and herein of his Oath.

THE High Sheriff hath his Authority given him by two (*a*) Patents; by the one the King commits to him the Cuſtody of the County; by the other the King commands all other his Subjects within that County to be aiding and aſſiſting to him in all Things belonging to his Office.

Dalt. Sh. 7. Where ſee the Form of ſuch Patents. (*a*) As the Sheriff is made by Letters Patent of Record, if therefore it ſhall come in Queſtion, whether he be Sheriff or not, it is to be tried by the Record, or it may be tried by the Examination of the Sheriff. Dalt. Sh. 8. 9 Co. 31. Jenk. 90. ——For the Fees of his Patent, *vide* 3 Geo. 1. c. 15.

By

Dalt. Sh. 6. By the Statute of 9 *E.* 2. *ſtat.* 2. the Chancellor, Treaſurer and Judges are to meet (*a*) *Craſtino Animarum*, being the 3d of *November* †, every Year, in the Exchequer Chamber, to nominate Perſons to be made Sheriffs; and the Manner is, The Lord Chancellor, Treaſurer and other high Officers, being of the Privy Council, together with the Judges of both Benches and the Barons of the Exchequer, being aſſembled in the Exchequer Chamber, nominate three Perſons in every County to be preſented to the King, that he may prick one of them to be Sheriff of every County.

(*a*) But it may be put off to another Day.

Cro.Car. 13, 595.

†By 24G.2. c. 48. ſ. 12. Sheriffs are to be appointed on the Morrow of St. *Martin*.

Dyer 225. Dalt. Sh. 6. And yet the King by his Prerogative may make and appoint the Sheriffs without this uſual Aſſembly, and Election or Nomination in the Exchequer, as is the daily Practice at this Day upon the Death of any Sheriff.

34H.8.c.26. Dalt. Sh. 6. The Sheriffs in every of the Shires of *Wales* ſhall be nominated yearly by the Lord Preſident, Council and Juſtices of *Wales*, and ſhall be certified up by them, and after appointed and elected by the King as other Sheriffs are.

Dalt. Sh. 7. The Sheriff, before he doth exerciſe any Part of his Office, and before his Patent is made out, is to give Security in the King's Remembrancer's Office in the Exchequer, under Pain of 100 *l.* for the Payment of his Proffers, and all other Profits of his Sheriffwick; but theſe Securities are never ſued, unleſs there is a Deficiency in the Sheriff's Effects.

*Page 433

Dalt. Sh. 9. The Sheriff before he takes upon him the Exerciſe of his Office, muſt not only take the Oaths of Allegiance and Abjuration injoined all Officers by divers Acts of Parliament, but likewiſe a particular Oath of Office, which is (*b*) ſaid to be by the antient Common Law, and contains a conciſe Account of the Nature and ſeveral Branches of his Office. This antient Oath is ſet down in *Dalton* 9.

(*b*) Dyer 168.

(*c*) *Vide* Cro. Car. 26. Several Exceptions taken by my Lord *Coke* to the Additions made to the ancient Oath, and annexed to the *Dedimus* to ſwear him Sheriff of *Bucks*.

But there being in this Oath ſome Things which were thought too (*c*) ſtrict with Reſpect to Sheriffs, inſtead thereof it is now enacted by the 3 *Geo.* 1. *c.* 15. *ſ.* 18. that the following Oath ſhall be taken by all High Sheriffs, except the Sheriffs of *Wales* and of the County Palatine of *Cheſter*, *&c. viz.* "I *A. B.* do ſwear that I will well and truly ſerve the "King's Majeſty in the Office of Sheriff of the County of "and promote his Majeſty's Profit in all Things that belong to my Office "as far as I legally can or may. I will truly preſerve the King's Rights "and all that belongeth to the Crown. I will not aſſent to decreaſe, leſſen, "or conceal the King's Rights, or the Rights of his Franchiſes; and "whereſoever I ſhall have Knowledge that the Rights of the Crown are "concealed or withdrawn, be it in Lands, Rents, Franchiſes, Suits or "Services, or in any other Matter or Thing, I will do my utmoſt to "make them be reſtored to the Crown again; and, if I may not do it "myſelf, I will certify and inform the King thereof, or ſome of his "Judges. I will not reſpite or delay to levy the King's Debts for any "Gift, Promiſe, Reward or Favour, where I may raiſe the ſame without "great Grievance to the Debtors. I will do Right as well to Poor "as to Rich, in all Things belonging to my Office. I will do no Wrong "to any Man for any Gift, Reward, or Promiſe, nor for Favour or "Hatred. I will diſturb no Man's Right, and will truly and faithfully "acquit at the Exchequer all thoſe of whom I ſhall receive any Debts or "Duties belonging to the Crown. I will take nothing whereby the "King may loſe, or whereby his Right may be diſturbed, injured or de-"layed. I will truly return, and truly ſerve all the King's Writs ac-

"cording

" cording to the beſt of my Skill and Knowledge. I will take no Bailiffs " into my Service but ſuch as I will anſwer for, and will cauſe each of " them to take ſuch Oaths as I do in what belongeth to their Buſineſs and " Occupation. I will truly ſet and return reaſonable and due Iſſues of " them that be within my Bailiwick, according to their Eſtate and Cir- " cumſtances, and make due Panels of Perſons able and ſufficient, and not " ſuſpected or procured, as is appointed by the Statutes of this Realm. " I have not ſold or let to Farm nor contracted for, nor have I granted or " promiſed for Reward or Benefit, nor will I ſell or let to Farm, nor con- " tract for or grant for Reward or Benefit by myſelf or any other Perſon " for me, or for my Uſe, directly or indirectly, my Sheriffwick or any " Bailiwick thereof, or any Office belonging thereunto or the Profits of " the ſame to any Perſon or Perſons whatſoever. I will truly and dili- " gently execute the good Laws and Statutes of this Realm, and in all " Things well and truly behave myſelf in my Office for the Honour of the " King and the Good of his Subjects, and diſcharge the ſame according to " the beſt of my Skill and Power. So help me God."

If a Perſon refuſed to take upon him the Office of Sheriff, it was uſual to puniſh him in the Star-chamber; and he may now be proceeded againſt by Information in the Court of King's Bench. Alſo if he refuſes to take the Oaths injoined him, or officiates in the Office before he hath thus qualified himſelf, that Court, which hath a general * Superintendancy over all Officers and Miniſters of Juſtice, will grant an Information againſt him; and it hath been (*a*) held, that a Refuſal of Oaths injoined to be taken, amounts to a Refuſal of the Office. Dalt. Sh. 15. Dyer 167. *Page 434 (*a*) 3 Lev. 116. Carth. 307.

If the Sheriff be not in *London*, the Oath may be taken by *Dedimus poteſtatem*, directed to any two Juſtices of the Peace of the ſame County, one to be of the *Quorum*, or to any other Commiſſioner or Commiſſioners, or before one of the Judges of Aſſiſe for that County, or one of the Maſters in Chancery, who, it is ſaid, may as well as the Judge adminiſter ſuch Oath without any *Dedimus*. Dalt. Sh. 13. 14.

If the Commiſſioners ſhall return the Commiſſion or Writ, and the Oaths to be taken when they were not taken, this is finable. Dyer 168. Dalt. Sh. 14.

It is held, that the Breach or Violation of this Oath, although an high Offence, is not however Perjury, nor puniſhable as ſuch. 11 Co. 98.

(D) That he muſt attend to this Office ſingly, and cannot execute any other.

IT is holden, that a Sheriff cannot be elected *Knight* of the Shire for that County for which he is Sheriff. 4 Inſt. 48. Lit. Rep. 326. Sir *Simon Dewe*'s Jour. 38, 436.

And although a Sheriff is by Virtue of his Office a Conſervator of the Peace, yet it is enacted by the 1 *Mar. Stat.* 2. *cap.* 8. *ſect.* 2. " That no " Perſon having the Office of Sheriff of any County ſhall exerciſe the " Office of Juſtice of the Peace in any County where he ſhall be Sheriff " during the Time he ſhall uſe the Office of Sheriff." Dalt. Sh. 37.

By the 1 *H.* 5. *cap.* 4. it is enacted, " That no Under Sheriff, Sheriff's " Clerk, Receiver, nor Sheriff 's Bailiff, ſhall be Attorney in any of the " King's Courts during the Time that he is in Office." Dalt Sh. 454.

(E) Hath

(E) How long to continue in his Office, and by what determined.

Confirmed by the 23 H. 6. c. 8.

BY the 14 *E.* 3. *cap.* 7. it is enacted, "That no Sheriff, (*a*) Under "Sheriff, nor Sheriff's Clerk, ſhall tarry or abide in his Office above "one Year, upon Pain to forfeit two hundred Pounds yearly as long as "he occupieth the Office; and that every Pardon made for ſuch Offence "or Forfeiture ſhall be void; and all (*b*) Letters Patent made to occupy "ſuch Office above one Year ſhall be void, any Words or Clauſe of *Non* "*obſtante* put into ſuch Patent notwithſtanding; and that whoſoever ſhall "preſume to take upon himſelf the Office of a Sheriff above one Year by "Force of ſuch Letters Patent, ſhall be diſabled from ever after to be "Sheriff within any County of *England.*"

(*a*) By the 42 E. 3. c. 9.

(*b*) Notwithſtanding this it hath been adjudged in the Year-Book, 2 H. 7. 6. b. that the King by the Clauſe of *Non obſtante*, might make a good Patent of ſuch Office for Life; and by the following Authorities, which ſeem to be grounded on this Reſolution, it is ſaid, that the King by his Prerogative may diſpenſe with theſe Statutes, and grant the Office of Sheriff for Years, Life, or in Fee. 7 Co. 14. Finch of Law 234. Plow. 502. Dalt. Sh. 22. But yet *vide* 2 Hawk. P. C. 390. where the contrary Opinion is holden, and the Reaſon of theſe Authorities refuted. ‡

‡ *Vide* the ſtat. 1 W. & M. ſeſſ. 2. c. 2. whereby it is enacted, that no Diſpenſation by *Non obſtante* of or to any Statute or any Part thereof be allowed, but that the ſame ſhall be held void and of none Effect, except a Diſpenſation be allowed in ſuch a Statute. See alſo the Doctrine of *Non obſtantes*, under *Prerogative*, *ante* 177, &c.

*Page 435

Confirmed by 23 H. 6. c. 8.

* By the 1 *Ric.* 2. *cap.* 11. it is enacted, "That none that hath been "Sheriff of any County a Year ſhall be within two Years next choſen "again, or put in the ſame Office, if there be other ſufficient."

And by the 1 *Hen.* 5. *cap.* 4. it is enacted, "That they that be Bailiffs "of Sheriffs one Year ſhall be in no ſuch Office by three Years next fol-"lowing, except Bailiffs of Sheriffs which inherit in their Office."

Dyer 165. Dalt. Sh. 17.

By the Common Law the Patents of Sheriffs, like all other Commiſſions, determined by the Death or Demiſe of the King; but now by the Statutes 7 *W. & M.* (*cap.* 27. *ſ.* 21.) and 1 *Ann.* (*ſtat* 1. *c.* 8.) ſuch Commiſſion ſhall remain in full Force for the Space of ſix Months next after ſuch Death or Demiſe, unleſs ſuperſeded, determined or made void by the next Succeſſor.

7 Co. 30.

But though ſuch Patent was determined by the Death of the King, yet it was adjudged, that if the Sheriff after ſuch Demiſe, and before his taking out a new Patent, ſuffered a Priſoner to eſcape, that an Action lay againſt him.

Cro. Eliz. 12. *Sir Lewis Mordant's* Caſe.

It hath been held, that the Office of Sheriff does not determine by the Party's becoming a Peer on the Death of his Father, but that he ſtill remains Sheriff *ad voluntatem regis.*

(F) That he muſt be reſident in his County, and whether he hath any Juriſdiction out of it.

(*a*) The Word in the Original is *demurrant*, which is ſaid is not well tranſlated by the Word *dwelling*. Lit. Rep. 328.

BY the 4 *H.* 4. *cap.* 5. it is enacted, "That every Sheriff ſhall be (*a*) dwelling in proper Perſon within his Bailiwick for the Time he

ſhall

ſhall be ſuch Officer, and that the Sheriff ſhall be *(b)* ſworn to do the ſame.

(b) Is now left out of the new Oath.

Hence it is clear, that a Sheriff hath no Juriſdiction in any other County, nor can he do a Judicial Act, and in which his perſonal Preſence is required, out of his County; but it is held that he may do a (c) Miniſterial Act, as make a Panel, or return a Writ out of his County. Dalt. Sh. 22. (c) 9 H. 4. 1.

But if the Sheriff be beyond Sea, and maketh a Panel or any Return there, and ſends it into *England*, it is not good, for he is an Officer but only in *England*. Dalt. Sh. 22.

If on a *Habeas Corpus*, &c. the Sheriff is commanded to carry a Priſoner to a certain Place out of his County, and in doing this he is obliged to go through ſeveral Counties, to this ſpecial Purpoſe he hath Authority in theſe other Counties. Dalt. Sh. 23.

So if a Priſoner of his own Wrong ſhall make an Eſcape, and fly into another County, the Sheriff or his Officers upon freſh Suit may take him again in another County. Plow. 37. Dalt. Sh. 23.

---

* (G) Cannot diſpoſe of his Bailiwick.

*Page 436

BY the 23 *H.* 6. *cap.* 10. it is provided, " That no Sheriff ſhall let to " Farm in any Manner his County, nor any of his Bailiwicks, Hun- " dreds or Wapentakes."

In the Conſtruction hereof it hath been holden, that this is a particular Law, and muſt be pleaded, otherwiſe the Judges cannot take Notice of it. 3 Keb. 678. *Ellis* v. *Nelſon*.

It hath been holden, that a Leaſe thereof, though no Rent was ever reſerved, is within the Statute, the Intent thereof being that Sheriffs ſhould keep their Counties in their own Hands. 20 H. 7. 13. Dalt. Sh. 23.

It ſeems the better Opinion, that a Leaſe, reſerving only Part of the Profits, is within the Statute. Plow. 87. Dalt. Sh. 23.

It hath been doubted, whether a Leaſe made by the Sheriff of his Office or County only by Parol, be within the Statute. Dalt. Sh. 24.

It hath been adjudged in the Caſe of the Sheriff of *Nottingham*, who took Money for his Bailiwick, which he firſt gave his Servants, and which they ſold, but he himſelf received the Money, that this was within the Statute 4 *H.* 4. *cap.* 5. which prohibits the letting to Farm, &c. under certain Penalties; and that it was not only *malum prohibitum*, but likewiſe *malum in ſe*, as tending to Extortion and other Oppreſſions. Moor 781. *Stockwith* v. *North*. *Vide* Title *Office*.

By the 3 *Geo.* 1. *cap.* 15. *ſect.* 10. " It ſhall not be lawful for any Per- " ſon to buy, ſell, let or take to Farm the Office of Under Sheriff or De- " puty Sheriff, Seal-Keeper, County-Clerk, Shire-Clerk, Gaoler, Bailiff, " or any other Office pertaining to the Office of High Sheriff, or to con- " tract for any of the ſaid Offices, on Forfeiture of 500 *l.* one Moiety to his " Majeſty, the other to ſuch as ſhall ſue in any Court at *Weſtminſter* " within two Years after the Offence.

" Provided that nothing in this Act ſhall hinder any High Sheriff " from conſtituting an Under Sheriff or Deputy Sheriff, as by Law he " may, nor to hinder the Under Sheriff in Caſe of the High Sheriff's " Death, when he acts as High Sheriff, from conſtituting a Deputy, nor " to hinder ſuch Sheriff or Under Sheriff from receiving the lawful Fees " of his Office, or from taking Security for the due anſwering the ſame, " nor to hinder ſuch Under Sheriff, Deputy Sheriff, Seal-Keeper, &c.

from

" from accounting to the High Sheriff for all such lawful Fees as shall " be by them taken, nor for giving Security so to do, nor to hinder the " High Sheriff from allowing a Salary to his Under Sheriff, &c. or other " Officers †."

†If a Sheriff takes Bond of his Bailiff to pay 20 *d.* for every Defendant's Name in every Warrant in *mesne Process*, it is not letting his *Sheriffwick to Farm*. *Ballantine* v. *Irwin*, M. 4. Geo. 2. *C. B.* Fort. 368.

(H) Of the High Sheriff's Power and Duty in appointing an Under Sheriff, and other Deputies: And herein,

1. Of the Under Sheriff, and in what Manner appointed.

Dalt. 3, 514. Hob. 13. ALthough the King by his Letters Patent granteth to the Sheriff *Custodiam Comitatus*, without any express Words to make a Deputy, *Page 437 yet hath the Sheriff Power to make a Deputy or Under Sheriff, * who may execute all the Ministerial Parts of the Office; for Experience, says my Lord *Hobart*, proves, that many Sheriffs cannot execute it themselves; from the *(a)* Antiquity therefore and Necessity of this Officer the Law takes Notice of him, and on his being appointed, the Law implicitly gives him Power to execute all the ordinary Offices of the Sheriff himself, that can be transferred by Law.

(a) Was formerly called *Seneschallus Vicecomitis* Dalt. Sh. 3. — And in the Statute *Westm.* 2. 13 Ed. 1. stat. 1. cap. 39. he is called *Subvicecomes*; and in the Statute 11 H. 7. c. 15. *Shire Clerk*. 4 Co. *Mitton*'s Case. 9 Co. 49. Dyer 355.

Hob. 13. He is, says my Lord *Hobart* in Nature of a general Bailiff to the Sheriff over the whole Shire, as others are over the Hundred; and being in Effect but the Sheriff's Deputy, according to the Nature of a Deputation, he is removable as an Attorney is; and though made irrevocable, yet may the High Sheriff remove him; but having once appointed him, though he may totally remove him, yet he cannot *(b)* abridge him of any Part of his Power.

(b) 2 Brownl. 281.

Dalt. Sh. 3. The High Sheriff may execute the Office himself, and the Under Sheriff hath not, nor ought to have, any Estate or Interest in the Office itself; neither may he do any Thing in his (*c*) own Name, but only in the Name of the High Sheriff, who is answerable for him.

(*c*) An Under Sheriff must act in the Name of the High Sheriff, because the Writs are directed to the High Sheriff. Salk. 96.

By the 3 *Geo.* 1. *cap.* 15. *sect.* 8. it is enacted, " That if any Sheriff " shall die before the Expiration of his Year, or before he be superseded, " the Under Sheriff shall nevertheless continue in his Office, and execute " the same in the Name of the Deceased 'till another Sheriff be appointed " and sworn; and the Under Sheriff shall be answerable for the Execu- " tion of the Office during such Interval, as the High Sheriff would have " been; and the Security given by the Under Sheriff and his Pledges shall " stand a Security to the King, and all Persons whatsoever, for the due " performing his Office during such Interval."

The

The Under Sheriff, before he intermeddle with the Office, is to be ſworn; this is injoined (*d*) by the Statute 27 *Eliz. cap.* 12. and the Form of the Oath there preſcribed.

(*d*) That before this Statute the Under Sheriff was never ſworn. Rol. Rep. 274. *Per Coke.*

And now by the 3 *Geo* 1. *c.* 15. *ſect.* 19. it is enacted, That all Under Sheriffs of any Counties in *South Britain*, except the Counties in *Wales* and County Palatine of *Cheſter*, before they enter upon their Offices, ſhall take the following Oath, *viz.* "I *A. B.* do ſwear, that I will well "and truly ſerve the King's Majeſty in the Office of Under Sheriff of "the County of ———— and promote his Majeſty's Profit in all "Things that belong to the ſaid Office as far as I legally can or may, "and will preſerve the King's Rights and all that belongeth to the Crown. "I will not aſſent to decreaſe, leſſen or conceal the King's Rights, or "the Rights of his Franchiſes; and whenſoever I ſhall have Knowledge "that the Rights of the Crown are concealed or withdrawn, be it in "Lands, Rents, Franchiſes, Suits or Services, or in any other Matter or "Thing, I will do my utmoſt to make them be reſtored to the Crown "again; and if I may not do it of myſelf I will certify and inform ſome "of his Majeſty's Judges thereof, and will not reſpite or delay to levy "the King's Debts for any Gift, Promiſe, Reward or Favour, where I "may raiſe the ſame without great Grievance to the Debtors. I will do "Right as well to Poor as to Rich, in all Things belonging to my Office. "I will do no Wrong to any Man for any Gift, Reward or Promiſe, "nor for Favour or Hatred. I will diſturb no Man's Right, and will "truly and faithfully acquit at the Exchequer * all thoſe of whom I *Page 438 "ſhall receive any Debts, Duties or Sums of Money belonging to the "Crown. I will take nothing whereby the King may loſe, or whereby "his Right may be diſturbed, injured or delayed. I will truly return, "and truly ſerve all the King's Writs to the beſt of my Skill and Know- "ledge. I will truly ſet and return reaſonable and due Iſſues of them "that be within my Bailiwick, according to their Eſtates and Circum- "ſtances, and make due Panels of Perſons able and ſufficient, and not "ſuſpected or procured, as is appointed by the Statutes of this Realm. "I have not bought, purchaſed, or taken to Farm or contracted for, nor "have I promiſed or given any Conſideration, nor will I buy, purchaſe, "or take to Farm, or contract for, promiſe or give any Conſideration "whatſoever by myſelf or any other Perſon for me, or for my Uſe, di- "rectly or indirectly, to any Perſon or Perſons whatſoever, for the Office "of Under Sheriff of the County of ———— which I am now "to enter upon and enjoy, nor for the Profits of the ſame, nor for any "Bailiwick thereof, or any other Place or Office belonging thereunto. "I have not ſold or contracted for, or let to Farm, nor have I granted or "promiſed for Reward or Benefit by myſelf, or any other Perſon for me, "or for my Uſe, directly or indirectly, any Bailiwick thereof, or any other "Place or Office belonging thereunto. I will truly and diligently execute "the good Laws and Statutes of this Realm, and in all Things well and "truly behave myſelf in the ſaid Office for his Majeſty's Advantage and "for the Good of his Subjects, and diſcharge my whole Duty according "to the beſt of my Skill and Power. So help me God."

Which Oath is to be adminiſtered by ſuch Commiſſioners as ſhall be named to adminiſter the Oath to the High Sheriff, as often as a Commiſſion of *Dedimus* ſhall be ſued forth for that Purpoſe, or by the Barons, or one of them, when the Sheriff deſires to be ſworn in Town †.

† The Sheriff cannot depute two Perſons to take an Inqueſt. *Denny* v. *Trapnell*, P. 8 Geo. 3. 2 Wilſ. 378.

2. Of Covenants between the High Sheriff, his Under Sheriff, and other Officers.

Dalt. Sh. 445. 2 Keb. 352.

It is meet and ſafe, ſays *Dalton*, for the High Sheriff to take good Security from his Under Sheriff and other Officers before he truſts them with their Offices; and for this commonly the High Sheriff taketh Bonds, and Covenants from the Under Sheriff and Friends, as alſo of his Bailiffs and Gaoler.

Hob. 12, 13. Moor 856. Godb. 212. Brownl. 65.

And as this is allowed by Law, it is holden, that if an Under Sheriff covenants with the High Sheriff to diſcharge and ſave him harmleſs from all Eſcapes of Priſoners arreſted by the Under Sheriff, or any by him appointed, this is a good Covenant; for ſince the High Sheriff transfers his Authority, it is but reaſonable he ſhould take Security for the faithful Execution of it; and there is nothing intended againſt Law, but rather to prevent than connive at Eſcapes.

Hob. 12, 13. Godb. 212. 2 Brownl. 281. *Sir Daniel Norton* v. *Sims.*

But if the High Sheriff makes *J. S.* his Under Sheriff, and takes a Bond or Covenant from him that he will not ſerve Executions above 20*l.* without his ſpecial Warrant, this is a void Covenant, becauſe it is againſt Law and Juſtice, in as much as when he is made Under Sheriff, he is liable by the Law to execute all Proceſs as well as the Sheriff is.

Hob. 14.

But it was reſolved in the above Caſe, that though this Covenant was void in Law, that yet the Bond was good for the reſt of the Covenants which were agreeable to Law; and a Difference was taken between a Bond made void by Statute and by Common Law; for upon the Statute of 23 *H.* 6. *cap.* 9. if a Sheriff will take a Bond for a Point againſt
Page439 that Law, and alſo for a due Debt, the whole Bond is void, for the Letter of the Statute is ſo; for a Statute is a ſtrict Law; but the Common Law doth divide according to common Reaſon, and having made that void that is againſt Law, lets the reſt ſtand.

Hob. 13.

Alſo it was reſolved, that this Caſe was not within the Statute 23 *H.* 6. *c.* 9. becauſe it was not a Bond made by or on the Behalf of a Priſoner, and becauſe the Statute is not pleaded, as it ought to be, being a ſpecial Law.

Moor 242. *Cartwright* v. *Daleſworth.*

So in Debt upon an Obligation entered into by the Sheriff's Clerk, or Under Sheriff, for Payment of Money into the Exchequer within 14 Days after he received it, who pleaded the Statute 23 *H.* 6. *c.* 9. and averred that it was taken *colore officii*; but adjudged upon Demurrer, that the Statute extended only to Bonds taken from thoſe who were to appear, or who were in Ward, and not to this Caſe.

Stil. 16. *Wroth* v. *Elſey*, *vide* Title *Pleadings.*

In Debt on an Obligation by the Under Sheriff to the High Sheriff for ſaving him harmleſs, the Defendant pleaded, that he had ſaved him harmleſs; which on Demurrer was held an ill Plea, becauſe he might have ſaved him harmleſs in ſome Things though not in all, and therefore *Non damnificatus* had been the proper Plea.

Stil. 18. *Stoughton* v. *Day.* Allen 10. S. C.

In Debt by an Under Sheriff againſt his Bailiff on an Obligation to ſave him harmleſs in executing of Proceſſes and other Things contained in the Condition, it was objected, that it was not alledged that the Proceſs was to be executed within the Hundred wherein he had Juriſdiction; and this the Court held a good Objection, becauſe the Bailiff cannot execute a Proceſs out of the Hundred wherein he is Bailiff, by Virtue of his general Authority, but only as a ſpecial Bailiff.

For though the Words of the Condition were general to make Return of all Warrants directed to him, yet it was to be underſtood of ſuch only as were to be executed within the Hundred of which he was made Bailiff. 2 Saund. 414. S. C. cited.

Debt

Debt on a Bond to perform Covenants, which was, that the Defendant ſhould not let at large any Priſoner arreſted without the Sheriff's Warrant; the Plaintiff ſhews the Defendant had let ſuch a Priſoner at large at *Weſtminſter*, &c. it is good without ſhewing the Time and Place of the Arreſt, for the Eſcape is the material Part of the Covenant, and the Manner of the Arreſt is not in Queſtion; and whether he were legally taken or impriſoned, was not material when he was ſuffered to go at large. Sid. 30. *Jenkins* v. *Hancock.*

In Debt on an Obligation conditioned to perform the Covenants and Agreements in an Indenture made between the Sheriff of *Eſſex* and the Under Sheriff, in which the Under Sheriff covenanted to pay all Sums of Money, and to diſcharge the Sheriff of them, which ought to be paid by the Sheriff touching the Execution of the ſaid Office; Defendant pleads Performance generally; Plaintiff in his Replication aſſigns a Breach in Non-payment of 40*l.* to the Gaoler of *Chelmsford*, expended *pro materia tangent' execut' offic' prædict. viz.* for the conducting of a Priſoner from *Chelmsford* to *York* Caſtle, and for his Meat and Drink in the Journey, which Sum the Gaoler hath recovered againſt the Sheriff. Defendant rejoins, that the Recovery was for a particular Matter between them, and not for Matter touching his Office, and concludes to the Country; upon which the Plaintiff demurs. It was urged for the Plaintiff, and agreed to by *Wyld* Juſtice, that the Defendant ought not to have concluded his Rejoinder to the Country, but to have left it to the Plaintiff to anſwer to. *Per Cur.* there is no good Breach aſſigned; for the Recovery within this Covenant ought to be for ſuch Matter as concerns the Sheriff, and which by Law he is compellable. The Recovery againſt the Sheriff was in an *Aſſumpſit.* It does not appear that the Sheriff was obliged to bring him to *York.* It does not appear that there was any *Habeas Corpus*; and the Sheriff * cannot deliver his Priſoner to another Sheriff without an *Habeas Corpus*, upon the Back of which he writes his Charges, which are allowed by the Judges of Aſſiſe; and this ſhall be allowed to him upon his Account in the Exchequer, if the Priſoner was carried into another County; but if it was in the ſame County, he ſhall not have Allowance for his Charges; as to that which is aſſigned, that Part became due for finding Meat and Drink for the Priſoner; this is no Breach; for before the Party is convicted he ought to live at his own Charges, and therefore till Conviction hath his Goods, but after Conviction at the Charge of the King; and therefore the Sheriff ſhall have Allowance in the Exchequer. At the Plaintiff's Requeſt the Court permitted him to diſcontinue paying the Defendant all his Coſts without Proceſs. H. 26 & 27 Car. 2. in *B. R. Lewin* v. *Alſop.* 3 Keb. 448. S. C. *Page 440

3. Of Acts that may be done by either of them, or where the High Sheriff muſt himſelf be perſonally preſent.

As it is impoſſible the High Sheriff can himſelf perſonally execute every Breach and Thing belonging to his Office, and as the Law, from the Neceſſity of the Thing, and in Furtherance of Juſtice, allows him to make a Deputy, hence it is neceſſary that ſuch Deputy ſhould in all Things, in which the High Sheriff's perſonal Preſence is not required, have the ſame Power with the Sheriff himſelf; and as by the Nomination of him the Sheriff implicitly confers on him a Power of doing all ſuch Offices as he himſelf could execute, and which may be transferred by the Law, it is likewiſe held, that the Deputy's Authority is by Law ſo equal with the Principal's, that any Condition, Covenant or other Bargain to reſtrain it is void; and therefore it is now univerſally agreed, that the Hob. 12, 13. Salk. 95. Ld. Raym. 658. Com. Rep. 84. pl. 52. See 12 Mod. 467, 470, 690.

the Under Sheriff may make Bills of Sale upon Executions, aſſign Bail-Bonds, † make Return to Writs, and in general do every Thing that the Sheriff himſelf can do.

† The Under Sheriff himſelf may aſſign a Bail-Bond in the Name of the High Sheriff, ſince ſtat. 4 & 5 Ann. c. 16. but the Under Sheriff's Clerk may not *Kitſon* v. *Fagg*, T. 3 Geo. Stra. 60. *Sed qu.* If it is not every Day's Practice, and whether the Aſſignment is not good if it hath the Seal of Office, *i. e.* ſuppoſing it made in the uſual Form, and not in the Name of the Deputy, or any other but of the Sheriff, and if the Law will not preſume it done by the Sheriff, and being only a miniſterial Act, and a mere Matter of Form, not ſuffer it to be called in Queſtion?

Dalt. Sh. 103. Upon any Writ or Proceſs delivered to the Under Sheriff, he, as well as the High Sheriff, may direct his Bailiff or other Officer to arreſt or otherwiſe to execute ſuch Proceſs; but ſuch Bailiff or other Officer muſt ſerve or execute it himſelf, for he cannot command any other to do it either by Word or Writing.

Dalt. Sh. 104. So the Under Sheriff, Bailiff, or other ſuch Officer, may, if need be, take the *Poſſe Comitatus*, that is, what Number of other Perſons they ſhall think good, to execute any Writ, Proceſs or other lawful Warrant to them directed, and ſuch as ſhall not aſſiſt them therein, being required, ſhall make Fine to the King.

Caſes in *B. R.* 454. And as the Under Sheriff is principally active in the Execution of the Office, ſo the Courts have refuſed to grant an Attachment againſt the High Sheriff where the Under-Sheriff refuſes to return a Writ, but will grant an Attachment againſt ſuch Under-Sheriff, and by a (*a*) Rule oblige the High Sheriff to return ſuch Attachment againſt the Under Sheriff; but the uſual Courſe is to direct the Attachment to the Coroners.

(*a*) *Gravely* v. *Ford*, H. 5 Ann. in *B. R.*

Cro. Eliz. 294. *Lewett* v. *Farrar*. A Writ upon the Statute of *Northampton* was awarded to the Sheriff and Juſtices of Peace of the County of *Norfolk* to remove a Force; the Under Sheriff by Command of the High Sheriff executed the Writ, and by virtue thereof arreſted *J. S.* and it was held, that the Execution of the Writ by the Under Sheriff was good, eſpecially as it named him only by the Name of his Office, and not by his proper Name, and as it did not expreſsly command him to act in his proper Perſon.

Dalt. Sh. 34. *Page 441 But in all Caſes where the Writ commands the Sheriff to go in Perſon, there the Writ is his Commiſſion, from which he cannot * deviate; but if the Sheriff returns that he was there in Perſon, and this Return be received and filed, then any Information to the contrary comes too late, becauſe by the Filing 'tis become a Matter of Record, againſt which no Averment in *Pais* lies, neither can the Party have Error upon the Return.

Cro. Eliz. 9, 10. *Clay*'s Caſe. As in a Writ of Partition, the Sheriff muſt be on the Lands in Perſon according to the Direction of the Writ; and if he be not, the Court upon Information thereof, before filing the Return, will order the Filing to ſtay; and if upon Examination it be ſo found, will award a new Writ.

11 H. 4. 7. 6 Co. 12. Hob. 13. Jenk. 181. So in a Writ of Rediſſeiſin, in which by the Statute of *Merton* the Sheriff is Judge as well as Officer, he muſt execute it in Perſon, and cannot make a Deputy.

Reg. 23. 6 Co. 12. 8 Co. 52. 4 Co. 65. 2 Inſt. 390. Dalt. 34. Dyer 204. pl. 1. So in a Writ of Enquiry of Waſte, the Sheriff muſt himſelf go in Perſon and view the Place waſted; for though in this Caſe he is not in Strictneſs Judge, but is to inquire by the Oaths of twelve Men, *&c.* yet his Writ being in Nature of a Commiſſion, he muſt execute it in Perſon; and, as he is *in loco Judicis*, if the Land lie in a Franchiſe, the Sheriff cannot make his Warrant to the Bailiff of the Franchiſe, or return *Mandavi Ballivo*, *&c.* for he cannot grant over the Judicial Power, but he muſt enter the Liberty and execute the Writ himſelf.

So

So in a Writ of Admeaſurement of Dower and Paſture, the High Sheriff muſt execute theſe in Perſon, being Vicountiel and not returnable, and to which the Parties may plead before the Sheriff in the County, if they think fit, unleſs they are removed in *C. B.* by a *Pone*, which the Plaintiff may do without ſhewing any Cauſe. F.N.B. 148. Dalt.Sh. 34. Noy 21.

So in a Writ *de nativo habendo*, if it goeth to the Sheriff to hold Plea of the Matter, there he is both Judge and Officer, and muſt execute it in Perſon; but where it is directed to the Sheriff returnable in *B.* there his Office is miniſterial only, and he may execute it by his Under Sheriff or Deputy. Bro. *Offic.* 36. Dalt.Sh. 34.

In a Writ of *Juſticies*, which is a Commiſſion to the Sheriff to hold Plea above 40 *s.* the High Sheriff muſt execute it in Perſon; and if it be done by the Under Sheriff, the Judgment thereon is utterly void, and *coram non Judice*. 2 Leon. 34.—Yet in this Caſe my Lord *Coke* holds that the Suitors are Judges, and not the Sheriff. 6 Co. 12, 13.

It hath been adjudged, that an Aſſignment of Priſoners by the Under Sheriff is as valid as if made by the High Sheriff himſelf. M. 6 G. 2. in *C. B. Holt* v. *Greenlaw.*

4. The Manner of appointing Bailiffs and other (*a*) Officers; and therein of his being anſwerable for their Acts.

(*a*) By the 1 & 2 Ph. & M. c. 12. muſt appoint four Perſons in the County in his Name to make Replevins, *&c.*

Although all Writs and Proceſſes are directed to the High Sheriff, and uſually delivered to the Under Sheriff, yet, it being impoſſible for them to execute them all themſelves, they are to make out Warrants or Precepts to their (*b*) Bailiffs and other Officers, who are to execute the ſame; and for that Purpoſe they are impowered to appoint a Bailiff in each Hundred, and may appoint a ſpecial Bailiff or particular Perſon to execute a Writ upon any certain Occaſion. Dalt. Sh. 103, 117. Keilw. 86.

(*b*) A Bailiff is to take the ſame Oath appointed to be taken by the Under Sheriff, by the Statute 27 Eliz. c. 12. but a Special Bailiff, or one employed by the Sheriff for a particular Time only, as to execute one Writ, *&c.* is not obliged to take the Oath. Jon. 249. 2 Lev. 151.———The Sheriff may take Security from them, as he is anſwerable for their Acts. Stil. 18.———For the Form of ſuch Securities, *vide* Dalt. 118.———Cannot abridge them of their Power. 2 Brownl. 283.

* But though the Sheriff, having a Writ directed to him, may authoriſe others to execute it, yet the Perſon to whom he directs it muſt himſelf (*c*) perſonally execute it; but any one may lawfully aſſiſt him. *Page 442 Dalt.Sh 117.

(*c*) And therefore an Arreſt by a Bailiff's Follower is not good. 6 Mod. 211.———And there made a *Quære* whether good, though in the Bailiff's Preſence.——If a Warrant be directed to two Men jointly to arreſt another, yet either of them alone may do it. Co. Lit. 181. §——If a Warrant be directed to a Bailiff, and Stranger *conjunctim et diviſim*, it may be executed by the Stranger only. Dalt. Sh. 104.

---

§ *Vide ante* 403. n.

If a blank Warrant be filled up with the Name of a Special Bailiff, either by the Party himſelf or Bailiff, without the Privity or ſubſequent Agreement of the Sheriff, this is ſuch an Abuſe and Contempt, for which an Attachment will be granted. Noy 101. Moor 770.

Alſo the Sheriff ought not to make a blank Warrant for the Attorney to fill up with a ſpecial Bailiff. † Caſes in *B.R.* 527. *Per Holt* Ch. J.

† See the Caſe of *Richard Curtis*, Foſt. 135.

In

2 Lev. 19. *Jones* v. *Green. Vide* 1 Saund. 892

In Treſpaſs for a Battery and Impriſonment, the Defendant juſtifies by Writ out of the King's Bench directed to the Sheriff, and a Warrant thereupon made to him; the Plaintiff demurs ſpecially, becauſe it is not pleaded that the Writ was delivered to the Sheriff in the common Form; to which it was anſwered, that it was not neceſſary to be ſo pleaded; for if in Truth a Writ be ſued out, and he make a Warrant before the Writ comes to his Hands, 'tis well, and the Precedents are both Ways; and of this Opinion was the whole Court.

But now by the Statute 6 *Geo.* 1. *cap.* 21. *ſ.* 53. it is enacted, "That "no High Sheriff, Under Sheriff, their Deputies or Agents, ſhall make "out any Warrant before they have in their Cuſtody the Writs upon "which ſuch Warrants ought to iſſue, on Forfeiture of 10 *l.*

And by the 54th Section of the ſaid Statute, "Every Warrant to be "made out upon any Writ out of the King's Bench, Common Pleas or "Exchequer, before Judgment, to arreſt any Perſon, ſhall have the ſame "Day and Year ſet down thereon as ſhall be ſet down on the Writ itſelf, "under Forfeiture of 10 *l.* to be paid by the Perſon who ſhall fill up or "deliver out ſuch Warrant."

Rol. Abr. 98. *Attorton* v. *Harward.*

If a Bailiff Errant takes *J. S.* in Execution at the Suit of *J. D.* and after he eſcapes by a Reſcue of himſelf, the Sheriff, if he will, may have an Action upon the Caſe againſt the Bailiff for this Eſcape, becauſe when he takes upon him to be his Bailiff, there is an *Aſſumpſit* in Law to keep the Priſoners ſafely, and not to ſuffer them to eſcape.

Under Sheriffs, Bailiffs, *&c.* are looked upon as the High Sheriff's Officers, for whom he ſhall anſwer as their (*b*) Superior, and their Acts are to many Purpoſes conſidered as his own.

(*b*) For this *vide* 2 Inſt. 382, 466.

9 Co. 98. 2 Jon. 60. 2 Lev. 158. Vent. 314. 2 Mod. 119. Noy 69.

Latch 187. Dalt. Sh. 3.

But though the High Sheriff muſt anſwer for his Under Sheriff and other Officers, yet he is not to be puniſhed criminally for their Acts, nor to be impriſoned nor indicted for their Miſdemeanors.

Rol. Abr 94. Cro. Eliz. 175. Leon. 146. S. C. *March* v. *Aſtry.*

And therefore for the perſonal Torts and Injuries ‡ of ſuch Officers they muſt anſwer themſelves; as if the Demandant in a Writ of Entry *ſur Diſſeiſin* delivers a Writ of Summons to the Under Sheriff of the County, and he ſummons the Tenant upon the Land accordingly, and notwithſtanding does not return the Writ, an Action upon the Caſe may be brought againſt the Under Sheriff, if the Plaintiff pleaſes; for, perhaps the Sheriff had no Notice thereof, and it may be the Under Sheriff took the Fees for the Execution of the Writ.

‡ And therefore *qu.* If a Bailiff under Colour of a Warrant, to take the Goods of *A.* takes thoſe of *B.* If the Sheriff has not any Notice of this, can an Action be maintained againſt him, as the Officer has not purſued his Warrant? And whether the only Remedy is not againſt the Officer?——In the Caſe of *Saunderſon* v. *Baker* and *Martin* Sheriffs of *London*, &c. the Adjudication that Treſpaſs lay againſt the Sheriffs, was founded on the Fact, that they had *recognized* the wrongful Act of their Bailiff.

2 Jon. 197. Lev. 214. 2 Lev. 26.

One who is arreſted by a Sheriff's Bailiff is in the Sheriff's Cuſtody, and if reſcued, the Sheriff may alledge that he was reſcued out of his Cuſtody.

*Page 443

2 Salk. 586. pl. 2. *et vide* Sid. 332. 2 Jon. 197.

* But although in Law the Cuſtody of the Bailiff be the Cuſtody of the Sheriff, yet the Sheriff upon a Reſcue cannot return that ſuch a one was in his Cuſtody, and reſcued out of the Cuſtody of his Bailiff, becauſe of the Repugnacy; but he may return that he was reſcued out of his own Cuſtody, although he was never in his actual Cuſtody, or that he was reſcued out of his Bailiff's Cuſtody.

5 Co. 89. Rol. Abr. 94.

So an Arreſt by the Sheriff's Officer is in Judgment of Law the ſame as if the Arreſt were by the Sheriff in Perſon, and if ſuch Officer

ſuffer

ſuffer the Party arreſted to eſcape, the Action muſt be brought againſt the Sheriff.

But if the Sheriff directs his Warrant to his Bailiff, and afterwards *J. S.* puts in his own Name as ſpecial Bailiff, and thereupon arreſts the Defendant, who eſcapes, here *J. S.* ſhall be only chargeable, and not the Sheriff, becauſe the Defendant was never in the Sheriff's Cuſtody. Cro. Eliz. 745.

5. Of his Juriſdiction over Gaols and Gaolers.

Although all Gaols and Priſons regularly belong to the (*a*) King, yet the Sheriff ſhall have the Cuſtody of all Perſons taken by Virtue of any Precept or Authority to him directed, notwithſtanding any Grant by the King of the Cuſtody of Priſoners to another Perſon. And. 345. 4 Co. 34. 9 Co. 119. Cro. Eliz. 829.

(*a*) Although a Subject may have the Cuſtody or keeping of them. 2 Inſt. 100.—But it is ſaid that none can claim a Priſon as a Franchiſe, unleſs they have alſo a Gaol-Delivery. Salk. 343. 7 Mod. pl. 1.—Cannot be erected by le's Authority than by Act of Parliament. 2 Inſt. 705. But *vide* 11 & 12 *W.* 3. c. 19 by which Juſtices of Peace on Preſentment of the Grand Jury are impowered to raiſe Money for that Purpoſe, and Tit. *Gaol and Goaler.*

Every County hath two Sorts of Gaols, one for Priſoners by the Sheriff taken for (*b*) Debt, and this the Sheriff may appoint in any Houſe, or where he pleaſes; the other is for Breach of the Peace and Matter of the Crown, which is the (*c*) County Gaol. Latch 16. & *vide* And. 345.

(*b*) By the 22 & 23 Car. 2. c. 20. ſect. 13. it ſhall not be lawful for any Sheriff or Gaoler to lodge Priſoners for Debt and Felons together in one Room, but they ſhall be kept apart, upon Pain that they that offend againſt this Act ſhall forfeit their Office and treble Damages to the Party grieved. (*c*) By the 1 *Ann.* c. 6. thoſe taken on an Eſcape Warrant are to be ſent to the County Gaol.

Though the Sheriff may remove his Gaol from one (*d*) Place to another within his Bailiwick, yet he muſt keep it and his Priſoners within it, and not ſuffer them to go at large out of the Priſon, though he himſelf attends them. Hob. 202. Latch 16. Sid. 318.

(*d*) The Maſhal of the King's Bench cannot keep his Priſoners in other Place than where the old Priſon is appointed, but the Court of *B. R.* may by Rule appoint it to be kept in any Place in *England*, but then the Marſhal is to keep them, and the Extent of the Priſon is to be limited by the Rule. Cro. Car. 466. Rol. Abr. 810.—And that this was the proper Method to be taken where the Priſoners were in Danger of the Infection by the Plague. Hutt. 29. & *vide* 19 Car. 2. *c.* 4. for impowering Juſtices of Peace to remove Priſoners in Caſe of Infection.

By the 2 *Geo.* 2. *cap.* 22. *ſect.* 1. "No Sheriff, Bailiff or other Officer "ſhall convey any Perſon by him arreſted, by Virtue of any Proceſs or "Warrant, to any Tavern, Alehouſe or other Public Victualling or "Drinking-houſe, or to the Houſe of ſuch Officer, or of any Tenant or "Relation of his, without the free Conſent of the Perſon ſo arreſted, nor "ſhall carry any ſuch Perſon to Priſon within 24 Hours from the Time of "Arreſt." See now 32 Geo. 2. c. 28.

But by the 3 *Geo.* 2. *cap.* 27. *ſect.* 6. "If any Perſon ſhall be arreſted by "Virtue of any Proceſs or Warrant, and ſhall refuſe to be carried to ſome "ſafe Dwelling houſe of his own Appointment, ſo as ſuch Dwelling-"* houſe be in a City or Market-Town, if ſuch Perſon ſhall be there ar-"reſted, or if out of a City or Market-Town, then within three Miles from "the Place where the Arreſt ſhall be made, and ſo as ſuch Houſe be not "the Houſe of the Perſon arreſted, provided it be within the ſame County "and Liberty, it ſhall be lawful for the Officer to carry the Perſon ſo re-"fuſing to Gaol by Virtue of ſuch Proceſs." This Act has been ſuffered to expire. *Page 444

Reg. 295. The Gaoler is but the Sheriff's Servant, whom he may diſcharge at his Pleaſure; and if he refuſes to ſurrender up or quit Poſſeſſion of the Gaol, the Sheriff may turn him out by Force, as he may any private Perſon; alſo they are each of them ſo far under the Regulation of the Court of King's Bench, that they will compel the Sheriffs to (*a*) aſſign Priſoners, *&c.* the Gaolers to ſurrender up Gaols, *&c.*

(*a*) Where the new Sheriff was not bound to take Delivery of a Priſoner but in the common Gaol of the County. Poph. 85. 2 Leon. 54. Hard. 30, 33.

Confirmed by 19 H. 7. c. 10. By the 14 *E.* 3. *cap.* 10. "In the Right of the Gaols, which were wont "to be in the Ward of the Sheriffs, and annexed to their Bailiwicks, it is "aſſented and accorded that they ſhall be rejoined to the Sheriffs, and the "Sheriffs ſhall have the Cuſtody of the ſame Gaols as before this Time they "were wont to have, and they ſhall put in ſuch Under Keepers for whom "they will anſwer."

2 Lev. 159. 2 Jon. 62. 2 Mod. 124. *et vid.* 5 Mod. 414, 416. And therefore if a Gaoler, who is the Sheriff's Servant, ſuffers a Priſoner to eſcape, the Action muſt be brought againſt the Sheriff, not againſt the Gaoler; for an Eſcape out of the Gaoler's Cuſtody is by Intendment of the Law an Eſcape out of the Sheriff's Cuſtody.

Where it is ſaid in general that Gaolers are liable for Eſcapes; but the Queſtion being there touching the Eſcape of a Perſon committed for a criminal Offence muſt be underſtood of Eſcapes in thoſe Caſes, for which whoever *de facto* occupies the Office of Gaoler, is liable to anſwer; nor is it material whether his Title to the Office be legal or not. Hal. P. C. 114. 2 Rol. Rep. 146. 2 Hawk. P. C. 135. *et vide* Hard. 29, 35. That where Actions for Eſcapes are ſaid to lie againſt Gaolers, ſuch abſolute Gaolers are intended as Writs are directed to.——Yet it has been holden by my Lord Chief Juſtice *Holt*, that an Action lies for a voluntary Eſcape againſt the Gaoler, as well as againſt the Sheriff, it being in Nature of a Reſcue. 2 Salk. 441. pl. 2. 3 Salk. 18.

(I) Of the preceding and ſucceeding Sheriff; and herein of the Acts neceſſary to be done by each of them.

Dalt. Sh. 18. THE old Sheriff may execute his Office until his Writ of Diſcharge be delivered to him; and by the Statute 12 *E.* 4. *cap.* 1. "if any Sheriff "execute or return any Writ or Warrant within *Michaelmas* Term after "the 6th of *November*, and before any Writ of Diſcharge delivered to "him, he ſhall not be damnified by the Statute 23 *H.* 6. *cap.* 8. although "he hath occupied the Office before the Days of Return *Craſtino Martini*, "*Octabis Martini*, or *Quinden Martini*."

And by the 17 *E.* 4. *cap.* 6. "Every old Sheriff ſhall have Power as "well to execute and return every Writ or Warrant, as to execute every "other Thing which to the Office pertaineth, during the Terms of St. "*Michael* and St. *Hilary*, unleſs he be lawfully diſcharged."

Moor 186, 364. *St. John's* Caſe. In an Action of falſe Impriſonment, the Defendant pleaded that he was Sheriff of *W.* and that by Virtue of a *Capias* directed to him he arreſted the Plaintiff, *&c.* the Plaintiff replied that *J. S.* was then *Page 445 * Sheriff; to which the Defendant rejoined, that he had not Notice of *J. S.*'s Patent, and that no Writ of Diſcharge was delivered to him; and on Demurrer it was adjudged for the Defendant, and that he continued Sheriff 'till the Writ of Diſcharge delivered to him, or perfect (*a*) Notice of the new Patent.

(*a*) It ſeems the better Opinion, that delivering the Writ of Diſcharge to the Clerk of the County Court, though in the Abſence of the Sheriff, is ſufficient Notice, becauſe every Perſon being obliged to give his Attendance there, ſhall be preſumed to be preſent. Dyer 355. Crompt. 203. Dalt. Sh. 18.

But

But if the old Sheriff, after he is discharged, shall make his Warrant or Precept to any of his late Bailiffs or Officers to arrest another, and the Officer by Force thereof shall arrest the Party, an Action of false Imprisonment will lie against both the Sheriff and Officer. Dalt. Sh. 18.

So where the old Sheriff returned the Proclamation upon an Exigent after that he was discharged of his Office; and it was adjudged that the Outlawry was void, and the Party was discharged. Dyer 41. Dalt. Sh. 18.

All Writs are by View and by Indenture precisely to be set over by the old Sheriff to the new, and if they have been executed by the old Sheriff, they must be returned by him or in his Name, and (*b*) indorsed by the new Sheriff; but if there hath been no Execution by the old Sheriff of them, then the Return is to be in the new Sheriff's Name. 2 Rol. Abr. 457, 458. Bulst. 70. Dalt. Sh. 18.

(*b*) Thus, *Istud breve prout indorsatur mihi deliberatum fuit per* R. S. *armiger' nuper vic' prox' predecessor' meum in exit' ab officio suo.* Dalt. Sh. 18.

If the Return of the old Sheriff happen to be erroneous, and that a new Sheriff be chosen, yet the Court may cause the old Sheriff or his Under Sheriff, Clerk, or Deputy, to amend the same. Dalt. Sh. 19.

The old Sheriff is to deliver over by (*c*) Indenture all the Prisoners in his Custody charged with their respective Executions, and 'till such Delivery by him they remain in the Custody of the old Sheriff, and he shall be answerable for them. Cro. Eliz. 365, 366. Hob. 266. Bulst. 70. 2 Leon. 54.

3 Co. 72. 2 Rol. Abr. 457. (*c*) For the Form whereof, *vide* Dalt. Sh. 18.

If the Sheriff dies, and before another is made, one in Execution goes at large, (*d*) this is no Escape, for the Prisoners were in the Custody of the Law 'till a new Sheriff made; but after a new Sheriff is made, he is bound to take Notice of all Executions against any Persons he finds in the Gaol, for there is no Person to make Delivery or give him Notice thereof. 3 Co. 72. Cro. Eliz. 366.

(*d*) That there is no Remedy but to take him again. ‖ 1 Mod. 14.

‖ The Under Sheriff is now answerable, by 3 Geo. 1. c. 15. s. 8. which *vide ante* 437.

If *J. S.* be in Execution at the Suit of *A.* and *B.* severally, and the Sheriff at the End of his Year delivers him over to the new Sheriff by Indenture, in which Indenture the Execution at the Suit of *A.* only is mentioned, and the Execution at the Suit of *B.* is omitted, this is an Escape, for which an Action lies against the old Sheriff, though *J. S.* continues in Prison; for *eo instante* that the old Sheriff hath delivered his Prisoners to the new, (*e*) he ceases to have the Custody of them, and he cannot be in the Custody of the new Sheriff at the Suit of *B.* with which he was never charged; and though the Executions are of Record, yet the new Sheriff is not bound to take Notice thereof. 3 Co. 71. *Westley's* Case, adjudged upon a special Verdict. Poph 85. S. C. Cro. Eliz. 365. S. C. Moor 688. S. C. adjudged upon a special Verdict, being found also that the old Sheriff gave no Notice of this Execution to the new, and affirmed upon a Writ of Error in the Exchequer Chamber; but it is said, that it seemed to the Justices, that Notice by Parol would have been sufficient though the Execution was not mentioned in the Indenture. (*e*) And the new Sheriff is to be charged with an Escape after. Cro. Jac. 380.——But if a Prisoner is omitted in the Indentures, and so not turned over at all, he remains in the Custody of the old Sheriff. Sid. 335. Noy 51. 2 Leon. 54. 2 Keb. 224.

* It hath been adjudged, that an Assignment by the Under Sheriff is sufficient; and also that an Assignment of the Prisoners, though not by Indenture, shall bind the new Sheriff if he has Notice of the Causes wherewith the Prisoners are charged; for it seems the Form of the Indenture was introduced only for the Conveniency and Security * Page 446 M. 6 Geo. 2. in *C. B. Holt* v. *Greenlaw.*

19 Vin. Abr. 454. pl. 8. *Barnes's* Notes, C.P. 259. 2 Kel. 125. pl. 101. *Ante* 441. Dalt. 15.

of Sheriffs; and therefore if a Note or Shedule only is made of the Priſoners, with the Cauſes of their Impriſonment, and this delivered to the new Sheriff, and thereupon he accepts the Cuſtody of the (*a*) Gaol, they are as effectually turned over as if done by Indenture; *Volenti non fit injuria*; and the new Sheriff can no more pretend Ignorance when the Truſt he engages in is declared to him by Deed Poll, than by Indenture.

Sid. 335. pl. 21. 2 Rol. Rep. 146. but the new Sheriff may compel the old Sheriff to make an Aſſignment by Indenture. 2 Kel. 125. pl. 101.——(*a*) That the new Sheriff is not bound to take Delivery of a Priſoner but in the common Gaol of the County. Poph. 85. 2 Leon. 54. Hardr. 30, 33.——A Writ for the new Sheriff to compel an Aſſignment by Indenture from his Predeceſſor. Reg. 295. ‡

---

‡ Sheriffs required to turn over all Proceſs not executed, by Indenture to their Succeſſor, 20 Geo. 2. c. 37.———Writs to be turned over to the ſucceeding Sheriff, *id.*———Sheriff not to be called upon to make a Return after ſix Months from the Expiration of his Office, *id.* ſ. 2.

Dalt. Sh. 19. Salk. 323.

If upon a *Fi. Fa.* the Sheriff ſeizes Goods, and he returns that Goods to ſuch a Value remain in his Hands *pro defectu emptorum*, and he is removed, yet he and not the new Sheriff is to proceed in the Execution; for Execution being an intire Thing, he who begins muſt end it; and upon his Neglect a *Diſtringas nuper vicecomitem* lies, of which there are (*b*) two Sorts, one to diſtrain the old Sheriff to ſell and bring in the Money, the other to ſell and deliver the Money to the new Sheriff, to bring it into Court, which plainly ſhews his Authority continues by Virtue of the firſt Writ.

(*b*) For which *vide* Theſ. Brev. 90 24 H. 6. 36. Raſt. 164.

And that the *Diſtringas*, which commands the new Sheriff to diſtrain the old one to ſell and bring in the Money, is the moſt uſual. 6 Mod. 299.

Cro. Jac. 73. Moor 557. Rol. Abr. 893, 894. *Airev. Aden.* But in Yelv. 44. S. C. it is ſaid to be adjudged *cont.* but ſeems to be a Miſtake; *& vide* Hob. 207. Cro. Eliz. 597. Yelv. 6. Dyer 98. Godb. 276. Cro. Jac. 515. Latch 117. 4 Leon. 20. 2 Saund. 47, 345. Mod. 31.

And therefore it hath been adjudged, that if the Sheriff on a *Fi. Fa.* ſeiſes Goods to the Value of the Debt, and pays Part of the Debt, and is diſcharged before he hath ſold the Reſt of the Goods or having returned his Writ, that notwithſtanding ſuch Diſcharge, and without any Writ of *Venditioni exponas*, he may ſell the Goods remaining in his Hands, and ſuch Sale and Execution ſhall be good by Force of the Writ of *Fi. Fa.*

Cro. Eliz. 440. *Boucher* v. *Wiſeman.*

If a *Fi. Fa.* (before the Statute) had been delivered to the Sheriff 9 *Nov.* and he had executed it the ſame Day, and after a Writ of Diſcharge, dated 6 *Nov.* had been delivered to the Sheriff the ſame Day, if it did not appear the Sheriff had Notice of it before the Execution ſerved, the Execution had been good.

By the 3 *Geo.* 1. *cap.* 15. *ſ.* 9. "When any Sheriff ſhall by Proceſs "out of the Exchequer extend any Goods, *&c.* into the Hands of his "Majeſty, *&c.* for any Debts due to the Crown, and ſhall die or be "ſuperſeded before a *Venditioni exponas* be awarded for Sale, or before "he has made actual Sale thereof, and a Writ ſhall afterwards be awarded "to a ſubſequent Sheriff, who ſhall make Sale of ſuch Goods, *&c.* the "Barons of the Exchequer, if ſitting, or if not ſitting, they, or any "one of them of the Degree of the Coif, ſhall ſettle the Fees or Poundage for ſuch Seiſure and Sale between ſuch preceding and ſubſequent "Sheriff, with regard to the Trouble each Sheriff had in the Execution "of ſuch Proceſs." †

† By ſtat. 7 Geo. 3. c. 29. He is not intitled to Poundage for the taking Body in Execution, on Proceſs at the Suit of Sheriff, *&c.* on Bail-Bond for Appearance of Perſon ſued for Duties, or for Penalty for ſmuggling, or in any Caſe where he would not be intitled if the Suit was directly in the Name of the Crown.

* (K) Where more than one Sheriff. *Page 447

IN *London* and *Middleſex* there are two Sheriffs; the Beginning of which Cuſtom ſeems to be founded on the Charter of King *John*, who granted the Sheriffwick of *London* and *Middleſex* to the Mayor and Citizens of *London*, at the Farm of 300 *l. per Ann.* ſo that being a Grant in Fee of the Sheriffwick to them as a Corporation, they had a Right to name one or more Officers in order to execute the ſame, and they thought it proper to name two Officers indifferently to execute both Offices, and both of them execute as one Sheriff, though the Writ in *Middleſex* is directed to them as one, *Vic' Com' Middleſex Præcipimus tibi*; in that of *London* it is to both *Vic' Comitib' London' Præcipimus vobis*; and the Reaſon of this Difference ſeems to be, that before this Grant of the Sheriffwick to the Corporation, the Corporation nominated to the Crown, and the Crown appointed the Sheriffs for *London*, and the *London* Sheriffs were reſponſible to the King for the *London* Profits of the Sheriffwick; and that was the Reaſon why two were appointed, that both might be reſponſible, and this Nomination was that the Citizens might exhibit to the King reſponſible Perſons; and that ſeems to be the Reaſon, that in many of the Corporations that are Cities and Counties, there are two Sheriffs; but when, by the Charter of King *John*, the Sheriffwick of *London* and *Middleſex* was granted to the Citizens as a perpetual Fee-Farm, then they elected their Sheriffs, which before were nominated for *London* only, and the Election of the two was for both Sheriffwicks; but the Directions of the King's Writs were as before, *viz.* in *London* to the two Sheriffs, and in *Middleſex* as if there was only one. *Priv. Lond.* 5, 272. 3 Co. 72. b. 2 Inſt. 382. 2 Show. 262. pl. 268. Skin. 104. pl. 3. Carth. 482. Leon. 284. Gilb. Hiſt. P. C. 180.

Where there are two Sheriffs, they regularly make but one Officer, and therefore if one of them die, the Office is at an End until another is choſen, and the Courts of *Weſtminſter* can award no Proceſs to the other. 4 Mod. 65.

If one Sheriff of *London* make his Return without his Fellow, this being as no Return at all is not aided by the Statute, which aids inſufficient Returns, for the Court takes Notice that one Sheriff there is two Perſons. Hob. 70. Lit. Rep. 129.

But though they are conſidered but as one Officer, yet where in an Information for a Riot committed in *Cheſter*, it was ſuggeſted on the Roll that one of the Defendants was Sheriff, whereupon the *Venire* was prayed and directed to the other Sheriff, and they found guilty; and it was moved in Arreſt of Judgment that the *Venire* ſhould be awarded to the Coroner, becauſe both Sheriffs make but one Officer; but in this Caſe it was adjudged that the *Venire* was well awarded, and that where one Sheriff is challenged the other ſhall ſupply the Place, and that the Coroner is not the Perſon to execute the Proceſs of the King's Courts but where the proper Officer is wanting, which cannot be where there is one Sheriff. 4 Mod. 65. Salk. 152. pl. 2. *The King* v. *Warrington*. Carth. 214. S. C. And there ſaid, that in the Caſe of *Bethel*, Sheriff of *London*, againſt *Harvey*, and of *Rich*, Sheriff of *London*, againſt *Player*, the *Venires* were directed to the other Sheriff alone; & *vide* Stil. 342.

In a Writ of Error to reverſe an Outlawry, among other Errors it was aſſigned that the Direction of the Exigent to the Sheriffs of the City of *Lincoln* was *Quod capias Corpus ejus ita quod Habeas Corpus ejus, &c.* where, they being two Sheriffs, the Writ ought to have been *Capiatis et habiatis*; *ſed non allocatur*, for they both be but one Officer to the Court; and altho' in the End of the Writ it is *ita quod habeatis ibi hoc breve*, yet there is no Repugnancy, for it is good both Ways. Cro. Jac. 576. *Gargrove* v. *Markham*.

If

*Page 448 Cro. Eliz. 625. *Benion* v. *the Sheriffs of the City of York.*

* If there are two Sheriffs of the ſame Place, and an Action of Eſcape is brought againſt them both, if one of them dies, yet the Writ ſhall not abate; for, it being in Nature of a Treſpaſs, and merely perſonal, the Party can only have Remedy againſt the Survivor.

Carth. 145. Show. 162. *Riding* v. *Edwin.*

A Priſoner in *Wood-ſtreet* Compter upon meſne Proceſs on a Plaint levied againſt him, *&c.* eſcaped; whereupon the Plaintiff brought his Action againſt both Sheriffs of *London*, and upon a Demurrer to the Declaration the Plaintiff had Judgment; and it was reſolved, that though the Plaint was levied before one Defendant only in his Court, and the Priſoner eſcaped out of his Compter, yet that both Sheriffs had the Cuſtody of the Priſoners in both Compters, and by Conſequence the Action was well maintainable againſt both.

(L) Of his Duty and Acts as a Judicial Officer.

Vide Juriſdiction of this Court, Title *Courts.*

THE Sheriff hath in many Things a Judicial Authority, and particularly in his Torn, which is the King's Court of Record holden before the Sheriff for the redreſſing of common Grievances within the County.

Cromp. Jur. 212. Stamf. 84. 2 Inſt. 32. Dalt. Sh. 25. 2 Hal. Hiſt. P. C. 69. 2 Hawk. P. C. 66.

In this Court the Sheriff had antiently a very large and ample Juriſdiction, for he could not only inquire of all capital Offences, as Treaſons and Felonies, but likewiſe iſſue Proceſs on them, and determine the ſame; but his Power herein is now much reſtrained by Statute; and 1ſt, by the Statute of *Magna Charta*, *cap.* 17. by which it is enacted, "That "no Sheriff, Conſtable or other Bailiff of the King ſhall hold Pleas of "the Crown." 2dly, by the Statute of 1 *E.* 4. *cap.* 2. his Power of making out Proceſs upon theſe Indictments is taken away as well in Caſe of Indictments of Felony, as other Miſdemeanors within his Cognizance; but he is to deliver all ſuch Preſentments and Indictments to the Juſtices of the Peace at their next Seſſions, who are to make out Proceſs thereupon, and hear and determine them; but, if the original Preſentment were not within the Juriſdiction of the Torn, the Juſtices of Peace ought not to proceed upon ſuch Indictments, though removed before them.

2 Hawk. P. C. 66, 67. 2 Hal. Hiſt. P. C. 69.

But though the Sheriff by the abovementioned Statutes is reſtrained from determining in capital Offences, and of iſſuing Proceſs in ſuch Caſes, yet hath he ſtill in his Torn a Judicial Authority *virtute Officii*, of inquiring and taking Preſentments of all capital Offences, of a publick Nature, as all Treaſons and Felonies at (*a*) Common Law, Aſſaults and Batteries, if accompanied with Bloodſhed; all Affrays, being *in terrorem populi*; common Grievances, as Breaking of Hedges, Dikes or Walls; all common Nuiſances, Annoyances to common Bridges or Highways, Bawdy-houſes, *&c.* and all other ſuch like Offences as Selling corrupt Victuals, Breaking the Aſſiſe of Beer and Ale, Neglecting to hold a Fair or Market, keeping falſe Weights or Meaſures, *&c.*

(*a*) And therefore cannot take an Inquiſition of Rape, becauſe as the Law now ſtands, it is only Felony by Statute.

2 Hal. Hiſt. P. C. 69. 2 Hawk. P. C. 58.

Alſo a Sheriff, as Judge of a Court of Record, may in his Torn impoſe a Fine on all ſuch as ſhall be guilty of a Contempt in the Face of the Court, and on a Suitor refuſing to be ſworn, and on a Bailiff refuſing to make a Panel, and on a Tithingman refuſing to make a Preſent-

* Preſentment, and on a Juryman refuſing to preſent the Articles given in Charge, and on a Perſon duly choſen Conſtable refuſing to be ſworn. *Page 449

But he cannot take a Preſentment concerning the Freehold, as he cannot hold Plea of Lands; and therefore if a Preſentment charge a Perſon with not repairing a Highway as he ought to do by the Tenure of his Lands, this is to be removed into the King's Bench, and there traverſed. Dalt. Sh. 25. 3 Mod. 138.

The Sheriff, as he is a principal Conſervator of the Peace within his County, may *ex officio* award Proceſs of the Peace, and take Surety for it; and it ſeems the better Opinion, that the Security ſo taken by him is by the Common Law looked on as a Recognizance or Matter of Record, and not as a common Obligation or Matter in *Pais* only, for that it is taken by him by Virtue of the King's Commiſſion, by which he is intruſted with the Cuſtody of the County, and conſequently has by it an implied Power of keeping the Peace within ſuch County. Cro. Car. 26. 2 Hawk. P. C. 33.

In ſome Caſes the Sheriff hath two Powers, or a double or two-fold Authority; the one as Judge, and the other as an Officer, in the one and the ſame Buſineſs; and in a Writ of Rediſſeiſin, in a Writ of Inquiry of Waſte, in a *Nativo habendo*, and in a Writ of Admeaſurement of Paſture, &c. in theſe Caſes the Writ is as a Commiſſion to the Sheriff, and by Virtue thereof the Sheriff is Judge of the Cauſe. Dalt. Sh. 34. *Vide* what Writs he is to execute in Perſon.

(M) Of his Duty and Acts as a Miniſterial Officer; And herein,

1. That he is the proper Officer to execute all Writs, except in Caſe of Partiality.

THE Sheriff is the immediate Officer to the King's Courts, to whom all Writs and Proceſſes are regularly to be directed, and who is to execute the ſame without Favour, Dread or Corruption, and to which he is ſworn. Dalt. Sh. 96. Plowd. 74. Dyer 60.

And as this is an Employment for the Good and Convenience of the Public, if the Sheriff refuſe to receive a Writ, or to execute it, this is an Offence of a public Nature, for which he may be (*a*) fined and impriſoned; alſo ſuch an Injury to the Party grieved for which an Action on the Caſe lies. Dalt. Sh. 101, 102.

(*a*) An Exigent delivered to the Sheriff was imbeziled, and a Copy of it returned by him, for which he was amerced 30 *l.* for the Return of the Copy, and 20 *l.* for the Imbezilment. 5 H. 4, 5. Dalt. Sh. 202.

And if any, ſays *Dalton*, doth fear the Malice, indirect Dealing, or Negligence of the Sheriff, &c. in the Execution of any Writ, they may deliver their Writs in the open County Court, or in any other Place in the County; and may take of the Sheriff or Under Sheriff, being preſent, a Bill, wherein the Names of the Demandants and Tenants mentioned in the Writ ſhall be contained, whereto, upon Requeſt made by him which delivered the Writ, the Sheriff or Under Sheriff ſhall put to their Seal for a Teſtimony, without any Fee; and if they refuſe, others preſent may put their Seals as Witneſſes. Dalt. Sh. 202.

But

*Page 450 Co. Lit. 158. a. *Vide* Tit. *Jury.*

* But though the Sheriff is the proper Officer to whom Proceſs is to be directed, and who is to execute the ſame, yet if he be partial, that is ſuch a one as from his Conſanguinity or Affinity, his being under the Power of either Party, cannot be preſumed indifferent in making a Return of a Jury, in ſuch Caſe the *Venire* ſhall be directed to the Coroners, if they are impartial, or to thoſe of them who are ſo; and in caſe all the Coroners are partial or not indifferent, as every Officer who hath any way to do with the Adminiſtration of Juſtice ought to be, then the *Venire* ſhall be directed to two Elizors named by the Court, and againſt whom for that Reaſon no Challenge can be taken.

8 Mod. 248. But as the Sheriff is the proper Officer to return Juries, if there be no legal Exception againſt him the Court cannot ſlip him, and order another to return a Jury, without the Conſent of the Parties, to try an Iſſue at the *Niſi Prius*; but if there be any lawful Objection to him, and it appears ſo on Affidavit, then a ſpecial Jury may be ſtruck by the Maſter of the Office without the Conſent of the Parties.

Cro. Car. 415, 416. 1 Rol. Abr. 797. If one that is Sheriff of a County levies a Fine, the Writ of Covenant is to be directed to the Coroners; for though the Sheriff is the proper Miniſter for the Execution of all Writs, yet where the Writ is brought againſt himſelf, and where he with others are Parties to it, to prevent Partiality, which every one is naturally guilty of, to himſelf, it has been the Practice to direct the Writ to the Coroners.

Moor 547. In Replevin it appeared that the *Liberate* on a Statute was executed by the Conuſee, being himſelf Sheriff; and this was held erroneous.

2 Vent. 216. If a Sheriff of a County in a City be in Contempt, the Attachment is to go to the Coroner, and not to the Mayor or chief Officer of the Corporation in ſuch City or Town; and if the Offender be out of his Office, the Attachment ſhall be directed to the new Sheriff.

2. That he cannot diſpute the Authority by which they iſſue, nor object any Irregularity in them.

Dalt. Sh. 104. Neither the Sheriff nor his Officers are to diſpute the Authority of the Court out of which any Writ, Proceſs or Warrant iſſues, but are at their Peril truly to execute all ſuch Writs, *&c.* as are directed to them by the King's Judges and Juſtices, according to the Command of the ſaid Writs, and hereunto they are ſworn.

Dyer 60. 9 Co. 68. 2 Bulſt. 65. But now *vide* Tit. *Privilege.* And hence it hath been held, that if a *Capias*, Exigent or Writ of Execution iſſued againſt a Peer, and was delivered to the Sheriff, that he was obliged to execute it; and that if any ſuch Writ iſſued, and the Party was taken thereupon and eſcaped, an Action lay againſt the Sheriff.

22 E. 4. 33. 10 Co. 76. Dalt. Sh. 106. 2 Leon. 84. Dyer 175. 8 Co. 141. 5 Co. 64. 2 Bulſt. 64. Cro. Jac. 280. Poph. 203. But herein there is an eſtabliſhed Diſtinction mentioned in Variety of Books and Caſes, to wit, that when a Court hath Juriſdiction of the Cauſe, and proceeds *inverſo ordine*, or erroneouſly, there the Officer or Miniſter of the Court who executes the Precept, is excuſable; for the Rule is, *Quicunque juſſu judicis aliquid fecerit non videtur dolo malo feciſſe, quia parere neceſſe eſt.* But when the Judge hath no Juriſdiction of the Cauſe, there the Officer is not obliged to obey, and if he does, it is at his Peril, though he do it by Virtue of a Precept directed to him; a void Authority being the ſame as none at all.

2 Saund. 100. 3 Mod. 325. Carth. 148.

Therefore

* Therefore if a *Formedon* iſſues out of the Court of King's Bench, or an Appeal out of the Common Pleas, though theſe are (*a*) ſuperior Courts, yet not having Juriſdiction in theſe Matters, the Sheriff is not obliged to execute the Writ. *Page 451

2 Bulſt. 64. Dalt. Sh 105.

(*a*) Wherein Eſcape the Plaintiff declared, that the Sheriff arreſted *J. S.* by virtue of a *Latitat*, without ſaying out of what Court it iſſued; and it was urged, that though the Sheriff could not take Advantage of an erroneous Proceſs, that yet he might of a void Writ. 5 Mod. 413. Ld. Raym. 397.

If Juſtices of Peace arraign a Perſon of Treaſon in their Seſſions, who is convicted and executed, this is Felony as well in the Juſtices as Sheriff or Officer, who executed their Sentence; but if he had been indicted of a Treſpaſs, found guilty and hanged, though this had been Felony in the Juſtices, yet it would not be ſo in the Sheriff, becauſe a Matter in which the Juſtices had Juriſdiction, and in which they only were to blame in exceeding their Authority. Dalt. Sh. 107.

In an Action upon the Caſe *in Banco Regis* againſt an Officer of the inferior Court for an Eſcape, if the Plaintiff declares that he brought an Action againſt *J. S.* in the ſaid inferior Court (as in *Kingſton* upon *Hull*) upon an Obligation made (*b*) at *Hallifax in Comitatu Eborum*, and does not alledge this to be within the Juriſdiction of the ſaid inferior Court, and that upon this Judgment was given, and Execution granted, and the Defendant took him in Execution and ſuffered him to eſcape, and thereupon he hath brought this Action; this Declaration is not ſufficient to charge the Defendant, becauſe it is not alledged that the Obligation was made within the Juriſdiction of the Court; for though the Action be tranſitory, yet this inferior Court having but a limited Juriſdiction of Things ariſing within the Juriſdiction, (*c*) the Proceedings there were *Coram non Judice*, and wholly void, of which the Officer ſhall take Advantage in this Action upon the Eſcape. Rol. Abr. 809. *Richardſon* v. *Bernard*; *et vide* Noy 45. 2 Show. 424. pl. 391. 2 Lutw. 1569. (*b*) Salk. 202. Said it would have been otherwiſe if it had not appeared where made. And Lutw. 1567. it is ſaid the Cauſe of Action, by the Declaration appearing to be out of the Juriſdiction, was the Cauſe of this Action not lying. Skin. 51. 2 Mod. 197. 3 Lev. 23. like Point. (*c*) 4 Inſt. 231. 3 Lev. 23, 234.

So if *A.* declares that he proſecuted one *J. S.* in the Court of *Ely* upon a Bond made *Infra Juriſdictionem*, upon which he was in Execution, and that the Defendant ſuffered him to eſcape, if the Jury find that there was ſuch a Proſecution, but that the Bond was not made *Infra Juriſdictionem*, the Action does not lie; for all that was done was *Coram non Judice*; and therefore no legal Commitment; and though the Defendant in the Court below pleaded *Non eſt factum*, yet that could not give the Court any Juriſdiction which it had not originally in the Cauſe. 2 Mod. 29, 30. *Squibbs* v. *Hole*, adjudged by three Judges againſt *Ellis*.

If after the Year a *Capias ad Satisfaciendum* is taken out, and the Defendant thereupon arreſted, and after ſuffered to eſcape, Debt lies for this Eſcape (*d*) though the Proceſs was erroneouſly awarded; for it was ſufficient to arreſt him, and the Sheriff may juſtify in an Action of falſe Impriſonment, and (*e*) therefore cannot let him at large. Cro. Eliz. 188. *Buſbe*'s Caſe. 7 Mod. 29. Salk. 273. pl. 4. S. P. adjudged.

Ld. Raym. 775. (*d*) That the Sheriff can take no Advantage of Error in the Proceſs. Cro. Eliz. 767, 893. 2 Bulſt. 258. 8 Co. 142. Godb. 27. Noy 78. Cro. Jac. 280, 289. Stil. 232. 3 Mod. 325. Carth. 148.——But otherwiſe if the Arreſt was void; as if the Arreſt, on which the Eſcape is ſuppoſed, is laid to be out of the County of which the Defendant is Sheriff. Cro. Eliz. 877. *et vide* Noy 51. Brownl. 79. Owen 72. 5 Mod. 413.——If the Judgment for Error is reverſed, the Sheriff may plead *Nul tiel Record*. 8 Co. 142. Saund. 39. Lev. 95. (*e*) Though the Sheriff may juſtify the Execution of a *Capias* teſted out of a Term, yet the Plaintiff ſhall not take Advantage thereof ſo as to charge the Sheriff for an Eſcape. 7 Mod. 30. 2 Salk 700. pl. 4. *per Holt* Ch. J.

If one taken upon a Writ of *Excommunicato Capiendo*, upon a Sentence in the Spiritual Court for Non-payment of Money decreed for Tithes and Coſts, eſcapes, an Action will lie againſt the Sheriff; Lutw. 121. *Slipper* v. *Maſon*, adjudged.

for

Page 452 for though this is founded on a Matter merely Spiritual, yet the Proceſs iſſues out of a Temporal Court, and is directed to and executed by a Temporal Officer, and the Damages conſequential thereupon Temporal.

Rol. Rep. 47. 2 Buſt. 236. Moor 834. *Barns* v. *Cary*. If a Commiſſion of Bankruptcy iſſues againſt *A.* who refuſes to be examined, and thereupon he is committed to Priſon, and the Gaoler ſuffers him to eſcape, as the Commiſſioners had ſufficient Authority to commit, an Action lies by the Creditor for the Eſcape.

Salk. 700. pl. 4. Ld. Raym. 775. *Shirley* v. *Wright*. If one be taken on a *Capias ad Satisfaciendum*, between the Teſte and Return whereof a whole Term intervenes, and the Sheriff ſuffers him to eſcape, an Action lies againſt him; for this Writ was not void, the Party not being prejudiced thereby, for he had no Day in Court, and muſt however lie in Priſon; otherwiſe where taken upon a *Capias ad Reſpondendum*, in which a Term intervenes between the Teſte and Return, for ſuch Writ is void, and by the Intermiſſion the Cauſe is diſcontinued and out of Court, and ſo the Sheriff not chargeable †.

†One was arreſted by a *Capias ad reſpondendum*, teſted in *Trinity*, and returnable in *Hilary* Term following, the Writ was ſet aſide as void. Treſpaſs for falſe Impriſonment lies againſt the Plaintiff in that Writ, and he cannot juſtify under a void or irregular Writ. 3 Wilſ. 341.

(N) How he is to exerciſe ſuch Writs. And herein,

1. That it muſt be without Favour or Oppreſſion, and after ſuch Writ is actually taken out, and before it is returnable.

Dalt. Sh. 109. THE Sheriff being obliged to execute every Writ and Proceſs iſſuing, and directed to him by lawful Authority, he is likewiſe obliged by the Duty of his Office to execute ſuch Proceſs with the utmoſt Expedition, or as ſoon after he receives it as the Nature of the Thing will admit of; and herein there cannot be a ſurer Rule for him to go by than a ſtrict Obſervance of what is injoined by the Writ; but as on the one Hand he muſt not ſhew any Favour, nor be guilty of any unreaſonable Delay; ſo on the other Hand he muſt not be guilty of Oppreſſion, nor make uſe of other Force nor greater Violence than the Thing requires.

Dalt. Sh. 110. If the Defendant doth the Thing commanded by the *Præcipe*, yet the Sheriff is to ſerve the Proceſs, and to make Return thereof.

9 Co. 69. Dalt. Sh. 110. Cro. Jac. 485. A ſworn and known Officer, be he Sheriff, Under Sheriff, Bailiff or Serjeant, need not ſhew his Warrant or Writ when he cometh to ſerve it upon any Man's Perſon or Goods, although the Party demandeth it; but a ſpecial Bailiff muſt ſhew his Warrant if the Party demands it, otherwiſe he need not obey it; alſo ſuch known Officer upon the Arreſt ought to declare the Contents of his Warrant, at whoſe Suit he makes the Arreſt, out of what Court, when returnable, to the End that, if it be upon an Execution, he may pay the Money, and ſo free his Perſon; or if on meſne Proceſs, that he may put in Bail, or agree with his Adverſary.

Dalt. Sh. 111. If any Officer do arreſt a Man before that he (*a*) hath a Warrant, and afterwards doth procure a Warrant, or a Warrant cometh to him

(*a*) If in Truth a Writ was ſued out, and the Sheriff had made his Warrant before the Writ came to his Hands, this hath been held well. 2 Lev. 19. 1 Saund. 298.—But now by the 6 Geo. 1. c. 21. it is enacted, That no High Sheriff, &c. ſhall make out any Warrant before they have in their Cuſtody the Writs upon which ſuch Warrants ought to iſſue, on Forfeiture of 10 *l.*

to arreſt the Party for the ſame Cauſe, yet the firſt Arreſt was wrongful, and the Party grieved may have his Action of falſe Impriſonment.

* And as the Sheriff cannot arreſt before the Writ iſſues, or make his Warrant before it comes to his Hands, it hath alſo been adjudged that he cannot execute it after the Return, not even the very next Day after, and before the *Quarto die poſt*. *Page 453 Sid. 229. *Ellis* v. *Jackſon*.

2. Of his raiſing the *Poſſe Comitatus*.

By the Common Law the Sheriff may raiſe the *Poſſe Comitatus* or Power of the County, that is, ſuch a Number of Men as are neceſſary for his Aſſiſtance in the Execution of the King's Writs, Quelling of Riots, Apprehending Traitors, Robbers, &c. and herein every Perſon above the Age of Fifteen, not aged or decrepid, is bound to be aiding, and (*a*) if they refuſe to aſſiſt, may be puniſhed by Fine and Impriſonment. Flet. l. 2. c. 62. Bract. l. 5. Lamb. 157. 2 Inſt. 193, 453.

(*a*) The Statute 2 H. 5. c. 8. inflicteth both Fine and Impriſonment upon ſuch as ſhall not aid the Sheriff, they being thereunto required. Dalt. Sh. 356.

This Power is not only allowed the Sheriff, but likewiſe is given to his Bailiff or other Miniſter of Juſtice, having the Execution of the King's Writs, and being reſiſted in endeavouring to execute the ſame, may lawfully raiſe ſuch a Force as may effectually enable them to overpower any ſuch Reſiſtance; alſo a Conſtable, or even a private Perſon, may aſſemble a competent Number of People, in order, with Force, to ſuppreſs Rebels or Enemies, or Rioters, and afterwards with ſuch Force actually to ſuppreſs them; ſo a Juſtice of Peace, who has juſt Cauſe to fear a violent Reſiſtance, may raiſe the *Poſſe* in order to remove a Force in making an Entry into, or detaining of Lands. Dalt. Sh. 354. And. 67. Poph. 121. Moor 656. 2 Inſt. 193.

But notwithſtanding what was allowed and injoined herein by the Common Law, it was thought neceſſary by (*b*) poſitive Laws to remedy the great Inconvenience which there was in ancient Times by the Reſiſtance given to the King's Writs, and therefore the Statute (*c*) *Weſtm.* 2. (13 *Ed.* 1. *ſtat.* 1.) *cap.* 39. enacts as follows: *Multoties etiam falſum dant reſponſum mandando, quod non poterunt exequi præceptum regis propter reſiſtentiam poteſtatis alicujus magnatis. De quo caveat Vic' de cætero, quia hujuſmodi reſponſa multum redundant in dedecus domini regis et coronæ ſuæ, et quam cito ſub-ballivi ſui teſtificentur, quod invenerunt hujuſmodi reſiſtentiam ſtatim omnibus omiſſis aſſumpt' ſecum Poſſe comitat' ſui eat in propria perſona ſua ad faciend' execution', et ſi inveniat, &c.*

(*b*) By *Weſtm.* 1. 3 E. 1. c. 17, if a Diſtreſs be impounded in a Caſtle or Forteſs, and detained, the Sheriff or Bailiff taking with him the Power of the Shire, &c. may cauſe the ſaid Caſtle or Fortreſs to be beaten down. Dalt. Sh. 354.

(*c*) The original Commitment for Contempt ſeems to be derived from this Statute; for ſince the Sheriff was to commit thoſe who reſiſted the Proceſs, the Judges that awarded ſuch Proceſs muſt have the ſame Authority to vindicate it: Hence, if any one offers any Contempt to this Proceſs, either by Word or Deed, he is ſubject to Commitment during Pleaſure, *viz. A qua non deliberetur ſine ſpeciali præcepto domini regis*; ſo that notwithſtanding the Statute of *Magna Charta*, that none are to be impriſoned *Sine judicio parium, vel per legem terræ*, this is one Part of the Law of the Land to commit for Contempts, and confirmed by this Statute.

The Words of this Statute have been conſtrued to extend to Executions only, and not to Writs on meſne Proceſs; and that the Sheriff was not obliged to raiſe the *Poſſe Comitatus* where the Party was bailable, for that it cannot be preſumed that in ſuch Caſes the King's Writ will be diſobeyed. Rol. Abr. 807. *May* v. *Proby*. Rol. Rep. 388, 440. and Cro. Jac. 419. S. C. adjudged, and agreed *per Cur.* that though the Sheriff was not obliged, that yet he may take his *Poſſe* to ſerve meſne Proceſs. Cro. Eliz. 868. Noy 40. Moor 852. 3 Bulſt. 198. 2 Lev. 144. 3 Lev. 46. S. P.

Upon

Fitz. *Execut.* 147. Dalt. Sh. 354. Upon a Writ of Seiſin the Sheriff returned that he could not deliver Seiſin for Reſiſtance, and for that the Sheriff did not take the Power of the County according to the Statute, he was amerced 20 Marks.

*Page 454 Dalt. Sh. 355. * So in a Replevin if the Sheriff return that the Cattle are in a Fort or Caſtle, ſo as he cannot make Deliverance, he ſhall be amerced.

Dalt. Sh. 355. A Man demands the Peace in Chancery againſt a great Lord, and hath a *Supplicavit* directed to the Sheriff, *&c.* there, if need be, the Sheriff may take the *Poſſe* to aid him to arreſt ſuch Lord.

Dalt. Sh. 355. Lamb. 157. The Sheriff, if need be, may raiſe the Power of the County to aſſiſt him in the Execution of a Precept of Reſtitution; and therefore if he make a Return thereto, that he could not make a Reſtitution by Reaſon of Reſiſtance, he ſhall be amerced.

3 Inſt. 161. 2 Inſt. 193. Hob. 62, 264. *Vide* Title *Attachment.* But though it be the Duty of the Sheriff or other Miniſter of Juſtice, having the Execution of King's Writs, and being reſiſted in endeavouring to execute the ſame, to raiſe ſuch a Power as may effectually enable them to over-power any ſuch Reſiſtance; yet, it is ſaid not to be lawful for them to raiſe a Force for the Execution of a Civil Proceſs unleſs they find a Reſiſtance, and it is certain that they are highly puniſhable for uſing any needleſs Outrage or Violence therein.

3. Of his breaking open Doors.

5 Co. 91. *Semain's* Caſe. 3 Inſt. 162. Dalt. Sh. 350. Regularly the Sheriff cannot in executing a Writ break open the Door of a Dwelling-houſe; this Privilege, which the Law allows to a Man's Habitation, ariſes from the great Regard the Law has to every Man's Safety and Quiet, and therefore protects them from thoſe Inconveniencies which muſt neceſſarily attend an unlimited Power in the Sheriff and his Officers in this Reſpect; and hence it is that every Man's Houſe is called his Caſtle.

5 Co. 92. b. Cro. Eliz. 909. Moor 668. Yelv. 28. March 4. Cro. Car 537. Jon. 430. Bulſt. 46. And therefore upon a *Capias*, *Fieri Facias*, or other Proceſs at the Suit of a common Perſon, the Sheriff, after Requeſt to open the Doors, and Denial, cannot (*a*) break the (*b*) Houſe of the Defendant, and that in ſuch Caſe the Sheriff would be a Treſpaſſer, though the Execution would be (*c*) good.

(*a*) Cannot open a Latch Dalt. 350.—Where the Door was a little opened to ſee who was there, and the Bailiffs ruſhed in with drawn Swords. Hob. 62. *& vide* Hob 263, 264. (*b*) If the Officer findeth the outward Door open and entereth the Houſe that Way, or if the Door be open to him from within, and he entereth, he may break open *inward* Doors, if he findeth that neceſſary in order to arreſt the Defendant on meſne Proceſs in a civil Suit. Foſt. Cr. Law, 319.† (*c*) But it ſeems to be the modern Practice in ſome Caſes, on Complaint by Affidavit, to diſcharge ſuch Execution, and to grant an Attachment againſt the Officer.‡

---

† So determined in the Caſe of *Lee* v. *Ganſell*, *B. R.* H. 14 Geo. 3. 1774 Loſft's Rep. 374.—The Defendant was a Lodger, and had ſeparate Apartments; but the Street-Door was open.

‡ In *Trinity* Term, 17 Geo 3. the Court of Exchequer ſet aſide an Execution iſſued under ſuch Circumſtances, in the Caſe of *Yeates* v. *Delamayne*, Eſq.

5 Co. 91. But notwithſtanding this general Rule, yet in all Caſes where the King is Party, if the Door be not open, the Sheriff may break the Door of the Party, either to take him, or to execute the Proceſs, if he cannot otherwiſe enter therein; but before he enters he ought to ſignify the Cauſe of his coming, and make Requeſt to have the Door opened.

27 Aſſ. 35. 12 Co. 131. Moor 606. Crom. 170. Upon a *Capias* grounded upon an Indictment for any Crime whatſoever, or upon a *Capias* from the King's Bench or Chancery, to compel a Man to find Sureties for the Peace or good Behaviour, or even upon a Warrant

Warrant from a Juſtice of Peace, for ſuch Purpoſe the Officer may break open the Door of a Dwelling-houſe

So upon a *Capias* (*a*) *Utlagatum* or *Capias pro Fine*, in any Action whatſoever. Goulſ. 179. 4 Leon. 41. Dalt. Sh. c. 94. Moor 609. Cro. Eliz. 908. Yelv. 28.

(*a*) Though on meſne Proceſs, and at the Suit of the Subject. 2 Show. 87. pl. 78.

So upon the Warrant of a Juſtice of Peace for the levying of a Forfeiture in Execution of a Judgment or Conviction for it, grounded on any Statute, which gives the Whole, or but Part of ſuch Forfeiture, to the King, and authorizes the Juſtice of Peace to give ſuch Judgment or Conviction for it. 2 Jon. 233.

* So where a forcible Entry or Detainer is either found by Inquiſition before Juſtices of Peace, or appears upon their View. *Page 455 Dalt Sh 353.

So upon a (*b*) Commiſſion of Rebellion out of Chancery, the Sheriff or his Officers, or the Commiſſioners, may break open the Doors or Houſe to apprehend the Party, whether it be his own Houſe or that of a Stranger, if upon Requeſt ſuch Houſe is refuſed to be opened. Dalt Sh. 353. Crom. 47.

(*b*) But upon an Attachment for a Contempt, &c. iſſuing out of Chancery, it is ſaid the Officer cannot break open the Door; but *Quære*. Dalt. Sh. 353.

So in the Execution of a Commiſſion of Bankruptcy, the Commiſſioners, or any Officers deputed by them, may break open the Houſes, Chambers, Shops, Warehouſes, Doors, Trunks, or Cheſts of the ſaid Bankrupt, wherein the ſaid Bankrupt or any of his Good or Eſtate ſhall be, or reputed to be. 21 Jac. 1. c. 19. Dalt. Sh. 353.

By the 3 & 4 *Jac.* 1. *cap.* 35. it is enacted, "That upon any lawful "Writ, Warrant, or Proceſs awarded to any Sheriff or other Officer "for the taking of any Popiſh Recuſant ſtanding (*c*) excommunicated "for ſuch Recuſancy, it ſhall be lawful, if need be, to break open any "Houſe."

(*c*) Cannot otherwiſe break open a Door on an *Excommunicato Capiendo*. Cro. Eliz. 747.

Where one known to have committed a Treaſon or Felony, or to have given another a dangerous Wound, is purſued either with or without a Warrant by a Conſtable or private Perſon, it is lawful to break open Doors in order to apprehend him; but, where one lies under a probable Suſpicion only, and is not indicted, it ſeems the better Opinion at this Day, that no one can juſtify the Breaking open Doors in order to apprehend him. 2 Hawk. P. C. 86. and the Authorities there cited.

It is ſaid to have been reſolved, that where Juſtices of the Peace are by Virtue of a Statute authorized to require Perſons to come before them to take certain Oaths preſcribed by ſuch Statute, the Officer cannot lawfully break open the Doors of the Perſons who ſhall be named in any Warrant made in Purſuance of ſuch Statute, in order to be brought before the Juſtices to take ſuch Oath, becauſe ſuch Warrant is not (*d*) grounded upon a precedent Offence, neither doth it appear that the Party either is or will be guilty of any. 2 Hawk. P. C. 87.

(*d*) Upon the ordinary Warrant of a Juſtice of Peace, if not for Felony or Suſpicion thereof, the Officer cannot break open the Door. Bulſt. 146.

This Privilege of a Man's Houſe extends only to the (*e*) Owner, but ſhall not protect any Perſon who flies thither, nor the Goods of any Perſon conveyed thither to prevent a lawful Execution; and therefore if a *Fi. Fa.* be directed to the Sheriff to levy the Goods of *A.* and it happens that *A.*'s Goods are in the Houſe of *B.* if after Requeſt made by the Sheriff to 5 Co. 93. a. Sid. 186. Hob. 62.

(*e*) That is, for ſuch Perſon who lies there.

to *B.* to deliver theſe Goods, he refuſes, the Sheriff may well juſtify the Breaking and entering his Houſe.

5 Co. in *Semaine's* Caſe. In a Writ of Seiſin or *Habere Facias Poſſeſſionem* in Ejectment, the Sheriff may juſtify the Breaking open the Door, if he be denied Entrance by the Tenant; for the End of the Writ being to give the Party full and actual Poſſeſſion, conſequently the Sheriff muſt have all Power neceſſary for this End; beſides, in this Caſe the Law does not look upon the Houſe as belonging to the Tenant, but to him who has recovered.

Sid. 186. Keb. 698. *Penton* v. *Browne.* It hath been adjudged, that the Sheriff on a *Fi. Fa.* may break open the Door of a Barn ſtanding at a Diſtance from the Dwelling-houſe, without requeſting the Owner to open the Door, in the ſame Manner as he may enter a Cloſe, *&c.*

*Page 456 Brownl. 50. 2 Show. 87. pl. 78. Comb. 17, 327. * So on a *Fi. Fa.* when the Sheriff or his Officers are once in the Houſe, they may break open any (*a*) Chamber Door or Trunks for the compleating the Execution.

(*a*) That this muſt be after Requeſt and Refuſal. Palm. 54.

Cro. Jac. 555. Rol. Rep. 132. Palm. 52. *White* v. *Whitſhire.* So if the Sheriff's Bailiffs enter the Houſe, the Door being open, and the Owner locks them in, the Sheriff may juſtify Breaking open the Door for the inlarging and ſetting at Liberty the Bailiffs; for, if in this Caſe he were obliged to ſtay 'till he could procure a *Homine Replegiando*, it might be highly inconvenient; alſo it ſeems, that in this Caſe the Locking in the Bailiffs is ſuch a Diſturbance to the Execution, that the Court will grant an Attachment for it.

Rol. Rep. 138. Palm. 54. 6 Mod. 173. So if one be arreſted, and after eſcapes into his Houſe, the Sheriff may break the Doors to take him, as where one opened his Caſement, and the Sheriff took him by the Hand, *&c.*

Bro. *Falſe Impriſonment* 6. Crom. 170. So where an Affray is made in an Houſe in the View or Hearing of a Conſtable, or where thoſe who have made an Affray in his Preſence fly to a Houſe, and are immediately purſued by him, and he is not ſuffered to enter in order to ſuppreſs the Affray, in the firſt Caſe, or to apprehend the Affrayers in the other, in either Caſe he may break open the Doors.

4. Whether he can execute his Writ on a *Sunday*.

This depends on the Statute 29 *Car.* 2. *cap.* 7. *ſect.* 6. by which it is enacted, "That no Perſon upon the Lord's Day ſhall ſerve or execute, or "cauſe to be ſerved or executed, any Writ, Proceſs, Warrant, Order, "Judgment, or Decree, (except in Caſes of Treaſon, Felony, or Breach "of the Peace) but that the Service of every ſuch Writ, Proceſs, Warrant, Order, Judgment, or Decree, ſhall be void to all Intents and "Purpoſes whatſoever; and the Perſon or Perſons ſo ſerving or executing "the ſame ſhall be as liable to the Suit of the Party grieved, and to "anſwer Damages to him for doing thereof, as if he or they had "done the ſame without any Writ, Proceſs, Warrant, Order, Judgment, "or Decree."

5 Mod. 449. Ld. Raym. 706. Carth. 504. S. C. In the Conſtruction hereof it hath been holden, that a Citation out of the Spiritual Court may be ſerved on a *Sunday*, by fixing the ſame to the Church Door, and that the general Words of this Statute do not extend to ſuch Proceſs.

2 Salk. 626. pl. 7. It hath been adjudged, that a Perſon may be taken on an Eſcape Warrant on a *Sunday*, becauſe in Nature of freſh Purſuit, which may be on

on a *Sunday*, and this only in Nature of it, though it be by a new Method; and this is no original Proceſs, but the Party is in ſtill upon the old Commitment continued down. *Parker* v. *Sir William Moor.* 6 Mod. 95. S. C.

That no Indictment can be taken on a *Sunday*; and hence it hath been holden, that in every Caption of an Indictment taken in a Sheriff's Torn or Court Leet, the Day whereon it was taken ought to be ſet forth, that it may appear not to have been on a *Sunday*. 2 Saund. 290. Vent. 107. 2 Keb. 731.

As this Statute makes all Arreſts unlawful, it ſeems the better Opinion, that the killing an Officer who endeavours to arreſt a Perſon on a *Sunday* is not Murder, though it had been otherwiſe, had ſuch publick Officer been killed on an ordinary Day. Hawk. P.C. 86.

That the Arreſt is void, ſo that the Party may have an Action of falſe Impriſonment. Salk. 78. pl. 1. 5 Mod. 95.

Alſo the Court will relieve on Motion, and diſcharge from ſuch Arreſt without putting the Party to his *Audita Querela*. 6 Mod. 95.

* 5. In what Manner he is to do Execution.

*Page 457

The Sheriff in doing Execution muſt be careful that he obſerves the Direction of the Writ, which is his Authority, as in executing a *Fi. Fa.* or *Levari Fa.* by the firſt of which the Goods and Chattels of the Debtor only can be taken in Execution; and though by the latter the Sheriff may not only ſell the Goods, but alſo collect the Debt out of the Profits of the Land, as Corn or Graſs growing thereon, yet in neither Caſe has he Authority to meddle with the Debtor's Lands, ſo as to ſell or deliver ſuch Lands to the Creditor in Satisfaction of his Debt. 3 Co. 11. Co. Lit. 290. b. 2 Inſt. 453. Plow. 441. Finch. 101. Godb. 290. Comb. 470.

And as he has not by theſe Writs a Power to diſpoſe of the Freehold or Inheritance, hence it hath been adjudged, that the Sheriff cannot deliver a Furnace annexed to a Freehold in Execution, though the Writ gives the Sheriff Authority to levy the Debt upon the Goods and Chattels of the Debtor; and this is indeed a Chattel, yet they do not give the Sheriff any Authority to break or diſunite any Thing from the Freehold, which he cannot do unleſs particularly impowered by Writ. Owen 70. Rol. Abr. 891. Off. of Ex. 87.

But it hath been held, that if a Soap-boiler or other Trader, being an Undertenant, for the Convenience of his Trade puts up Vats, Coppers, Tables, Partitions, and paves the Backſide, &c. upon a *Fi. Fa.* againſt him the Sheriff may take them in Execution, in the like Manner as the Leſſee himſelf might have removed them during the Term. Salk. 368. *per Holt* Ch. Juſt. at *Niſi prius.*

Otherwiſe where ſuch Trader makes Hearths and Chimney-pieces to compleat the Houſe, and not for the Conveniency of his Trade. Salk. 368. *per Holt.*

The Sheriff on a *Fi. Fa.* or *Lev. Fa.* cannot ſell an Eſtate for (*a*) Life, which being a Freehold, can no more be affected by theſe Writs than any Eſtate of Inheritance. Dalt. Sh. 145. 3 Co. 13.

(*a*) But it is ſaid, that ſince the Statute 29 Car. 2. c. 3. an Eſtate *per auter vie* may be ſold by the Sheriff on a *Fi. Fa.* Comb. 391.

On theſe Writs the Sheriff may (*b*) diſpoſe of Leaſes for Years, which are but Chattels, be they of ever ſo long Continuance; alſo upon an *Elegit* the Sheriff may either extend a Term for Years, that is, may deliver a Moiety thereof to the Plaintiff as Part of the Lands and Tenements of the Defendant, or may ſell it abſolutely as Part of his perſonal Eſtate. 4 Co. 74. Dalt. Sh. 137. 8 Co. 171. 2 Inſt. 395.

(*b*) But if a Sheriff on a *Fi. Fa.* ſells a Leaſe or Term of a Houſe, he cannot turn the Leſſee out of Poſſeſſion, but the Vendee in ſuch Caſe muſt bring his Ejectment. 2 Show. Rep. 85. pl. 74.

If

Cro. Eliz. 584. 4 Co. 74. *Palmer's* Caſe.

If the Sheriff, reciting that the Defendant hath a Term for Years, ſells it by Virtue of a *Fi. Fa.* this Sale is good; for it cannot be intended that the Sheriff ſhould certainly know the Beginning and End of the Term.

4 Co. 74. a.

But if undertaking to recite it he miſtakes, and ſells the ſaid Term, it is a void Sale, unleſs there be general Words, all the Intereſt, *&c.* of the Defendant therein.

4 Co. 74. a.

But a Term cannot be extended without ſhewing the Certainty thereof, becauſe after the Debt paid the Party is to have his Term again if any Part thereof remains.

Upon an *Elegit* the Sheriff is to impanel a Jury, who (*a*) are to make *Page 458 Inquiry of all the Goods and Chattels as of the Debtor, and to * appraiſe the ſame, and alſo to inquire as to his Lands and Tenements; and upon ſuch Inquiſition the Sheriff is to deliver all the Goods and Chattels (except Beaſts of the Plow) and a Moiety of the Lands, to the Party, and return his Writ, in order to record his Inquiſition in that Court, out of which the *Elegit* iſſued.

(*a*) It cannot be done by the Sheriff without an Inqueſt, for the Words of the Statute are *per rationabile pretium et extentum*, which muſt be found ſuch by the Oaths of twelve Men. 2 Inſt. 396. Co. Lit 389. Dyer 100. 5 Co. 74.

2 Inſt. 395. But an *Elegit* executed upon Goods only is not a *Fi. Fa* for a *Fi. Fa.* is executed by Sale by the Sheriff, but the *Elegit* by the Appraiſement of the Goods by the Jury, and Delivery to the Party. Sid. 184. Lev. 92. Keb. 105.

And although the Creditor takes out an *Elegit*, yet if it appears to the Sheriff that there are Goods and Chattels ſufficient of the Debtor's to ſatisfy the Debt, he ought not to extend the Lands.

Cro. Car. 319.

When the Jury have found the Seiſin and Value of the Land, the Sheriff, and not the Jury, is to ſet out and deliver a Moiety thereof to the Plaintiff (*b*) by Metes and Bounds.

(*b*) If upon an *Elegit* the Sheriff delivereth a Moiety of an Houſe without Metes and Bounds, ſuch Return is ill, and ſhall be quaſhed for Incertainty. Carth. 453. *per Holt.*

Lev. 160. Sid. 239.

If the Sheriff on an Inquiſition upon an *Elegit* returns the Defendant to have twenty Acres in *Dale*, and twenty Acres in *Sale*, and delivers the twenty Acres in *Sale* for the Moiety of the Whole, all is void, for he ought to deliver a Moiety of the twenty Acres in each Vill; and this may be avoided in Evidence in Ejectment brought for the Lands.‡

‡*Extent* not avoided by Omiſſion of Lands liable, 16 & 17 Car. 2. c. 5. ſ. 2.

Moor 32. pl. 104.

The Sheriff on an *Elegit* may extend a (*c*) Rent-Charge; for the Word *Land*, which is made ſubject to the Execution, includes all Hereditaments extendible; and in this Caſe the Party may diſtrain and avow for the Rent though the Tenant never attorned; for the Law, creating his Eſtate, gives him all Means neceſſary for the Enjoyment of it.

(*c*) But not a Rent-Seck. Cro. Eliz. 656.—— Nor can the Office of Filazer be extended, for a Man ſhall not have Execution of that which he cannot aſſign, tho' he may of this have an Aſſiſe *ut de libero Tenemento.* Dyer 7. pl. 10.

(*d*) Hob. 47. 4 Inſt. 270. 2 Inſt. 397. Moor 211. pl 351. Brownl. 234.

Lands in (*d*) Antient Demeſne upon an *Elegit* may by the Sheriff be delivered in Execution, becauſe the Title of the Land is not directly put in Plea in the King's Court; (*e*) but the Statute of *Weſtm.* 2. (13 *Ed* 1. *ſt.* 1.) which gives the *Elegit*, extends not to Copyhold Lands, for then

(*e*) 3 Co. 9. Co. Cop. 149. Salk. 368.

the

the Lord would have a Tenant brought in upon him without his Admittance or Conſent.

If one be Tenant for Years without Impeachment of Waſte, and a *Fi. Fa.* comes out againſt him, the Sheriff cannot cut down and ſell Timber; for the Tenant had only a *Power* ſo to do, and no Intereſt, as he hath in ſtanding Corn, which upon a *Fi. Fa.* againſt him the Sheriff may ſell. Salk. 368.

Upon the Writs of *Habere Facias Seiſinam*, and *Poſſeſſionem*, the Seiſin or Poſſeſſion is uſually performed by the Sheriff by delivering the Party, who recovers a Twig, Bough, Clod, *&c.* of the Land, or if it be of an Houſe, by the Delivery of the Ring of the Door, *&c.* Dalt. Sh. 254. Bro. *Seiſin* 7, 14, 30.

But though this Ceremony be uſed, yet it is held, that in (*a*) all Caſes where the Writ demands Land, Rent or other Thing in certain, the Demandant after Judgment may enter or diſtrain before any Seiſin delivered him by the Sheriff. Co. Lit. 34. b.

(*a*) Upon a Recovery of a Reverſion, Common, *&c.* that lie in Grant, the Recoveror is not in Poſſeſſion 'till Execution, Entry or Claim. Co. 94. b. 97. b. 106. b. Moor 141. Keilw. 108.

* But in (*b*) Dower, where the Writ demands nothing in certain, the Demandant after Judgment cannot enter or diſtrain 'till Execution ſued, upon which the Sheriff delivers the third Part in certain. So where the Wife of one Tenant in Common demands the third Part of a Moiety, ſhe cannot after Judgment enter till the Sheriff hath delivered her the third Part, though it is thereby reduced to no more Certainty than it was. * Page 459 Co. Lit. 34. b.

(*b*) In Dower the Writ was *de tertia parte rectoriæ de D.* and upon that the grand *Cape* iſſued, *Cape in manum noſtrum tertiam partem rectoriæ*, by Colour of which the Sheriff took the Tithes ſevered from the nine Parts, and carried them away with him; and it was agreed by the Juſtices, that the ſame is not ſuch a Seiſure as is intended by the ſaid Writ, but the Sheriff by virtue of ſuch Writ ought generally to ſeiſe, but leave them where he found them; and the Court was of Opinion to commit the Sheriff for ſuch his Miſdemeanor. Leon. 92.

Where the Execution is in the Generality without mentioning any Thing in particular, the Sheriff is to make Execution of the right Thing at his Peril, otherwiſe he will be a Diſſeiſor, for he is bound to take Notice thereof, and he hath no Warrant from the Court but to make Execution of the right Thing. Rol. Abr. 664.

A. and *B.* Tenants in Common of a Manor, *A.* purchaſed ſeveral Freeholds that lay ſo mixed with the Demeſne Lands of the Manor, that they could hardly be diſtinguiſhed from them; *B.* brings a Writ of Partition of the Manor only; and it was adjudged that Partition ſhould be made, and a Writ awarded accordingly; upon the Execution of which Writ *A.* comes to the Sheriff and Inqueſt, and acquaints them with the Purchaſe of the Freeholds that are not Parcel of the Manor, and bids them take Care how they make Partition of all the Lands within ſuch a Compaſs, leſt they offer Violence to their Conſciences, but does not ſhew them the Freeholds diſtinctly, nor the Limits of the Manor; which obliged the Sheriff to adjourn to a certain Day; on which one of the Inqueſt made Default, and thereupon the Sheriff returns a Fine of 40*s.* with an Account of the Difficulties they met with, *et ulterius propter brevitatem temporis breve illud exequi non potuit.* It was held, that *A.* ought to ſhew the Bounds of the ſeveral Freeholds that he purchaſed, or the Number of the Acres; but if no Light or Evidence is given by either Party to the Inqueſt, and they make Partition *de tanto quantum præſumitur et dignoſcitur per præſumptiones*, it is good, for they are under an Obligation to execute the Commands of the Court at their Peril. Dyer 265. pl. 5. Dalt. Sh. 265.

The Sheriff in executing a *Fi. Fa* or *Levari Fa.* muſt be careful that the abſolute Property of the Goods be in the Debtor; and therefore if the Keilw. 119. Bro. Tit. *Treſpaſs* 99.

the Sheriff takes the Goods of a Stranger, though the Plaintiff assures him they are the Defendant's, he is a Trespasser †, for he is obliged at his Peril to take Notice whose the Goods are, and for that Purpose may impanel a Jury to inquire in whom the Property of the Goods is vested; and this it is (*b*) said shall excuse him in an Action of Trespass.

† *Vide ante* 442. *n.* the last.

(*b*) Dalt. Sh. 146.

Bro. Pledges 28. Cro. Car. 149. Rol. Abr. 893.

The Sheriff cannot take in Execution Goods pawned or gaged for Debt, nor Goods demised or letten for Years, nor Goods distrained, (*c*) nor Goods before seised upon an Execution.

(*c*) Show. Rep. 174.—Unless such first Execution were by Fraud. 7 Mod. 37.

Salk. 395. 5 Mod. 112. Carth. 441. *Page 460 Skin. 617. pl. 13. Comb. 434. Ld. Raym. 305, 469. *Briton* v. *Cole.*

Upon a *Levari Fa.* to levy the yearly Value of 55*l.* found by Inquisition on an (*d*) Outlawry upon a Judgment in Debt, the Beasts of a Stranger *Levant* and *Couchant* on the Land may be taken, for they are the Issues of the Land; and were it otherwise, it would be in the Power of the Party by agisting his Lands to defeat the King of the Benefit of the Outlawry.

(*d*) But where on a *Fi. Fa.* out of the Exchequer for the Queen's Debt, the Sheriff took the Beasts of *J. S.* being *Levant* and *Couchant* on the Land of the Debtor, and sold them, this in an Action of Trespass was held not to be lawful; but it was held that they might have been distrained for the Queen's Debt. Cro. Eliz. 431. Rol. Abr. 159. *et vide Hard.* 101.

Salk. 392. pl. 1. Show. 173. Comb. 217. *Heydon* v. *Heydon.*

If there are two Coparceners of Goods, and a Judgment is given against one of them, the Sheriff upon a *Fi. Fa.* upon this Judgment must seise all, because their Moieties are undivided; for if he seises but a Moiety, and sells that, the other Coparcener will have a Right to a Moiety of that Moiety; but he must seise the Whole, and sell a Moiety thereof undivided; so that the Vendee will be Tenant in Common with the other Partner.

Cro. Jac. 78. *York* v. *Twine.*

A Person had an Annuity for twenty-one Years granted by Queen *Elizabeth*, payable by her Receiver of her Court of Wards, which upon a *Fi. Fa.* upon a Judgment against the Grantee was extended and sold; and it was resolved the Extent and Sale was good; for being an Annuity certain for Years certain, and payable by the Receiver, it is in Nature of a Rent-Charge for twenty-one Years, and is grantable over and vendible, and not like an Annuity which chargeth the Person only.

3 Co. 12. (*e*) Comb. 356 *per Holt.*

On a Writ of *Fi. Fa.* the whole personal Estate is liable to Execution, except wearing Apparel; and it hath been held, that (*e*) if the Party hath two Gowns the Sheriff may sell one of them.

Cro. Eliz. 504. *Thompson* v. *Clerk* adjudged.

Upon a Writ of *Fi. Fa.* the Sheriff cannot (*f*) deliver the Goods of the Defendant to the Plaintiff in Satisfaction of his Debt, but the Goods are to be sold, and the Money in Strictness is to be (*g*) brought into Court.

Lutw. 589. S. P.—Where a Sheriff after a *Fi. Fa.* delivered to him pays the Plaintiff out of his own Money, it is made a Question by *Hobart*, whether the Sheriff may levy the Money on the Defendant. Hob. 207. (*f*) Though they cannot be delivered to the Plaintiff, they may be sold to him. Comb. 452. Admitted to be the Practice to make a Bill of Sale of the Goods to the Plaintiff. Carth. 419. —But the Sheriff, though he pays the Plaintiff out of his own proper Money, yet he cannot keep the Goods to his own Use, for the Authority by which he acted was to sell the Goods. Noy 107. Lutw. 589. (*g*) For it is not of Record without. Godb. 147.—But the Law seems otherwise; for though the Writ be *ita quod habeas*, &c. yet the Sheriff may return that he hath paid the Money to the Plaintiff. 2 Show. Rep. 87. pl. 78. 3 Lev. 204.

Salk. 320. (*h*) By which it is enacted, that no *Fi. Fa.* or other

If two Writs of *Fi. Fa.* bear Teste the same Day, the Sheriff at Common Law, and now since the Statute (*h*) 29 *Car. cap.* 3. is bound to execute that which was first delivered to him.

Where

Writ of Execution shall bind the Property of the Goods, but from the Time such Writ shall be delivered to the Sheriff, Under-Sheriff or Coroner, to be executed; and for the Manifestation of the Time,

Where ſince the Statute *A.* delivered a *Fi. Fa.* to the Sheriff at Nine in the Morning, and after at Ten the ſame Day *B.* delivered another, deſiring him forthwith to execute it, which he did, and ſold the Goods, and after executed *A.*'s *Fi. Fa.* on the ſame Goods, it was held the firſt Execution was good, and *A.* had Remedy only by Action againſt the Sheriff. Salk. 320. pl. 4. Ld. Raym. 251. Carth. 419. *Smalcomb* v. *Buckingham.*

5 Mod. 376. S. C. Comb. 428. S. C. and *Holt* inclined there ſhould be no Fraction of a Day, and that the Sheriff had his Election, Carth. 419. S. C. the laſt bearing Teſte firſt; and *per Holt*, where a *Fi. Fa.* is delivered the Sheriff To-day and another To-morrow, and he executes the laſt firſt by making Sale of the Goods, ſuch Sale will ſtand good, and he who delivered the firſt Writ hath Remedy only by Action againſt the Sheriff.——But if two Writs are delivered the Sheriff the ſame Day, he ought to give Preference to that which was firſt delivered; but if he executes the laſt firſt, the Execution cannot be defeated by a ſubſequent Execution of the firſt, but the Party concerned in the firſt is put to his Action againſt the Sheriff.

* But if *A.* when he delivered his Writ, had ordered the Sheriff to ſtay Execution till the next Day, he could have had no Action againſt the Sheriff. † *Page 461 Salk. 320. pl. 4. Ld. Raym. 251.

† The Sheriff is not liable for ſeizing Goods in Execution after an Act of Bankruptcy; but if he ſells them after Commiſſion iſſues Trover lies. *Cooper* v. *Chitty*, M. 30 Geo. 2. 1 Burr. 20.

(O) Of his Duty in admitting Perſons to Bail, and herein of Securities taken for Eaſe and Favour.

THIS depends chiefly on the Statute 23 *H.* 6. *cap.* 9. before which the Sheriff was not obliged to take Bail, unleſs the Party ſued out a Writ of Mainprize; but he might have taken Bail on his own Head, and if he had not the Body ready according to his Return, he was amerced, as he now is if the Plaintiff does not take an Aſſignment of the Bail-Bond. Dalt. Sh. 356. *et vide* Head of *Bail.*

This Statute hath been always deemed an excellent Law, as it frees Debtors and ſecures them from the Oppreſſion of Sheriffs and their Officers, and at the ſame Time prevents ſuch Officers from admitting Perſons to Bail not bailable by Law, to the Prejudice of juſt Creditors; and for this Purpoſe it is enacted, "That Sheriffs, Under Sheriffs, and "other Officers and Miniſters, ſhall let out of Priſon all Perſons in "their Cuſtody, by Force of any Writ, Bill or Warrant, in any Ac- "tion perſonal, or by Cauſe of Indictment of Treſpaſs, upon reaſon- "able Surety of Perſons having ſufficient within the Counties to keep "their Days, (Perſons in Ward by Redemption, Execution, *Capias* "*Utlagatum* or *Excommunicatum*, Surety of the Peace, and all Perſons "committed by ſpecial Commandment of the Juſtices except) and no "Sheriff nor his Officers ſhall take any Obligation for any Cauſe afore- "ſaid, or by Colour of their Office, but only to themſelves, nor by "any Perſon which ſhall be in their Ward by Courſe of Law, but by Plow. 67.

Time, the Sheriffs, &c. their Deputies and Agents, upon the Back of the ſaid Writ ſhall indorſe the Day and Year when received.—This muſt be intended as to Strangers who might have a Title to the Goods between the Teſte of the Writ and Delivery thereof to the Sheriff, but as to the Party himſelf, his Executors and Adminiſtrators, the Goods ſince the Statute, as before, are bound from the Teſte. 2 Vent. 218. Comb. 33. 2 Show. 485. 6 Mod. 225.

" the Name of their Office, and upon Condition written that the ſaid Pri-
" ſoner ſhall appear at the Day contained in the Writs, Bill, or Warrant;
" and if any Sheriffs or Officers aforeſaid take any Obligation in other
" Form by Colour of their Office, it ſhall be void——And all Sheriffs,
(a) Cro. Eliz. 76, 77. " &c. who (a) do contrary to this Ordinance, ſhall loſe to the Party grieved
" his treble Damages, and ſhall forfeit 40 *l.*"

Dalt. Sh. 356. and the Authorities *infra*.

On the firſt Branch of this Statute it hath been adjudged and admitted in Variety of Books and Caſes, that the Sheriff is obliged, in ſuch Caſes not excepted by the Statute, to admit the Party to Bail, and that if he refuſes, an Action lies againſt him by the Party injured.

Rol. Abr. 93. Cro. Eliz. 852. Noy 39. S. C. *Bowles* v. *Laſſels*.

And as he is obliged to admit the Party to bail, hence alſo it hath been adjudged, that if the Sheriff return (b) *Cepi* on meſne Proceſs, *et paratum habeo*, no (c) Action lies againſt him, nor will the Court grant an Attachment in ſuch Caſe againſt the Sheriff where he had bailed the Party, for this he was obliged to do by the Statute; and therefore if he is miſtaken in his Sureties, he is not to ſuffer in his Liberty. So (d) if the Sheriff return *Languidus* where he admitted the Party to Bail, no Action lies againſt him.

(b) For the Return in Effect and Conſtruction of Law is true. Mod. 244. 2 Mod. 83. (c) But in this Caſe the Defendant muſt not demur to the Declaration, but muſt plead the Statute. Moor 428. pl. 596. Cro. Eliz. 400. 2 Keb. 591. Sid. 439. Mod. 57. Vent. 85. 2 Saund. 155.—or upon Not guilty may give it in Evidence. Sid. 439. Mod. 58. Vent. 85. (d) Noy 39. Cro. Eliz. 852.

*Page 462 Rol. Abr. 807.

* But if the Sheriff returns a *Cepi Corpus* and *Paratum habeo*, or *Languidus*, where the Defendant is at large, without any Bail taken, he is not aided by the Statute, but an Action lies againſt him for the falſe Return.

Vent. 85. Salk. 99. pl. 6. 6 Mod. 122. 2 Saund. 59. Ld. Raym. 435.

The Party, at whoſe Suit the Arreſt was, may either take an Aſſignment of the Bail-Bond, which he may now ſue in his own Name, or if he diſlikes the Security, he may ſtill move to amerce the Sheriff; for, the Sheriff having returned a *Cepi Corpus*, it's a Breach of Duty in him not to bring him in according to his Return, for which the Court amerces him as one of their Officers who has been diſobedient to their Writ, and becauſe the Diſobedience is to the Writ which is returned and filed, the Court amerces him, becauſe it appears on Record he has diſobeyed the King's Writ; but, if the Writ be not returned, and the Court makes an Order that the Sheriff ſhall return his Writ in four Days, as is uſual, there the Diſobedience is to the pronounced Order of the Court, and conſequently a Contempt of the Court, for which an Attachment lies; but if it be in another Term, then there muſt be a *Habeas Corpus* upon a *Cepi* returned, becauſe the Sheriff might be prepared to have him according to his Writ the firſt Term; but not being required to have him in Court the ſecond Term, an *Habeas Corpus* is neceſſary, and the Sheriff on this Writ muſt return the Body, or a *Languidus*, or a *Mortuus*, or elſe he will be amerced.

Cro. Eliz. 808. adjudged in Sir *William Drury*'s Caſe. 10 Co. 100. S. C. cited.

If a Sheriff takes an Obligation with (e) one Surety only, it is good enough, and not void by the Statute.

(e) May take one, two or more, according to his Diſcretion. Cro. Jac. 286.

Cro. Eliz. 808. *Sir George Clifton* v. *Web*. 2 And. 175. Moor 636. Cro. Eliz. 862.

So in Debt upon an Obligation conditioned for the Appearance of one arreſted upon a *Capias*, the Defendant pleaded that the Plaintiff took the Obligation from him and a Stranger who had nothing, and who did not inhabit within the County, and pleaded the Statute 23 *H.* 6. *cap.* 9. and inſiſted that for this Cauſe the Obligation was void; but upon Demurrer to this Plea it was held, that this Statute was made for the

Eaſe

Eaſe of the Party to prevent Oppreſſion, and the Sheriffs inſiſting upon unreaſonable Securities; but that it did not alter the Law as to the Matter of thoſe Securities, which the Sheriff was ſtill at Liberty to take in what Manner he pleaſed, ſo that he did not vary from the Manner preſcribed by the Statute, or make them oppreſſive to the Party; and here his taking the Security in a leſs ſtrict Manner than he might have inſiſted upon, can be no Foundation for the Party to make it void.

Like Point adjudged between *Cotton* v. *Vale*.

It is ſaid that there are only three Forms to be obſerved within this Statute; 1ſt, That the Bond be made to the Sheriff himſelf; 2dly, That it be made to him by the Name of his Office; 3dly, That it be only for the Party's Appearance at the Day.

Cro. Eliz. 862. That it be made to him only by the Name of his Office, and ought to expreſs the Day and Place of the Party's Appearance; and theſe Circumſtances being obſerved, although it be variant in others, it is not material. Cro. Jac. 286. and Dyer 119. S. P.

An Obligation made to a Deputy of a Bailiff of a Franchiſe, or to an Under Sheriff's Deputy, is void by the 23 *H.* 6. *cap.* 9. for it ought to be in the Name of the Bailiff or Sheriff himſelf.

Noy 69. *Taverner's* Caſe.

The Condition of an Obligation to ſave the Sheriff harmleſs on his admitting Perſons to Bail who are not bailable by Law, is void by the Common Law.

Plowd. 67. *Dive* v. *Maningham*. 10 Co. 100. b. S. C. cited.

* If the Sheriff, for the Eaſe and Inlargement of a Priſoner takes a Promiſe to ſave him harmleſs, this is within the Statute, being within the ſame Miſchief, though the Statute ſpeaks only of Bonds; alſo ſuch Promiſe is void by the Common Law.

*Page 463 10 Co. 101.

On an Attachment for a Contempt the Sheriff cannot take Bail, and, ſuch Contempts are only bailable by the Judges of the Court from whence the Proceſs iſſued, being in Nature of Executions; but on an Attachment out of Chancery, for want of an Anſwer, the Sheriff may bail, being only Attachments of Proceſs; and herein it ſeems ſettled, that if the Sheriff take one upon an Attachment in Proceſs, he is to give a Bond of 40*l.* Penalty. to the Sheriff to appear and anſwer; but, for one taken up in Execution after a Decree, the Sheriff may inſiſt on Security proportionable to the Duty; but in both Caſes, on the Regiſter's Certificate that the Party has appeared, the Sheriff is to deliver up the Bond.

M. 9 Geo. 2. *The King* v. *Baſkerville*, Sheriff of *Shropſhire*; & *vide* 2 Salk. 608. Stil. 234. Abr. Caſ. Eq. 351.

An Obligation taken by the Sheriff of one arreſted by Virtue of an Attachment under the Privy Seal of the Court of Requeſts, was held not to be within the Statute; but it was held that ſuch Bond was voidable by Dureſs, ſuch Court not having Juriſdiction to iſſue ſuch Proceſs and conſequently could be no Warrant to the Sheriff to take the Body nor the Obligation; but it was admitted in this Caſe, that the Sheriff ought to obey the Proceſs out of the Court of Wards and Duchy Court.

Cro. Eliz. 646. *Stepney* v. *Loyd*; & *vide* 2 And. 122. S. C.

So if one be arreſted in one County, and is carried by the Bailiff into another, where he gives Bond to the Sheriff of the County where the Arreſt was, although this is not void within the Statute, yet the Party may avoid it for Dureſs; but then he muſt plead ſuch Dureſs, and rely on it.

Cro. Eliz. 745. *Brown* v. *Adams*.

A Bond to the Sheriff, that the Party on a *Fi. Fa.* will pay the Money into Court at the Return of the Writ, is not within the Statute, becauſe the Statute extends to Obligations made by Perſons in Cuſtody, nor is ſuch Obligation void (*a*) by the Common Law.

10 Co. 99. b. *Beawfage's* Caſe.

An

(*a*) If one taken on a *Capias ad Satisfaciendum* at the Suit of *A.* aſſigns a Mortgage to the Under Sheriff for ſecuring the Money to him at a certain Day, and is thereupon diſcharged, and after a new Sheriff made he pays the

10 Co. 100. a. (a) That the King is not bound by the Statute. Dyer 119. 5 Co. *Whelpdale*'s Caſe.

An Obligation taken by the Sheriff *pro ſolutionæ pecuniæ debite (a) Dominæ Reginæ*, on an Extent out of the Exchequer, is not within the Statute.

10 Co. 100 b. (b) If the Sheriff takes Bond in another's Name to elude the Statute, ſuch Bond is void. 2 Mod. 305.

On an Indictment of Treſpaſs, in which the Sheriff is obliged by the Statute to admit to Bail, yet, if the Bond is taken in *(b)* another's Name it is void, as varying from the Form preſcribed by the Statute, which requires that it ſhould be in the Sheriff's own Name.

2 Mod. 304, 305. *Hall* v. *Carter*.

But where in Debt on an Obligation the Defendant craved Oyer of the Condition, which was, that if another Perſon (who was arreſted at the Suit of the Plaintiff, and for whom the Defendant was now bound) ſhould give Security, as the Plaintiff ſhould approve of, for the Payment of 90*l.* to him, or ſhould render his Body to Priſon at the Return of the Writ, then the Obligation to be void; this Statute was pleaded, but adjudged not to be within the Statute.

So if a *Capias* be taken out againſt the Defendant, and a third Perſon gives the Plaintiff a Bond that the Defendant ſhall pay the Money, * or render himſelf at the Return of the Writ, 'tis a good Bond, and not within the Statute, becauſe it is not by the Direction of the Officer, but by the Agreement of the Plaintiff; and there is no Law that makes the Agreement of the (c) Parties void, and if the Bond was not taken by ſuch Agreement, it might have been traverſed.

*Page 464

2 Jon. 95. 2 Mod. 305. cited.

(c) The Statute doth not extend to a Bond given to the Plaintiff himſelf. Allen 58.

Hard. 464. Keb. 391. (d) Bond taken by the Marſhal of the Queen's Bench for the Eaſement or Delivery of a Priſoner in Execution, is void by the Statute, although he be not named in the Statute. Cro. Eliz. 66. 3 Keb. 71. S. P.——But a Bond to the Serjeant at Arms attending upon the Preſident and Council of the Marches of *Wales* is not within the Statute. Cro. Car. 309. *Johns* v. *Stradford* ‡

Bond taken by the *(d)* Serjeant at Arms attending the Houſe of Commons not within the Statute, but being for Eaſe and Favour is void by the Common Law.

---

‡ *Sed. qu.* if not void by the Common Law, according to the Caſe in the Text?

2 Leon. 119.

If *A.* be taken on a *Capias ad Satisfaciendum*, and eſcapes, and is after retaken, and for his Inlargement gives a Bond to the Gaoler, this is within the Statute.

Noy 43. Sid. 151, 456. S. P. ſeems *cont.* (e) So if after the Return. Sid. 301.

If a *Capias* be awarded againſt *B.* and *(e)* before the Arreſt the Sheriff takes an Obligation of him for his Inlargement, this by ſpecial Pleading, may be avoided by Force of the Statute 23 *H.* 6. *c.* 9.

Vent. 237. Raym. 222. S. C. (f) If the She-

If the Condition of a Bond be to be a true Priſoner, and *(f)* to pay ſo much by the Week for Chamber-Rent, this is void by the Statute; but *Hale* ſaid, that a Bond for true Impriſonment is good *prima facie*, but

---

the Money to the Under Sheriff, who re-aſſigns the Mortgage, yet this ſhall not excuſe the Eſcape, for the Sheriff had no Power to take Security, or even the Money. Letw. 588, 599. But for this *vide* Cro. Eliz. 404. Mod 194. 2 Jon. 97. 2 Lev. 203. 3 Keb. 748. 2 Show. 139. pl. 116.

but that the Defendant may (*a*) aver that it was alſo for Eaſe and Favour.

riff adds to the Condition, that the Party ſhall be a true Priſoner, that he ſhall pay for his Meat and Drink, this makes the Obligation void. 10 Co. 100. b. (*a*) If the Obligation be for the Payment of Money generally, yet the Defendant may aver that it was for Eaſe and Favour, in the ſame Manner as an Obligor may in the Caſe of Simony or Uſury. Carth. 301. Hard. 464.

If a Sheriff take a Bond for a Point againſt Law, and alſo for a due Debt, the whole Bond is void; for the Letter of the Statute of 23 *H.* 6. *cap.* 9. is ſo; and a Statute is a ſtrict Law; but the Common Law doth divide according to common Reaſon, and having made that void which againſt Reaſon, lets the reſt ſtand. Hob. 14. Vent. 237. Carter 229.

It is now (*b*) ſettled, that though the Statute makes ſuch Bonds void, yet are they not *ipſo facto* ſo, but muſt be avoided by ſpecial Pleading. Dyer 116. Sid. 22. 2Saund. 154.

(*b*) It was formerly held by *Roll* and *Glin* that it was a general Law, of which the Judges were to take Notice *ex Officio*, but ſince held otherwiſe. Lev. 86.

The Defendant pleaded the Statute of 23 *H.* 6. *c.* 9. and that he was attached and in Cuſtody, and that the Bond was made for his Inlargement, and ſo not his Deed; whereupon the Plaintiff demurred ſpecially upon the Concluſion of the Plea, which ought to be, Judgment *ſi Actio*, &c. and therefore the Plea, naught; and it was ſo agreed by the Court. Allen 58. *Leech* v. *Davys.*

In pleading this Statute the Defendant muſt recite it truly. † Cro. Eliz. 108. pl. 4. Sid. 356.

† By 14 Geo. 3. c. 20. Priſoners acquitted or diſcharged by Proclamation ſhall be immediately ſet at large in Court, without paying any Fee; and the Treaſurer of the County, &c. ſhall, on Judge's Certificate, pay the uſual Fee, not exceeding 13 *s.* 4 *d.*——The Sheriff may retain his Poundage out of Money levied by *Levari*, on an Outlawry, ordered to be reſtored on giving Security. *Semb. Rex* v. *Burrel*, M. 1731. Bunb. 305.———On a Writ of falſe Judgment, if Sheriff's Fees are not paid he may execute a Writ *de Executione judicii.* 1 Barnes 135.——Penalty on Clerk's not returning Eſtreats, 3 Geo. 1. c. 15. ſ. 12.———Fees for executing *Habere facias poſſeſſionem*, &c. *id. ſ.* 16.——Sheriffs taking more than their Poundage guilty of Extortion, *id. ſ.* 17.———The Date of the Writ to be written on the Warrant, 6 G. 1. c. 21. ſ. 54.———Payment of Poſt Fines regulated, 32 Geo. 2. c. 14.——Landlord to be paid Year's Rent, if in Arrear, before Execution executed, 8 Ann. c. 14.

*Page 465

* S I M O N Y.

SIMONY, ſo called from *Simon Magus*, is the buying or ſelling of Holy Orders, or an Eccleſiaſtical Benefice.

The Words Eccleſiaſtical Benefice, comprehend every Eccleſiaſtical Dignity and Promotion.

As by the Purchaſe of Eccleſiaſtical Benefices worthy and learned Men may be kept out of the Church, and a Door may, to the great Scandal of Religion and Prejudice of Morality, be opened to Perſons by no Means qualified to diſcharge the Duties of the ſacred Function, it is of the utmoſt Conſequence to Society, that it be prevented. With a View to this, Canons were antiently made, by which a very ſtrict Oath was enjoined; and the Purchaſer of an Eccleſiaſtical Benefice was puniſhed with Deprivation, or Diſability, as the Caſe might require.

It has been ſaid, that Simony was no Offence at the Common Law; and the Caſe of *Gregory* v. *Oldbury*, *Moor*. 564. has been as to this Point relied upon. It is laid down in that Caſe, that a Bond to pay Money upon a ſimoniacal Contract is good, becauſe Simony is no Offence at the Common Law; but, by attending to what is laid down in other Books, it will appear, that altho' Simony *eo Nomini* be not an Offence, either at the Common Law or againſt the Statute, for the Word Simony is not therein contained a corrupt Bargain, for preſenting to a Benefice, is an Offence at the Common Law.

In 1 *Inſt.* 17. *B.* ſuch corrupt Bargain is ſaid to be ſo deteſtable in the Eye of the Common Law, that a Plaintiff in *Quare impedit* could not before the Statute of *Weſtm.* 2. recover Damages for the Loſs of his Preſentation, it being conſidered as a Thing of no Value. In 1 *Inſt.* 89. it is ſaid, that a Guardian in Socage could not preſent to an Advowſon in Right of his Heir; becauſe, as he could take nothing for the Preſentation, he could not bring it to Account.

This Doctrine is confirmed in 3 *Inſt.* 156. and it is added, that Simony is the more odious to the Common Law, becauſe it is ever accompanied with Perjury; the Preſentee being ſworn to commit no Simony.

In *Mackaller* v. *Todderick*, *Cro. Car.* 353, it is ſaid, that Simony has, by the Law of God and of the Land, been always accounted a great Offence.

In *Winchcomb* v. *Pulleſton*, *Hob.* 167, it is laid down, that a Bond upon a Simoniacal Contract is againſt Law, becauſe it is given upon a Contract *ex turpi Cauſa*, and *contra bones Mores*; nay that it is as void as an uſurious Bond, which if an Executor pay, he is guilty of *a Devaſtavit*.

In *Carth.* 252. *Bartlett* v. *Vinor*, ſuch Bond is ſaid to be void, as being againſt Law, although it be not ſo declared by the Statute.

Other Authorities might be added; but theſe are ſufficient to ſhew, that a corrupt Bargain for preſenting to a Benefice is an Offence at the Common Law.

As neither the Conſideration of the Greatneſs of the Offence of Simony, nor the Proviſion made againſt it by the Canon or Common Law, was ſufficient to put a Stop to this Offence, it was at length prohibited, under very ſevere Penalties, by the 31 *Eliz. c.* 6.

Under

* Under this Head it will be proper to consider, *Page 466

(A) In what the Offence of Simony does consist.
(B) How far a Bond for resigning a Benefice is good at Law.
(C) Of the Power exercised over a Bond for resigning a Benefice by Courts of Equity.
(D) Whether the Penalty of a Bond for resigning a Benefice be saved, where the Ordinary has refused to accept a Resignation.
(E) Some Objections to a Bond for resigning a Benefice considered.
(F) Of the Forfeitures, Disabilities, and Punishments, incurred by Simony.

1. By the Incumbent.
2. By the Patron.
3. By the Ordinary.

(G) In what Cases, and at what Times, Advantage may be taken of the Forfeitures and Disabilities incurred by Simony.

1. By the King.
2. By other Persons.

(H) Of the Jurisdiction of Spiritual Courts in Simony.
(I) Of the Pleadings in an Action upon the 31 Eliz. cap. 6.

(A) In what the Offence of Simony does consist.

1. IT has already been observed, that Simony is an Offence at the common Law: But as much the greater Part of the Determinations, as to what is Simony, are founded upon 31 *Eliz. cap.* 6. and some Paragraphs of that Statute do not only contain a Description of the Offence, but do likewise ordain what Forfeitures and Penalties shall be incurred, and who may take Advantage thereof, it will be proper to recite the whole Paragraphs in this Place, and afterwards to refer to them: And as frequent Mention will, in treating of this Subject, be made of the Oath against Simony, that Oath shall be likewise recited.

2. By *Par.* 5. it is enacted, "That if any Person or Persons, Bodies "politick and corporate, shall for any Sum of Money, Reward, Gift, Every Person, presenting for corrupt Consideration, to forfeit the next Turn; and every Person, giving or taking any Thing for a Presentation, to forfeit the double Value, and the Presentee to be incapable of enjoying the Benefice.

"Profit,

" Profit, or Benefit, directly or indirectly, or for or by Reaſon of any Pro-
" miſe, Agreement, Grant, Bond, Covenant, or other Aſſurance, of or for
" any Sum of Money, Reward, Gift, Profit or Benefit, directly or in-
" directly, preſent, or collate any Perſon to any Benefice with Cure of
" Souls, Dignity, Prebend, or Living Eccleſiaſtical, or give or beſtow
" the ſame for or in Reſpect of any ſuch corrupt Cauſe or Conſider-
*Page 467 " ation, that then every ſuch * Preſentation, Collation, Gift, and Beſtow-
" ing, and every Admiſſion, Inſtitution, Inveſture and Induction, there-
" upon ſhall be utterly void, fruſtrate, and of no Effect in Law; and that
" it ſhall and may be lawful, for the Queen her Heirs and Succeſſors to
" preſent, collate unto, or give or beſtow, every ſuch Benefice, Dignity,
" Prebend, and Living Eccleſiaſtical, for that Time or Turn only; and
" that every Perſon or Perſons, Bodies politick and corporate, that ſhall
" give or take any ſuch Sum of Money, Reward, Gift, or Benefit,
" directly or indirectly, or that ſhall take or make any ſuch Promiſe,
" Grant, Bond, Covenant or other Aſſurance, ſhalll forfeit and loſe the
" double Value of one Years Profit of every ſuch Benefice, Dignity,
" Prebend, and Living Eccleſiaſtical: And the Perſon ſo corruptly tak-
" ing, procuring, ſeeking, or accepting, any ſuch Benefice, Dignity,
" Prebend, or Living, ſhall, thereupon and from thenceforth, be adjudged
" a diſabled Perſon in Law to have or enjoy the ſame Benefice, Dignity,
" Prebend, or Living Eccleſiaſtical."

Every Perſon corruptly inſtituting to a Benefice to forfeit the double Value; and the Benefice to be void.

3. By *Par.* 6. it is enacted, " That if any Perſon ſhall, for any Sum
" of Money, Reward, Gift, Profit or Commodity, other than for uſual
" and lawful Fees, or for or by Reaſon of any Promiſe, Agreement,
" Grant, Covenant, Bond, or other Aſſurance, of or for any Sum of
" Money, Reward, Gift, Profit or Benefit, directly or indirectly, admit,
" inſtitute, inſtall, induct, inveſt or place, any Perſon in or to any Bene-
" fice with Cure of Souls, Dignity, Prebend or Living Eccleſiaſtical: That
" every Perſon ſo offending ſhall forfeit and loſe the double Value of one
" Year's Profit of every ſuch Benefice, Dignity, Prebend and Living Eccle-
" ſiaſtical; and that, immediately from and after the Inveſting, Inſtallation
" or Induction, thereof had, the ſame Benefice, Dignity, Prebend and
" Living Eccleſiaſtical, ſhall be eſtſoons merely void; and the Patron or
" Perſon, to whom the Advowſon, Gift, Preſentation or Collation, ſhall by
" Law appertain, ſhall and may by Virtue of this Act preſent or collate
" unto, give and diſpoſe of the ſame Benefice, Dignity, Prebend or
" Living Eccleſiaſtical, in ſuch Sort, to all Intents and Purpoſes, as if
" the Party ſo admited, inſtituted, inſtalled, inveſted, inducted or placed,
" had been or were naturally dead."

No Lapſe to be till after ſix Months Notice to the Patron that the Benefice is void.

4. By *Par.* 7. it is provided, " That no Title to confer or preſent by
" Lapſe ſhall accrue to any Voidance mentioned in this Act, but after
" ſix Months next after Notice given of ſuch Voidance by the Ordinary
" to the Patron."

The Giver or Taker of Money for reſigning or exchanging a Benefice to loſe double the Sum.

5. By *Par.* 8. it is enacted,' " That if any Incumbent of any Benefice
" with Cure of Souls ſhall corruptly reſign or exchange the ſame, or ſhall
" corruptly take for or in reſpect of reſigning or exchanging the ſame,
" directly or indirectly, any Penſion, Sum of Money or Benefit: That
" then as well the Giver as the Taker of any ſuch Penſion, Sum of
" Money or other Benefit corruptly, ſhall loſe double the Value of the
" Sum ſo given, taken, or had. The one Moiety as well thereof, as of
" the Forfeiture of double Value of one Year's Profit before mentioned,
" to be to the Queen's Majeſty, her Heirs and Succeſſors, and the other
" Moiety to him or them that will ſue for the ſame, by Action of Debt,
" Bill, or Information, in any of her Majeſty's Courts of Record."

6. By

6. By *Par.* 9. it is provided, "That nothing in this Act ſhall in any "wiſe extend to take away, or reſtrain, any Puniſhment, Pain or Penalty, "limited, preſcribed, or inſtituted by the Laws Eccleſiaſtical, for any the "Offences before in this Act mentioned, but that the ſame ſhall remain "in Force and may be put in Execution, as it might be before the making "of this Act." The Penalties of the Eccleſiaſtical Laws not taken away by this Act.

7. By *Par.* 10. it is enacted, "That if any Perſon or Perſons ſhall at "any Time receive or take any Money, Fee, Reward, or any other "Profit, directly or indirectly, or ſhall take any Promiſe, Agree-"ment, Covenant, Bond, or other Aſſurance, to receive or have any "*Money, Fee, Reward or any other Profit, directly or indirectly, either "to him or themſelves, or to any other of their or any of their Friends, "ordinary and lawful Fees only excepted, for or to procure the ordain-"ing or making of any Miniſter or Miniſters, or giving of any Orders, or "Licence or Licences to preach: That every Perſon and Perſons ſo "offending ſhall for every ſuch Offence forfeit and loſe the Sum of forty "Pounds of lawful Money of *England*; and the Party ſo corruptly or-"dained or made Miniſter, or taking Orders, ſhall forfeit and loſe the "Sum of ten Pounds; and if at any Time, within ſeven Years next after "ſuch corrupt entering into the Miniſtry, or receiving of Orders, he "ſhall accept or take any Benefice, Living or Promotion Eccleſiaſtical, "that immediately from and after the Induction, Inveſting, or Inſtallation "thereof, or thereinto had, the ſame Benefice, Living and Promotion "Eccleſiaſtical, ſhall be eſtſoons merely void; and the Patron or Perſon "to whom the Advowſon, Gift, Preſentation or Collation, ſhall by Law "appertain, may by virtue of this Act preſent or collate unto, give or "diſpoſe of, the ſame Benefice, Living, or Promotion Eccleſiaſtical, in "ſuch Sort to all Intents and Purpoſes, as if the Party ſo inducted, in-"veſted or inſtalled, had been or were naturally dead; any Law, Ordi-"nance, Qualification or Diſpenſation, to the contrary notwithſtanding. "The one Moiety of which Forfeitures ſhall be to her Majeſty her Heirs and "Succeſſors, and the other Moiety to him or them that will ſue for the "ſame by Action of Debt, Bill, Plaint or Information, in any of her "Majeſty's Courts of Record." *Page 468 The Taker of Money to procure or give Orders to forfeit forty Pounds, and the Party ſo ordained to forfeit ten Pounds; and any Benefice he is preſented to within ſeven Years after to be void.

8. I *A. B.* Do ſwear, that I have made no Simoniacal Contract, Payment or Promiſe, directly or indirectly, by myſelf, or by any other to my Knowledge or with my Conſent, to any Perſon or Perſons whatſoever, for or concerning the procuring and obtaining of this Eccleſiaſtical Dignity, Place, Preferment, Office or Living; (*here that to which the Party is to be admitted, inſtituted, collated, inſtalled, or confirmed, is to be particularly named*) nor will at any Time hereafter perform, or ſatisfy, any ſuch Payment, Contract, or Promiſe made by any other without my Knowledge or Conſent; ſo help me God through *Jeſus Chriſt*. The Oath againſt Simony.

9. A Donative is not within the Words of the Statute, yet, as a corrupt Preſentation thereto is within the Miſchief intended to be remedied, it is within the Meaning. Cro. Car. 331. *Bawderok* v. *Mackaller.*

10. The Offences prohibited by the Statute, are more frequently committed when a Church is void; but they may be committed when it is full.

11. If a Contract be made when a Church is full, to give a Sum of Money after it ſhall become void for the Preſentation thereto, this is an Offence within the Meaning of the Statute. 1 Brownl. 7.

12. The buying of the next Preſentation to a Church when it is full, with Intent to preſent a certain Perſon when it ſhall become void, and the preſenting of that Perſon, is an Offence within the Meaning of the Statute. Lane 102. *Kitchen* v. *Calvert.* Noy 25. *Winchcomb* v. *Pulleſton.* Godb. 390.

13. The

Winch 63. *Sheldon* v. *Brett.*

13. The Purchaſe of the next Preſentation to a Church, when the Incumbent is ſick and near dying, with Intent to preſent a certain Perſon after his Death, and the preſenting of that Perſon, is an Offence within the Meaning of the Statute.

*Page 469 Cro. Eliz. 685. *Smith* v. *Shelborn.* Paſch. 4. Eliz.

* 14. It has been holden, that if a Father, the Incumbent being ſick, purchaſe a Living without the Privity of his Son, it is not a corrupt Contract, although it be with Deſign to preſent the Son, and the Son be afterwards preſented, a Father being bound by Nature to provide for his Son.

15. But the Doctrine of this Caſe has been ſince contradicted, and particularly in the Caſe of *Winchcomb* v. *Pulleſton*, *Noy* 25. *Paſch.* 15 *Jac.* 1.

16. And the Reaſon given in the former Caſe; namely, that a Father is bound by Nature to provide for his Son, does not hold: For if the Purchaſe of a Living, when full, with Intent to preſent a certain Perſon, be an Offence within the Meaning of the Statute, how can it be lawful, as the Words of the Statute are general, for a Father to do this? A Parent is by Nature certainly bound to provide for his Son, but this Obligation can never extend to the doing of a Thing prohibited by Law. This Way of reaſoning would open a wide Door for corrupt Contracts; for, as every Man is more bound by the Law of Nature to provide for himſelf, than a Father is to provide for his Son, every Man might purchaſe a Living for himſelf.

MS Rep. *Barrett* and *Reynell*, Clerk, v. *Glubbe*, Clerk, and *Rolle*, Hil. 16 G. 3. in *C. B.*

17. In a Caſe from the Court of *Chancery*, for the Opinion of the Court of *Common Pleas*, it was ſtated, that *Barrett*, having Notice that the Incumbent of a Rectory, with Cure of Souls, was upon his Death-Bed, and that it was uncertain whether he would live out the enſuing Night, purchaſed the Advowſon of the Rectory; that the Incumbent died the Day after the Purchaſe; and that *Barrett* preſented *Reynell*. The Queſtion was, Whether the Preſentation of *Reynell* be void, by reaſon of its having been upon a ſimoniacal Contract? The unanimous Opinion of the Court was, That the Preſentation is not void: And by *De Grey* Ch. J. an Advowſon, which is a Right of nominating to a Benefice, being a temporal Inheritance, it may be conveyed like any other temporal Inheritance. It is certain, that an Advowſon appendant may be lawfully purchaſed with the Manor to which it is appendant, during a Vacancy of the Benefice; and there ſeems to be no Reaſon why an Advowſon in Groſs ſhould not. The 31 *Eliz. cap.* 6. does only relate to Preſentations, and conſequently the Sale of an Advowſon, even during a Vacancy of the Benefice, is not thereby prohibited, except the Sale be connected with a corrupt Contract for preſenting. But if an Advowſon be granted during a Vacancy of the Benefice, the Preſentation upon that Vacancy does not paſs by the Grant; it being a Fruit fallen, or, as is laid down in the Caſe of *Leak* v. *Babington*, *Cro. Eliz.* 811. a Choſe in Action. A *bonâ fide* Purchaſe of an Advowſon is good, at what Time ſoever it is made; and a corrupt Purchaſe, whenever it is made, is bad. That which is ſaid in the Caſe of *The Biſhop of Lincoln* v. *Woolforſton*, 3 *Bur.* 1510. has been mentioned; namely, "that the Court were clear, that a Grant of a next Preſentation, or of an "Advowſon, made after the Church was actually fallen vacant, was a "void Grant." But this, ſo far as it relates to the Grant of an Advowſon, ſeems to be a Miſtake of the Reporter. As the Purchaſe of the Advowſon, in the preſent Caſe, is not ſtated to have been connected with any corrupt Contract for preſenting *Reynell*, or with a Deſign of preſenting him, neither of theſe Things is to be preſumed, and conſequently the Preſentation of him is not void.

18. Not-

18. Notwithſtanding the Determinations, that if a Perſon purchaſed the next Preſentation to a Benefice when full, with Deſign to preſent a certain Perſon, and did preſent that Perſon after it became void, it was an Offence within the Meaning of the Statute, it became a Doubt, whether it was ſo, for a Clerk to purchaſe for himſelf the next Preſentation to a Benefice while it was full, and to be preſented thereto after it became void.

19. To put an End to this Doubt, it is by the 12 *Ann. cap.* 12. enacted, "That if any Perſon ſhall for Money, Reward, Gift, Profit or Advantage, or for or by Reaſon of any Promiſe, Agreement, Grant, Bond or other Aſſurance, of or for any Money, Reward, Gift, Profit or Benefit, directly or indirectly, in his own Name, or in the Name of any other Perſon or Perſons, take, procure or accept the next Avoidance or Preſentation to any Benefice with Cure of Souls, Dignity, Prebend or Living Eccleſiaſtical, and ſhall be preſented or collated thereupon; that every ſuch Preſentation or Collation ſhall be utterly void and of no Effect in Law, and ſuch Agreement ſhall be deemed to be a ſimoniacal Contract; and it ſhall be lawful for the Queen's Majeſty, her Heirs and Succeſſors, to preſent or collate unto ſuch Benefice, Dignity, Prebend, and Living Eccleſiaſtical, for that Time or Turn only; and the Perſon ſo corruptly taking, procuring or accepting ſuch Benefice, Dignity, Prebend or Living, ſhall from thenceforth be adjudged a diſabled Perſon to have and enjoy the ſame, and ſhall be ſubject to any Puniſhment, Pain or Penalty, preſcribed or inflicted by the Laws Eccleſiaſtical, in like Manner as if ſuch Agreement had been made after ſuch Benefice, Dignity, Prebend or Living, had become vacant."

20. It is equally an Offence within the Meaning of the Statute, where there has been a corrupt Preſentation by a Perſon uſurping the Right to preſent, as if it had been by the Perſon having the Right. 3 Inſt. 153.

21. If a Preſentation be by one uſurping the Right of Patronage, and pending an Action of *Quare impedit* for removing his Clerk, who is afterwards removed, the Benefice be ſold, this is an Offence within the Meaning of the Statute, for the Church was never full of that Clerk. If this were allowed the Statute might be eluded, for it would be only getting an Uſurper to preſent while the Living was void, and then ſelling it. 3 Lev. 115. *Walker* v. *Hamerſly*. 2 Vent. 32. S. C.

22. A corrupt Contract with the Wife of the Patron is an Offence within the Meaning of the Statute, although the Patron himſelf be not privy thereto. 1 Rol. Rep. 235. Cro. Jac. 385.

23. If a Clerk contract to give Money for being preſented to a Church, and be afterwards preſented thereto *gratis*, this is an Offence within the Meaning of the Statute; the Clerk being deemed an unfit Perſon to hold the Benefice, for having at any Time been capable of intending to obtain it corruptly. Lane 103. *Kitchen* v. *Calvert*.

24. A corrupt Contract for procuring a Preſentation to a Benefice between Strangers, although neither the Patron nor Incumbent be privy thereto, is an Offence within the Meaning of the Statute; for if there be a corrupt Contract, it matters not by whom it is made: But in this Caſe the Preſentee is a *Simoniace promotus*, and not a *Simoniacus*. Cro. Car. 331. *Bawderick* v. *Mackaller*. Sid. 329. 3 Lev. 337.

*25. A ſecond Brother, having a Right to preſent, made a corrupt Contract to preſent a certain Perſon; but in order to the elude the Statute ſurrendered the Right of preſenting to his elder Brother. The latter, not being privy to the Contract, preſented the Perſon who, purſuant thereunto, was to be preſented. It was holden, that the corrupt Contract was an Offence within the Meaning of the Statute, and that its being performed by an innocent Perſon made no Alteration in the Caſe. *Page 470. Lane 73. *Calvert* v. *Kitchen*.

26. An Agreement was between *Richards* a Friend of *Boughton*'s and *Taylor*, that *Boughton* ſhould preſent *Hide*, and that *Taylor* ſhould pay *Richards* 3 Lev. 338. *Rex* v. *Hide* and others.

Richards 20 *l. per Annum* for six Years, in case *Hide* should so long live, for the Use of *Boughton*. In an Action of *Quare impedit*, *Hide* pleaded, that he had no Notice of the Agreement at or before his Presentation. Upon a Demurrer it was holden, that the corrupt Contract is enough, and that it is immaterial, whether he had or had not Notice thereof.

Cro. Eliz. 788. *Baker* v. *Rogers*.

27. If a Stranger, the Church being void, contract with the Patron for a Grant of the Presentation, and present a Person not privy to the Contract, the Presentee, although the Grant, it being of a Chose in Action, be void, is not to be considered as an Usurper but as a *simoniace promotus*, because he was presented in Pursuance of a corrupt Contract.

Cro. Jac. 533. *Booth* v. *Potter*.

28. If a Father, the Church being void, contract with the Grantee of the next Presentation to permit the Grantor to present his Son, and the Son be presented, he is a *simoniace promotus*.

Cro. Car. 425. *Birt* v. *Manning*.

29. If a Father, in Consideration of a Clerk's marrying his Daughter, covenant with the Father of the Clerk to procure for him a Presentation to a certain Church when it shall become void, and the Clerk be presented, when the Church becomes void, he is a *simoniace promotus*.

Noy 142. *Baker* v. *Mounford*.

30. If an Agreement be to pay five Pounds *per Annum* to the Widow of the last Incumbent, or ten Pounds *per Annum* to the Son of the last Incumbent, so long as he shall be a Student at *Cambridge* and unpreferred, neither of these is an Offence within the Meaning of the Statute.

1 Rol. Rep. *Carey* v. *Yeo*.

31. A Bond, with a Condition that the Incumbent shall not be absent eighty Days in a Year from his Living, it is not simoniacal; this being a lawful Condition.

Cro. Jac. 426. *Byrte* v. *Manning*.

32. *A.* covenanted, that *B.* his Son should marry *C.* the Daughter of *D.* In Consideration of the Marriage *D.* covenanted to advance 300 *l.* for his Daughter's Portion, and *A.* covenanted to settle certain Lands on *B.* and *C.* There were likewise Covenants on the Part of *A.* for the Value of the Lands and for quiet Enjoyment, and a Covenant on the Part of *D.* to procure a certain Benefice for *B.* on the next Avoidance. It was holden that this was not a corrupt Contract, it not being a Covenant in Consideration of the Marriage, but a distinct and independent Covenant without any apparent Consideration.

(B) How far a Bond for resigning a Benefice is good at Law.

1. A Bond for resigning a Benefice is sometimes Special, at other Times it is General.

2. The Condition of a Special Bond is that the Incumbent shall resign in favour of a certain Person, when that Person shall be capable of being presented to the Benefice.

3. The Condition of a general Bond is, that the Incumbent shall resign upon Request.

Cro. Jac. 248. *Jones* v. *Lawrance*.

4. A Bond, with Condition to resign within three Months after Request was holden to be good, although the Bond appeared to have been given with an Intent that the Patron should present his Son; and by the Court: A Man may without any Colour of Simony bind himself for a good Reason to resign, as if he take a second Benefice, or if he be non-resident, or that the Patron may present his Son: But if the Condition of a Bond be, to let the Patron have a Lease of the Glebe or Tithes, or

to pay a Sum of Money, it is ſimoniacal. The Judgment in this Caſe was affirmed in the Exchequer-Chamber.

5. The Doctrine of this Caſe, which was the Caſe of a ſpecial Bond, was not many Years after extended to the Caſe of a general Bond, and the Judgment in the latter Caſe was alſo affirmed in the Exchequer-Chamber. Cro Car. 180. *Babington* v. *Wood.*

6. In two modern Caſes, the Court refuſed to permit the Validity of a general Bond for reſigning a Benefice to be argued againſt: and, in the former of theſe Caſes, it is ſaid by the Court that a general Bond for reſigning a Benefice has been frequently holden good in the Court of Chancery. Stra. 227. *Peele* v. the Counteſs of *Carliſle.* Sayer 141. *Wyndham* v. *Bowen.*

(C) Of the Power exerciſed over a Bond for reſigning a Benefice by Courts of Equity.

1. IF an improper Uſe be made of a Bond for reſigning a Benefice, Relief may be had in a Court of Equity.

2. A perpetual Injunction was granted, becauſe it appeared, that a Bond for reſigning a Benefice had been made Uſe of, to prevent the Incumbent from demanding Tithes of his Patron. 1 Vern. 411. *Durſton* v. *Sands.*

3. Upon a Bill to be relieved againſt a Judgment, obtained on a general Bond for reſigning a Benefice, it appeared, that the Obligee had made an Offer to the Incumbent, that if he would give him ſeven hundred Pounds, he ſhould not be ſued upon the Bond. Satisfaction was ordered to be entered on the Judgment, and a perpetual Injunction was granted. A new Bond of Reſignation in the Penalty of two hundred Bounds was decreed; but it was ordered, that no Action ſhould be bronght thereupon without Leave of the Court. The Lord Keeper ſaid in this Caſe, he did not know, that ſuch Bond had ever been held good, except to preſerve the Benefice for the Patron himſelf, or for a Son or Friend of his, or to prevent the Non-reſidence, or to puniſh the vicious Courſe of Liſe of an Incumbent; and that, although a Bond be to reſign generally, he would never allow it to be recovered upon, unleſs ſome ſuch Reaſon were ſhewn for requiring a Reſignation; becauſe a Door would be thereby opened for Simony. Eq. Ca. Abr. 86. *Hilliard* v. *Stapleton.*

4. A Bill being brought to be relieved againſt a Judgment upon a Bond for reſigning a Benefice, it was diſmiſſed, upon the Defendants proving Miſbehaviour in the Incumbent. Eq. Ca Abr. 228. *Hodgſon* v. *Thornton.*

5. In another Caſe it is laid down, that a Bond to reſign a Benefice upon Requeſt, ſhall not be made uſe of to turn out the Incumbent, unleſs there be Non-reſidence, or ſome groſs Miſbehaviour; and that, if any other Uſe be made of the Bond, the Court will grant an Injunction. Chan. Prec. 513. *Hawkins* v. *Turner.*

6. *Capel*, upon preſenting *Peele* to a Living, took a Bond for reſigning, when the Patron's Nephew, for whom the Living was intended, ſhould be of Age. At his coming of Age it was agreed, that *Peele* ſhould continue to hold the Living, on paying the Nephew thirty Pounds a Year. After having paid this ſeven Years *Peele* refuſed to pay it any longer. An Action being hereupon brought upon the Bond, *Peele* filed a Bill in Equity, wherein he prayed an Injunction, and to have all the Money repaid. An Injunction was granted, not on Account of the Invalidity of the Bond; but becauſe an ill Uſe had been made thereof. As to the Money which had been paid, *Peele* was left to his Remedy at Law. Stra. 534. *Peele* v. *Capel.*

(D) Whe-

(D) Whether the Penalty of a Bond for reſigning a Benefice be ſaved, where the Ordinary has refuſed to accept a Reſignation.

Watſ. Com. Inc. 24.

1. IT is in one Caſe ſaid to be in the Power of the Ordinary, to diſcourage the Uſe of Bonds for reſigning Benefices, ſo that he may refuſe to accept a Reſignation made in purſuance of ſuch Bond.

2 Chan. Rep. 398. *Durſton* v. *Sands.*

In another Caſe it is ſaid, that the Biſhop refuſed to accept a Reſignation, offered in Purſuance of a Bond for reſigning a Benefice, and ordered the Incumbent to continue to ſerve the Cure; declaring, that he never would countenance ſuch unjuſt Practices.

Chan. Prec. 513. *Hawkins* v. *Turner.*

3. In another Caſe it is laid down, that an Ordinary is not obliged to accept a Reſignation in Purſuance of a Bond for reſigning a Benefice, unleſs there be ſome juſt Cauſe for turning the Incumbent out.

MS. Rep. *Marquis of Rockingham* v. *Griffith.* E. 27 G. 2. in Chan.

4. In a late Caſe a Grant was made to a Clerk of the two firſt of three Benefices, which ſhould become void, provided he were capable when they became void of holding them. In order to make himſelf capable of taking one of theſe Benefices, the Clerk offered a Reſignation of another Benefice to the Ordinary, which he refuſed to accept. One Queſtion in this Caſe was, Whether the Ordinary was obliged to accept the Reſignation? It was inſiſted by Mr. *Henley*, upon one Side, that no Caſe can be adduced to ſhew, that the Ordinary can arbitrarily refuſe to accept a Reſignation of a Benefice. Mr. Attorney *Murray*, who was on the other Side, contented himſelf with ſaying, in anſwer to this, that the plaineſt Points, having ſcarce ever been called in Queſtion, are ſupported by the feweſt Authorities. No Decree was made as to this Point; but as Lord *Hardwick* intimated it once or twice pretty ſtrongly to be his Opinion, that the Ordinary ought to have accepted the Reſignation, he did afterwards accept it.

5. What fell from Lord *Hardwick* upon this Occaſion, is ſufficient to render the Authority of the two laſt Caſes very doubtful. This was not indeed the Caſe of a Bond for reſigning a Benefice: but it was a ſtronger Caſe; for if the Ordinary cannot refuſe to accept a Reſignation, when the Deſign in reſigning is merely to take another Benefice, it would be ſtrange to hold, that he may refuſe to accept a Reſignation, to be made at the Requeſt of a Patron; in Conſequence of an Agreement, which it has been again and again determined, both at Law and in Equity, the Patron had a Right to make.

*Page 473 Caſes in the Time of Queen *Anne* 276. *Riley* v. *Adams* Noy 147. Cro. Jac. 198.

* 6. If a new Preſentation to a Benefice be made, before the Biſhop has accepted the Reſignation of the Incumbent, the Preſentation is void.

Lutw. 693. *Studholme* v. *Morriſon.*

7. If an Obligor bind himſelf to reſign a Benefice, it is incumbent upon him to procure the Ordinary's Acceptance of his Reſignation.

Sayer 185. *Heſketh* v. *Gray.*

8. In an Action upon a Bond, the Condition appeared to be, that an Incumbent ſhould, within three Months after the Expiration of ſix Years, to commence from the Day of the Date of the Bond, at the Requeſt of the Patron, his Heirs, Executors, Adminiſtrators or Aſſigns, reſign and deliver up a Vicarage into the Hands of the proper Ordinary; whereby it may become vacant, and the Patron, his Heirs, Executors, Adminiſtrators or Aſſigns, may preſent anew. The Defendant pleaded, that he did, within three Months after the Expiration of the ſix Years, offer to reſign,

reſign, and deliver up, into the Hands of the proper Ordinary, the Vicarage, for the Ordinary to accept the ſame; whereby the Vicarage might become vacant, and the Patron might preſent anew; and that the Ordinary did then refuſe, and from thenceforth hitherto hath refuſed, to accept the Reſignation. Upon a Demurrer to this Plea, it was holden to be bad; becauſe it is not therein averred, that the Biſhop did accept the Reſignation; and by *Rider* Ch. J. The Defendant, by undertaking to reſign, ſo that the Vicarage may become vacant, and the Plaintiff may preſent anew, has undertaken for the Biſhop's Acceptance of a Reſignation; which, according to what is laid down in *Farne*'s Caſe, *Cro. Jac.* 198. is neceſſary to the Completion of a Reſignation.

(E) Some Objections to a Bond for reſigning a Benefice conſidered.

1. THE Reſult of the Whole is, that a Bond for reſigning a Benefice is good at Law, and that Courts of Equity will reſtrain every improper Uſe thereof.

2. One Objection to a Bond for reſigning a Benefice is, that a corrupt Patron may make an ill Uſe thereof. It is a ſufficient Anſwer to this Objection, that the Uſe of a Thing ought not to be diſcontinued, becauſe there is a Poſſibility of its being abuſed.

3. Another Objection to a Bond for reſigning a Benefice, which is reported to have fallen from *Holt* Chief Juſtice, in the Caſe of *Swain* v. *Carter*, *Comb.* 13. is, that a Reſignation Bond comes as near Simony as poſſible; it being eaſy to procure a round Sum of Money, by making the Penalty of the Bond adequate to the Value of the Benefice, and agreeing privately, that the Money ſhall be paid. This, which would be an oblique Way of ſelling a Benefice, would more than would come near, for it would be downright Simony. If there be no other Way, or not as eaſy a Way, to do the ſame Thing, this Objection would be inſurmountable; but if there be, the Stopping of this would not prevent the Miſchief. The ſame Clerk, whoſe Conſcience would allow him to do this, might as well advance the Money agreed upon at firſt, or, if that did not ſuit him, give an abſolute Bond to pay the Money at a future Time. If this be ſo, that the ſame Crime might ſtill be committed, and with as much Secrecy, what good End would be anſwered by prohibiting * ſuch Bonds, which may be made Uſe of, to puniſh the Neglect of Duty, or the immoral Conduct of an Incumbent, and for other good Purpoſes. *Page 474

4. Another Objection to a Bond for reſigning a Benefice is, that when a Patron takes a Bond of Reſignation, the Preſentation is only during Pleaſure. Be it ſo; and I will ſuppoſe, which is the utmoſt that can be ſuppoſed, that the Bond is not taken with Deſign to make the Incumbent careful in the Diſcharge of his Duty, but to let ſome Friend or Relation afterwards into the Benefice. It by no Means neceſſarily follows, that the Church, which is the great Thing to be guarded againſt, will therefore be filled with an unfit Perſon. If the Succeſſor, which may be the Caſe, is better qualified for the miniſterial Office, the Intereſt of Religion will be advanced by the Exchange. If he be not ſo well qualified, it is an Evil: but it is that Evil, which, in the preſent Circumſtance of Things, cannot be eaſily prevented.

(F) Of the Forfeitures, Diſabilities, and Puniſhments, incurred by Simony.

1. By the Incumbent.

1. THE Perſon promoted in Purſuance of a corrupt Contract is at ſome Times *ſimoniacus*; at other Times *ſimoniace promotus*. In the former Caſe, wherein he is a Party or a privy to the Contract, he is liable to ſuffer more: But in the latter, although he be quite a Stranger thereto, he is to a certain Degree involved in the Conſequences of the Contract. The Deſign is, that if a Senſe of what becomes himſelf, and of the Duty he owes to the Publick, will not reſtrain a Patron from being guilty of Simony, a Regard for the Perſon whom he means to ſerve may do it.

31 Eliz. c. 6. par. 5. 2. A *Simoniacus* is liable to forfeit double the Value of one Year's Profit of the Benefice he has been preſented to in Purſuance of a corrupt Contract: A *Simoniace promotus* is not liable to this Forfeiture.

3 Inſt. 154. 3. The double Value, which is in any Caſe forfeitable under the Statute, is to be the double Value of what the Benefice could be let for, and not the double Value as valued in the King's Books.

March 84. 4. Neither a *Simoniacus* nor a *Simoniace promotus* can ſue for Tithes, the Right thereto being taken away by the corrupt Contract.

12 Rep. 100. 2 Rol. Rep. 465. 5. It is laid down, that, although a *Simoniace promotus* be deprived, he is not diſabled from being preſented again to the ſame Benefice.

*Page 475 Cro. Jac. 533. *Booth* v. *Potter*. * 6. But it has been in one Caſe holden; that a *Simoniace promotus* can never be preſented to the ſame Benefice again.

31 Eliz. c. 6. par. 8. 7. If an Incumbent take Money for Reſigning or Exchanging a Benefice with Cure of Souls, he is liable to forfeit double the Value of the Money.

31 Eliz. c. 6. par. 10. 8. A Perſon corruptly ordained, is liable to forfeit ten Pounds, and any Benefice, Living or Promotion Eccleſiaſtical, which he ſhall accept within ſeven Years after his having been ordained.

3 Inſt. 154. 2 Hawk. 396. 9. The Diſabilities incurred by Simony cannot be diſpenſed with by a *Non obſtante*; for when a Perſon is, for the Good of the Church or State, diſabled by a Statute, the King's Subjects have an Intereſt in the Diſability, and the King can no more diſpenſe therewith, that he can with a Diſability at the common Law.

Sid. 170. 10. The Offence of Simony is not pardoned by a general Pardon.

11. Beſides the Forfeitures and Diſabilities already mentioned *a Simoniacus*, provided he has taken the Oath againſt Simony, is liable to be indicted and puniſhed for Perjury.

Comp. Incumb. 188. 12. Dr. *Watſon* does indeed make a Queſtion, whether ſince the 13 *Ch.* 2. *c.* 12. the Oath againſt Simony ought to be adminiſtred? It is by this Statute enacted, "That it ſhall not be lawful for any Archbiſhop, "Biſhop, Vicar-general, Chancellor, Commiſſary, or any other Spiritual "or Eccleſiaſtical Judge, Officer, or Miniſter, or any other Perſon having or exerciſing Spiritual or Eccleſiaſtical Juriſdiction, to tender or adminiſter to any Perſon whoſoever the Oath uſually called the Oath *ex* "*Officio*, or any other Oath, whereby ſuch Perſon may be charged or "compelled to confeſs or accuſe, or to purge him or herſelf, of any criminal Matter, whereby he or ſhe may be liable to any Puniſhment, "or

"or Cenſure; any Thing in this Statute or any Law, Cuſtom or Uſage "heretofore to the contrary hereof in any wiſe notwithſtanding." The generality of the Words, *any other Oath*, being tied up by the ſubſequent Words to an Oath in certain Caſes, the Thing to be conſidered is, whether the Oath againſt Simony is an Oath, by which the Perſon taking it is charged or compelled to confeſs or accuſe, or to purge himſelf, of any criminal Matter? No Perſon does by this Oath confeſs himſelf guilty or accuſe himſelf of any criminal Matter. So far from doing this, the taking of the Oath is a Denial in the moſt expreſs Terms, of his having been guilty of a particular Offence. Nor does any Perſon by this Oath purge himſelf of any criminal Matter; for at the Time of taking it he does not ſtand charged with any criminal Matter. Upon the Whole the Oath againſt Simony does not ſeem to be within the Words, or Purview of that Statute.

2. By the Patron.

13. If a Patron be guilty of preſenting corruptly, the Preſentation ſhall be void, and the King may preſent for that Term; and the Patron is moreover liable to forfeit the Right of preſenting upon the next Avoidance, and likewiſe the double Value of one Year's Profit of the Benefice. 31 Eliz. c. 6. par. 5.

14. But if *A* have the Right of Preſentation, and *B* the Right of Nomination to a Benefice, and only one of them be guilty of preſenting corruptly, the Right of the other ſhall not be thereby prejudiced, nor ſhall he be ſubject to any Forfeiture. Lane 74. *Calvert* v. *Kitchen*.

* 15. If the Uſurper of a Benefice be guilty of preſenting corruptly, this ſhall not give the King a Right to preſent for that Term; becauſe it would be unreaſonable, to take away the Right of the Patron, who has not been guilty of any Offence. *Page 476 3 Inſt. 153.

16. The Patron, who has given Money, to procure the reſigning or exchanging of a Benefice, is liable to forfeit double the Value of the Money. 31 Eliz. c. 6. par. 8.

3. By the Ordinary.

17. If an Ordinary corruptly inſtitute, inſtall, or place any Perſon in a Benefice, with or without Cure of Souls, he is liable to forfeit the double Value of a Year's Profit of the Benefice. 31 Eliz. c. 6. par. 6.

18. If an Ordinary take a Reward for conferring of Orders, or granting a Licence to preach; he is liable to forfeit forty Pounds. 31 Eliz. c. 6. par. 10.

19. Beſides being liable to the Forfeitures, Diſabilities, and Puniſhments already mentioned, there is a Proviſo in the Statute, that every Perſon who ſhall be guilty of any Offence againſt it, ſhall be ſubject to all the Puniſhments, Pains, and Penalties, to which he was before ſubject by the Eccleſiaſtical Laws. 31 Eliz. c. 6. par. 9.

(G) In what Cases, and at what Times, Advantage may be taken of the Forfeitures and Disabilities incurred by Simony.

1. By the King.

31 Eliz. c. 6. par. 5.

1. IF a Patron have been guilty of presenting corruptly to a Benefice the Presentation is void, and the Right of presenting is for that Turn in the King.

3 Inst. 153.

2. The corrupt Presentation of an Usurper does not however give the King a Right of presenting for that Turn; because it would be unreasonable to take away the Right of the Patron, who has not been guilty of any Offence.

3. If there have been a Presentation, in Pursuance of a corrupt Contract, the Presentation is void, and the King may present for that Turn.

Cro. Jac. 385. *King* v. *Bishop of Norwich* and others.

4. But if the Presentee have been instituted and inducted, the King cannot take Advantage of his having been corruptly presented, until he be removed by *Quare impedit*; for although he be in *de facto* only and not *de jure*, the Church is full, until he be removed in a judicial Way, or resign.

Noy 25. *Winchcomb* v. *Pulleston.*

5. A Clerk, who had been presented corruptly, continued Incumbent till his Death above thirty Years after; yet it was holden that the King might present, for that as the Church had never been full *de jure* the King's Right of presenting was not taken away.

Lutw. 1090. *King* v. *Bishop of Chichester* and others.

6. After a Benefice became vacant *A.* agreed to give *B.* a Sum of Money for procuring *C.* the Patron to present *D.* The Money was paid, and *D.* being presented, enjoyed the Living till his Death. Afterwards *E.* to whom the Right of presenting for the next Turn belonged, presented *F.* In *Quare impedit* there was Judgment for the King, although neither *E.* nor *F.* were privy to the corrupt Contract between *A.* and *B.*

7. By 1. *W. & M. cap.* 16. *par.* 2. it is enacted, "That after the Death "of the Person simoniack or simoniacally promoted, the Offence or Contract "of Simony shall neither in pleading, or in Evidence, be alledged, to the "Prejudice of any other Patron innocent of Simony, or of his Clerk by "him presented, upon Pretence of Lapse to the Crown; unless the Person "simoniack or simoniacally promoted, or his Patron, was convicted of such "Offence at the Common Law, or in some Ecclesiastical Court, in the Life-"time of the Person simoniack or simoniacally promoted."

8. By the same Statute *par.* 3. it is enacted, "That no Lease, really and "*bona fide* made by any Person simoniack or simoniacally promoted, for "good and valuable Consideration, to any Person not being privy unto, or "having Notice of such Simony, shall be impeached or avoided by Reason "of such Simony, but shall be good and effectual in Law."

*Page 477

*9. One Moiety of the Forfeitures for Offences against the 31 *Eliz. cap.* 6. is by *par.* 10. of that Statute given to the Queen her Heirs and Successors.

2. By other Persons.

31 Eliz. c. 6. par. 6.

10. If any Person have been corruptly instituted, the Benefice becomes void; and the Person, in whom the Right of presenting is, may present thereunto, in such Sort as if the Person so instituted had been dead.

11. No

11. No Title to preſent by Lapſe can accrue upon any Avoidance mentioned in the 31 *Eliz. cap.* 6. until ſix Months are expired after Notice has been given of ſuch Avoidance by the Ordinary to the Patron. 31 Eliz. c. 6. par. 7.

12. This Proviſion of the Statute is agreeable to the Canon Law, by which Lapſe cannot run againſt the Patron, until Notice has been given him by the Ordinary that the Church is void." Dyer 293.

13. If two claim the Right of Preſentation to a vacant Benefice, and the Ordinary be not named in a *Quare impedit* brought to determine the Right, it ſhall, if a Judgment be not obtained within ſix Months after Notice given that the Benefice is void, lapſe to the Ordinary. 2 Rol. Abr. 365. *Abbot of York v. Biſhop of Norwich.*

14. By a Judgment in *Quare impedit* the Incumbent is ſo removed, that the Patron who recovers may preſent, although there be no Sentence of Deprivation: But the Clerk, againſt whom the Judgment is obtained, continues Incumbent *de facto* until ſuch Preſentation be made. 1 Rol. Rep. 62.

15. One Moiety of the Forfeitures, for having been guilty of Offences againſt the 31 *Eliz. cap.* 6. is by *par.* 10. of that Statute given to the Perſon who will ſue for the ſame. 31 Eliz. c. 6. par. 10.

(H) Of the Juriſdiction of Spiritual Courts in Simony.

1. SOME have been of Opinion, and amongſt theſe is the learned Author of the Codex, that only Spiritual Courts had before the Statute a Power to puniſh Simony: But if (*b*) as it has been already obſerved, Simony is an Offence at the Common Law, there can be little Doubt of its having been always puniſhable in Temporal Courts. It may be true in Fact, that it was for the moſt Part, or perhaps altogether, proceeded againſt in the Spiritual Courts. As the Intereſt of Religion is by this Offence ſtruck at in a more remarkable Manner, this is not to be wondered at; and the leſs, if it be conſidered, that in Times antecedent to the Statute, Spiritual Courts did, in ſome Caſes, wherein there was a concurrent Juriſdiction, encroach upon, and in others entirely ſwallow up, the Juriſdiction of the Temporal. Although then it cannot at this Time be made appear, that Temporal Courts did heretofore exerciſe any Juriſdiction in Simony, it does by no Means neceſſarily follow, that they had none. (*a*) Cod. 839, 840. (*b*) *Ante* page 465.

* 2. By the Statute a Power is reſerved to Spiritual Courts of inflicting ſuch Puniſhments, Pains and Penalties, in all the Caſes therein mentioned, as by the Laws Eccleſiaſtical could before the making thereof be inflicted. *Page 478. 31 Eliz. c. 6. par. 9.

3. It has been holden, that the Sentence of a Spiritual Court in Simony, it being a Matter properly triable there, is to be taken to be true, although it do in its Conſequence diveſt the Incumbent of his Freehold. Cro. Eliz. 788. *Baker* v. *Rogers.*

4. If a Man have been acquitted upon a Charge of Simony in a Temporal Court, a Spiritual Court may re-examine the Matter. Comb. 73. *Boyle v. Boyle.*

5. Upon a Motion for a Prohibition to a Suit in a Spiritual Court for Tithes, upon the Ground, that the Incumbent being a Simoniack had no Right thereto; it was holden, that a Prohibition does not lie; and by the Court: Simony may be more aptly tried in the Spiritual Court. Cro. Eliz. 642. *Riſby* v. *Wentworth.*

(I) Of

(I) Of the Pleadings in an Action upon the 31 Eliz. c. 6.

1. THE Poſſeſſion of a Benefice, to which an Incumbent has been ſimoniacally promoted, may be recovered by an Aſſiſe of *Darrein* Preſentment or by an Action of *Quare Impedit*. The latter is uſually preferred; becauſe, beſides being a ſhorter Way of Proceeding, the Right of Preſentation as well as the Right of Advowſon is thereby recoverable.

Vaugh. 57. *King* v. *Biſhop of Worceſter* and others.

2. It is not enough, to alledge in the Declaration in an Action of *Quare impedit*, that the Plaintiff, or the Perſon under whom he claims, is ſeiſed of the Advowſon; but a Preſentation muſt be alledged by him or ſome Perſon under whom he claims; for unleſs a paſt Preſentation has been joined to the Title, it does not appear that the Right of Preſentation is now in the Plaintiff.

Lutw. 1090.

3. The Declaration, in an Action of *Quare impedit* upon the Statute, is good, although there be no Recital of the Statute: But it was formerly the Practice, and it is as well to recite it.

Cro. Eliz. 788. *Baker* v. *Rogers.*

4. Nor is there any Danger in reciting the Statute; a Miſrecital not being fatal.

Comb. 108. *Betts* v. *Lowe.*

5. It is not enough, to aver in the Declaration in an Action of *Quare impedit* upon the Statute, that the Incumbent is a Simoniack: But as the Word *Simony* is not in the Statute, ſome ſimoniacal Act, which brings him within it, muſt be ſhewn.

7 Rep. 26. *Hall's* Caſe. 3 Lev. 16.

6. At the Common Law the Patron muſt be named in a Writ of *Quare impedit*, for as the Incumbent could not alledge any Thing which concerned the Right of Patronage, it would be unreaſonable, to name only a Perſon who could not defend the Right of Patronage: But as the Incumbent is by the 25 *Edw.* 3. *cap.* 7. enabled to plead his Patron's Right of Patronage in Defence of his Incumbency, it is not now neceſſary to name the Patron, unleſs his Right of Inheritance will be affected by the Judgment.

*Page 479 7 Rep. 26. *Hall's* Caſe.

* 7. An Incumbent cannot plead his Patron's Right of Patronage, without ſhewing that he is Parſon Imparſonee of the Preſentation of his Patron.

Ibid.

8. An Incumbent is not Parſon Imparſonee as againſt the King, unleſs he have been admitted, inſtituted and inducted; but Admiſſion and Inſtitution will make him ſo as againſt any other Perſon.

9. At the Common Law the Ordinary could only plead, that he does only claim as Ordinary; but ſince the Statute of 25 *Ed.* 3. *cap.* 7. he may plead a Title in himſelf by Lapſe, or that the Right of Patronage is in him.

Hob. 162. *Rolt and another* v. the *Biſhop of Litchfield.*

10. If *Ne diſturba pas*, which is in Effect the general Iſſue, be pleaded in an Action of *Quare impedit*, it amounts to a Confeſſion of the Right of Patronage, and only defends the Wrong with which the Defendant is charged; and conſequently the Plaintiff may pray immediately a Writ to the Ordinary, or he may proceed in the Action in order to recover Damages for the Diſturbance.

*SLANDER. *Page 480

SLANDER is the Publiſhing of Words, in Writing or by Speaking; by reaſon of which the Perſon, to whom they relate, becomes liable to ſuffer ſome corporal Puniſhment, or to ſuſtain ſome Damage.

It is no Excuſe in *foro Conſcientiæ*, that the ſlanderous Words which have been ſpoken or written are true; although the Law does, in Compaſſion to Mens Infirmities, allow it to be a Juſtification in an Action for Words, that they are true. If a Man have been guilty of any Thing, which the Law prohibits, he is liable to anſwer for it in a legal Way; but it can anſwer no good Purpoſe, for a private Perſon to accuſe him thereof; and there is a Degree of Cruelty in ſo doing. To rally a Man for a Foible or Failing, if it be done with Humour and in a friendly Way, may do him Service, but the publiſhing of a Foible or Failing, which can ſerve only to leſſen a Man in the Eſteem of his Neighbours, or to make him an Object of Ridicule, ſhould be abſtained from; for, although it may not amount to Slander in the legal Notion of that Word, it muſt create ill Blood.

Slander in Writing has at all Times, and with good Reaſon, been puniſhed in a more exemplary Manner than ſlanderous Words: For, as it has a greater Tendency to provoke Men to Breaches of the Peace, Quarrels and Murthers, it is of much more dangerous Conſequence to Society. Words which are frequently the Effect of a ſudden Guſt of Paſſion, may ſoon be buried in Oblivion; but Slander, which is committed to Writing, beſides that the Author is actuated by more deliberate Malice, is for the moſt Part ſo laſting, as to be ſcarce ever forgiven.

For written Slander the Party injured may proceed againſt the Author by Indictment or Information, it being conſidered as a publick Offence; he may likewiſe proceed by an Action upon the Caſe for the Damage ſuſtained, and he may in ſome Caſes inſtitute a Suit in a Spiritual Court.

Peers and the great Men of the Realm, beſides theſe Methods of Redreſs, have another by an Action of *Scandalum Magnatum*, which is peculiar to themſelves.

If the Slander be by Words ſpoken, there is in the general no other Remedy than by an Action upon the Caſe or a Suit in a Spiritual Court; yet in certain Caſes, the Speaker of ſlanderous Words may be proceeded againſt as a Criminal. For Inſtance, if the Words be a Slander upon the State, as ſaying the Coin is abaſed by Authority, or ſaying any Thing whereby the State may be prejudiced: or if they be a Slander which it more particularly concerns the Publick to prevent, as ſpeaking any Thing ſlanderous to a Juſtice of Peace in the Execution of his Office, the Slanderer may be proceeded againſt by Indictment or Information.

The criminal Methods of proceeding againſt a Slanderer having been treated of under the Titles *Indictment* and *Information*, and the Method of proceeding by Action of *Scandalum Magnatum* * under its proper Title, *Page 481. it only remains to conſider that Sort of Slander, for which the Remedy is by an Action upon the Caſe or by a Suit in a Spiritual Court.

For

*Page 481 * For the better understanding whereof it will be proper to consider,

(A) In what Cases, an Action for Words does in the general lie.

(B) What Words are in themselves actionable.

1. Words which import the Charge of a Crime.

   1. *Of Treason.*
   2. *Of Murder.*
   3. *Of Perjury.*
   4. *Of Forgery.*
   5. *Of Theft.*
   6. *Of another Crime.*

2. Words which import the Charge of having a contagious Distemper.
3. Words which are disgraceful to a Person in an Office.

   1. *To a Person in a judicial Office.*
   2. *To a Person in an Office of Trust.*

4. Words which are disgraceful to a Person of a Profession or Trade.

   1. *To a Clergyman.*
   2. *To a Physician or a Surgeon.*
   3. *To a Barrister or an Attorney at Law.*
   4. *To a Person professing an Art.*
   5. *To a Tradesman.*

(C) Some Words which become actionable by reason of the Damage received from them.

(D) Certain Circumstances which are to be regarded in the Construction of Words.

1. The Time when the Words were published.
2. The Place where the Words were published.
3. The Language the Words were published in.
4. The Occasion of publishing the Words.
5. The Intention in publishing the Words.

(E) In what Cases, Slanderous Words published in a Course of Justice are actionable.

(F) In what Cases, Words in the past or future Tense are actionable.

(G) How

(G) How far Words must be affirmative, in order to render them actionable.

(H) How far Words must be certain, in order to render them actionable.

* (I) By what means the Want of Certainty, sufficient to render Words actionable, may be supplied. *Page 482

1. By the Intention of the Speaker.
2. By an Averment.

(K) In what Cases, doubtful Words are to be construed in mitiori sensu.

(L) In what Cases, doubtful Words are not to be construed in mitiori sensu.

(M) In what Cases, adjective Words are actionable.

(N) In what Cases, Words which import only an Intent are actionable.

(O) In what Cases, Disjunctive or Copulative Words are actionable.

(P) In what Cases, an Action does not lie, by Reason of Repugnancy in the Words.

(Q) In what Cases, an Action lies for repeating Words which were published by another Person.

(R) In what Cases, actionable Words are rendered not actionable; or Words not actionable are rendered actionable, by subsequent Words.

(S) Of the Pleadings in an Action for Words.

1. In the general,
2. In what Cases, be an Averment is necessary.
3. In what Cases, be a Colloquium is necessary.
4. What is the Use of an Inuendo.
5. What may be pleaded in Justification of Words.

(T) In what Kinds of Slanderous Words Spiritual Courts have Jurisdiction.

(U) In what Cases, a Prohibition lies to a Suit in a Spiritual Court for Words.

1. Where actionable Words are coupled with Words which are a Spiritual Defamation.
2. Where a Temporal Damage has been received from Words, which are a Spiritual Defamation.
3. Where the Words, which are a Spiritual Defamation, import a Charge of an Offence not conusable in a Spiritual Court.

(A) In

(A) In what Caſes an Action for Words does in the general lie.

1. AN Action upon the Caſe lies for the publiſhing of any Words, by reaſon of which the Perſon to whom they relate does receive any Damage; but it is not always neceſſary to ſhew the Damage received. The Diſtinction is, that where the natural Conſequence of the Words is a Damage; as if they import a Charge of having been guilty of a Crime or of having a contagious Diſtemper; or if they are * prejudicial to a Perſon in an Office, or to a Perſon of a Profeſſion or Trade, they are in themſelves actionable: In other Caſes, the Party, who brings an Action for Words, muſt ſhew the Damage which was received from them.

*Page 483

4 Rep. 14. *Buckley* v. *Wood.* 3 Leon. 138. Cro. Eliz. 247.

2. It makes no Difference, whether the Slander be publiſhed in Writing or Print, or by Speaking; for, although the Party injured may, where it is in Writing or Print, this being a publick Offence, proceed in a criminal Way againſt the Author, he is not thereby precluded, from obtaining Satisfaction by an Action for the Injury to himſelf.

2 Ventr. 28. *King* v. *Lake.*

3. The writing of ſlanderous Words in a private Letter to a third Perſon is a Publication of the Words.

1 Rol. Abr. 34. *Matthew* v. *Croſe.* 4 Co. 20. Cro. Jac. 323.

4. If the Words be only a Spiritual Defamation an Action does not lie; the Remedy being by a Suit in a Spiritual Court.

2 Rep. 17, 20, 21. Carth. 213. Salk. 552. Comb. 138, 392. Sid. 214.

5. But if a Temporal Damage have been received from Words, which are a Spiritual Defamation, or if ſuch Words are coupled with others which are actionable, a Prohibition lies, to a Suit in a Spiritual Court for the Words. It would be vexatious, if the Publiſher of ſuch Words could be proceeded againſt both in a Temporal and Spiritual Court; and, as only a Temporal Court can make the injured Party Satisfaction for the Damage ſuſtained, the Proceeding in a Spiritual Court being *pro ſalute animæ* only, it is not reaſonable, that he ſhould proceed in both Courts.

(B) What Words are in themſelves actionable.

1. Words which import the Charge of a Crime

1. AS no greater Injury can be done to a Perſon, than to accuſe him of a Crime, for which he may be brought into Danger of ſuffering corporal Puniſhment. Words which import ſuch Accuſation have always, and with the higheſt Reaſon, ſtood firſt in the Liſt of thoſe which are in themſelves actionable.

1. *Of Treaſon.*

Cro. Eliz. 638. *Redſtone* v. *Elliot.* 1 Rol. Abr. 49.

2. An Action lies for publiſhing theſe Words of *J. S. He is a Rebel and not the Queen's Friend.*

3. So

3. So it does for publiſhing theſe Words, *He is an Enemy to the State*; for they are a very great Slander, if not a Charge of Treaſon. Cro. Eliz. 602. *Charter* v. *Peter.*

4. So it does for publiſhing theſe Words, *he did Treaſon in the Low Countries*; becauſe a Perſon may be tried and puniſhed in *England* for Treaſon in the Low Countries. 1 Rol. Abr. 63. pl. 32. 35 H. 8. c. 2.

5. It is ſaid that an Action lies for publiſhing theſe Words of *J. S. He is a* Jacobite, *and is for bringing in the Prince of* Wales *and Popery, to the deſtroying of our Nation*, becauſe they import a Charge of evil Principles. Salk. 696. *How* v. *Prinn.*

6. In another Report of the ſame Caſe, theſe Words are ſaid to be actionable, if publiſhed of a Perſon in an Office; but it is not ſaid that they are ſo, when publiſhed of a private Perſon. Ld. Raym. 812.

* 7. The Doctrine of the Report of this Caſe in *Salkeld* is recognized in a ſubſequent Caſe, in which it is laid down, that an Action lies for publiſhing the following Words of any Perſon, *He has the Pretender's Picture in his Room, and I ſaw him drink his Health. And he ſaid he had a Right to the Crown.* *Page 484 8 Mod. 283. *Fry* v. *Coſne.*

2. *Of Murder.*

8. An Action lies for ſaying to *J. N. thou haſt killed a Man*; for, although no particular Man be named, this is a great Slander. 1 Rol. Abr. 77. *Cooper* v. *Smith.*

9. So it does for ſaying, *you have killed the Servant of* J. S. or *you have ſtolen the Horſe of* J. S. although it be not ſhewn that *J. S* had a Servant or a Horſe; for, until the contrary be ſhewn, this ſhall be intended. Cro. Jac. 423. *Cooper* v. *Smith.* 1 Rol. Abr. 77.

10. It was heretofore holden, that an Action did not lie for publiſhing Words, which import a Charge of Murder, without an Averment, that the Perſon ſaid to be murdered is dead; but the later and better Opinion is, that the Perſon ſhall be intended to be dead, unleſs it appear in the Pleadings, that he is alive. 1 Ventr. 117. *Phillips* v. *Kingſton.* Cro. Jac. 489. Sid. 53. Cro. Eliz. 569, 823.

3. *Of Perjury.*

11. No Action lies, for publiſhing theſe Words of *J. S. he is forſworn*, unleſs it be added, in a judicial Proceeding, but it does for publiſhing theſe Words, *he is perjured*; for theſe Words ſhall be intended to mean, that he is forſworn in a judicial Proceeding. 4 Rep. 15. *Stanhope* v. *Blith.* 2 Bulſtr 150. 3 Inſt. 166.

12. Eccleſiaſtical Courts are not mentioned in the Statute of the 5th of *Eliz.* againſt Perjury; yet it has been holden, that an Action lies for publiſhing theſe Words of *J. S. he is forſworn in an Eccleſiaſtical Court.* Cro. Eliz. 609. *Shaw* v. *Thompſon.*

13. An Action lies for publiſhing theſe Words of *J. S. he was forſworn before a Juſtice of Peace*; for this Offence, if not within the Words, is certainly within the Purview of the Statute. 3 Lev. 166. *Gruneth* v. *Derry.*

14. An Action will lie for publiſhing Words, which import a Charge of Perjury, although it be not a Perjury within the Statute; for Perjury is an Offence puniſhable at the Common Law. 1 Rol. Abr. 39. *Pruer* v. *Meadman.* 3 Inſt. 164.

15. No Action lies, for publiſhing theſe Words of *J. S. he has forſworn himſelf in Leake Court*, without ſhewing that this is a Court which could compel the taking of an Oath. 1 Rol. Abr. 39. *Lawe* v. *Bennett.*

16. Nor 3 Inſt. 166.

1 Rol. Abr. 69. *Keble* v. *Page.*

16. Nor does an Action lie for ſaying to *J. S. thou waſt forſworn before the Biſhop of* Norwich; becauſe it does not appear to have been before him in his Court, and it ſhall not be intended, that it was.

1 Rol. Abr. 70. *Mitchell* v. *Brown.* 3 Inſt. 167.

17. An Action does not lie for publiſhing theſe Words of *J. S. He hath delivered falſe Evidence and Untruths in his Anſwer to a Bill in Chancery*; for, as ſome Things in a Bill in Chancery are not material to what is in Diſpute between the Parties, it is no Perjury, although ſuch Things are not truly anſwered.

4 Rep. 16. *Weaver* v. *Cariden.* Cro. Car. 268.

18. No Action lies for publiſhing theſe Words of *J. S. he is detected of Perjury*; for a Man who is not guilty of a Crime may be detected; and it may be ſaid of every Man, againſt whom a Bill of Indictment is preferred for a Crime, that he is detected of that Crime.

1 Rol. Abr. 51. *Harris* v. *Dixon.* Paſch. 3 Jac.

19. It is in one Caſe ſaid, that an Action does not lie for publiſhing Words which import a Charge of Subordination of Perjury, unleſs it be averred, that the Perjury was committed; for that the hiring of a Man to commit a Perjury is no Offence, unleſs the Perjury have been committed.

*Page 485 Cro. Jac. 158. *Harris* v. *Dixon.* Paſch. 5 Jac.

* 20. But in another Report of the ſame Caſe, for it appears to be the ſame although reported as of a different Year; it is ſaid to have been holden, that ſuch Words, which are a great Imputation, are actionable, although it be not alledged, that the Perjury was committed.

1 Rol. Abr. 41. *Ewer's* Caſe. M. 9 Car.

21. The Doctrine of the laſt mentioned Report was confirmed in a Caſe ſome Years after; it being there holden, that an Action lies for publiſhing theſe Words of *A. he gave* 10l. *to* B. *for forſwearing himſelf in Chancery*; and it is in this Caſe ſaid, that it ſhall be intended there was a Subordination of Perjury.

4. *Of Forgery.*

22. An Action lies for publiſhing any Words, which import the Charge of ſuch Forgery, as is within the Meaning of any Statute againſt this Offence.

1 Rol. Abr. 66. *Pudſey* v. *Pudſey.*

23. So it does for charging a Man with Forgery, although it be not ſuch Forgery as is within the Meaning of any Statute againſt this Offence; Forgery being puniſhable at the Common Law.

1 Rol. Abr. 65. *Garbut* v. *Bell.*

3 Leon. 231. 1 Rol. Abr. 65. pl. 4.

24. But no Action lies for publiſhing theſe Words of *J. S. he hath forged the Hand of* J. N. for, unleſs it had been ſaid, to what Deed, Inſtrument, or Writing, the Hand was forged, theſe Words are too general to import the Charge of ſuch Forgery, as is puniſhable under any Statute or at the Common Law.

5. *Of Theft.*

Cro. Jac. 114. *Minors* v. *Lecford.*

25. An Action does as well lie for calling a Man Thief, as for charging him with having been guilty of a particular Larceny.

Stra. 142. *Morgan* v. *Williams.*

26. After a Verdict for the Plaintiff, in an Action for publiſhing theſe Words of him, *He is a Thief of every Thing*; it was ſaid, in order to arreſt Judgment, that a Perſon cannot be a Thief of every Thing, the ſtealing of Trees growing not being a Larceny. Judgment, was given for the Plaintiff; and by the Court: It muſt be intended, that theſe Words import a Charge of ſtealing every Thing of which the Plaintiff

Plaintiff could be a Thief; becauſe as theſe Words include every Thing which can be ſtolen, they muſt intend a ſtealing of that which it is Felony to ſteal.

27. As the taking and carrying away of a Thing annexed to the Realty is not a Larceny, an Action does not in the general lie for publiſhing Words, which charge the ſtealing of ſuch Thing. 3 Inſt. 109.

28. Agreeably hereto it has been determined, that it is not actionable to publiſh theſe Words of *J. S. he ſtole the Shutters* of *my Windows*; but if the Words had been, *he ſtole the Shutters* off *my Windows*, an Action would have lain. Sid. 104. *Hall* v. *Hammond.*

29. According to ſome old Caſes no Action did lie for publiſhing Words, which import the Charge of ſtealing Trees growing, or of Lead fixed to a Houſe; becauſe theſe Offences are only Treſpaſſes. Cro. Jac. 39. *Kellam* v. *Maneſby.* Hob. 331. Cro. Jac. 114, 674. 3 Inſt. 109.

30. And although it be at this Day actionable, to charge a Man with having been guilty of cutting down Trees, or of ſtealing Lead fixed to a Houſe, this, which is occaſioned by Statutes made for puniſhing thoſe Offences, ſince thoſe Caſes were determined, does by no Means impeach their Authority; the Principle on which they are founded being ſtill Law.

31. It has been holden that no Action does lie for publiſhing theſe Words, *I charge* J. S. *with Felony, for taking Money out of my Pocket*; becauſe the Words do not neceſſarily imply a felonious Taking. Hutt. 38. *Maſon* v. *Thompſon.*

32. And in another Caſe it has been holden, that no Action does lie for publiſhing theſe Words of *J. S. He is a Pickpocket, he picked my Pocket of my Money*; for, as it does not appear that the taking was felonious, this might be only a Treſpaſs. 2 Lev. 51. *Walls* v. *Rymes.* 1 Ventr. 213.

33. But in another Caſe it is laid down, that an Action does lie for publiſhing theſe Words, *I charge* J. S. *with Felony in taking my Money out of my Pocket*; becauſe it ſhall be intended, that the Taking was felonious, and the Caſe * of *Maſon* v. *Thompſon*, upon the Authority of which the Caſe of *Walls* v. *Rymes*, was probably determined, is in this Caſe denied to be Law. Ld. Raym. 959. *Baker* v. *Peirce.* *Page 486

34. An Action lies for any Words, which amount to the Charge of petty Larceny: For, beſides that the Party guilty of this Offence incurs a Forfeiture of all his Goods, he is liable to ſuffer the Puniſhment of Whipping or to be tranſported. 1 Rol. Abr. 43. *Carter* v. *Hunt.* 3 Inſt. 109.

6. *Of another Crime.*

35. It is actionable to publiſh theſe Words of *J. S. he did burn a Barn with Corn in it, or a Barn that was Parcel of a Manſion-houſe*; the burning of ſuch Barn being a Felony. 4 Rep. 20. *Barham's* Caſe.

36 An Action lies for publiſhing theſe Words of *J. N. he harboured his Son knowing him to be a* Romiſh *Prieſt*; the doing of this being a Felony. Cro. Jac. 300. *Smith* v. *Flint.*

37. No Action lies for publiſhing theſe Words of a Perſon, except he be in an Office, *he is a Papiſt*; but it does for publiſhing theſe Words, *he goes to Maſs*, for this renders him liable to ſuffer corporal Puniſhment. 2 Ventr. 265. *Walden* v. *Mitchell.*

38. Heretofore no Action lay for publiſhing theſe Words *He received ſtolen Goods knowing them to be ſtolen*; becauſe a Receiver of ſuch Goods was not an Acceſſary, unleſs he had aided or comforted the Thief. 1 Rol. Abr. 68. *Dawes* v. *Boughton.* Cro. Eliz. 880.

39. But

3 W. & M. c. 9. 4 G. 1. c. 11. 39. But there can be no Doubt of ſuch Words being at this Day Actionable; for Receivers of ſtolen Goods, knowing them to be ſtolen, are by one Statute declared to be Acceſſaries after the Fact, and by another are liable to be tranſported for fourteen Years.

40. The Books abound with Caſes of Actions for Words, which charge the having been guilty of ſuch Acts of Conjuration, Witchcraft and Dealing with evil or wicked Spirits, as were within the Meaning of the 1 *Jac. cap.* 11.

9 G. 2. c. 5. 41. Theſe Offences being put an End to by the Repeal of that Statute, ſuch Actions would conſequently have been at an End; but, to remove all Doubt, it is expreſly provided by the repealing Statute, that no Suit ſhall be commenced againſt a Perſon, for charging another with any of theſe Offences.

4 Rep. 17. *Ann Davie's* Caſe. 42. It is laid down, that an Action lies for publiſhing theſe Words of a Woman, *She has had a Baſtard.*

Salk. 694, 696. 1 Rol. Abr. 38. 43. But this Caſe has been denied to be Law; and it has been holden, that no Action lies for publiſhing theſe Words, except it be averred, that the Baſtard has been chargeable to a Pariſh; for, unleſs it have been ſo, the Mother of a Baſtard is not liable to Impriſonment, under the 18 *Eliz. cap.* 3.

Cro. Car. 436. *Salter* v. *Brown.* 1 Rol. Abr. 37. 44. No Action lies for publiſhing theſe Words of *J. S. He is the reputed Father of a Baſtard*, except it be averred, that the Baſtard has been chargeable to a Pariſh; for, unleſs it have been ſo, the reputed Father of a Baſtard is not liable to Puniſhment under the 18 *Eliz. cap.* 3.

1 Rol. Abr. 36. *Haſſell* v. *Cooper.* Comb. 138. 45. An Action does not in the general lie for calling a Woman *Whore*, this being only a Spiritual Defamation: But it lies in *London*, Whores being by the Cuſtom of that City liable to be carted.

Lutw. 1042. *Houblon* v. *Miller.* 46. It has been holden, that no Word tantamount to the Word Whore is within the Cuſtom of the City of *London*; and conſequently, that no Action lies except the Word *Whore* be made Uſe of.

Str. 555. *Cook* v. *Wingfield.* 47. But this Caſe is not now Law; it having been ſince holden, that an Action lies in *London* for calling a Woman *Strumpet.*

Stra. 471. *Vicars* v. *Worth.* *Ib.* 545. 48. It has been holden likewiſe, that in *London* it is actionable to call a Woman's Huſband *Cuckold*; for that, as this is tantamount to the calling of her *Whore*, it is within the Cuſtom of that City.

*Page 487 Cro. Car. 229. *Holling ſhead's* Caſe. *Ib.* 261. * 49. It is not actionable to call a Woman a *Bawd*; this being only a Spiritual Defamation.

1 Rol. Abr. 44. *Turnam* v. *Thorn.* Cro. Car. 229, 261. 50. But it is actionable to charge any Perſon with keeping a Bawdy-houſe; becauſe keeping a Bawdy-houſe is an Offence puniſhable at the Common Law.

1 Rol. Abr. 62. *Lee* v. *Stradwick.* 51. An Action lies for publiſhing theſe Words of a Brewer, *his Beer is unwholeſome*; for a Brewer that ſells unwholeſome Beer is puniſhable; and it ſhall be intended to mean the Beer which he ſells.

Owen 150. *Cuddington* v. *Wilkins.* 52. It is actionable to charge a Perſon with having been guilty of a Crime, of which he has upon a Trial been acquitted.

Hob. 81. *Cuddington* v. *Wilkins.* 53. An Action lies for charging a Man with having been guilty of a Crime, of which he has been convicted and afterwards pardoned; for the Pardon takes away the Guilt as well as the Puniſhment.

54. It

54. It has been holden, that no Action lies for publiſhing theſe Words of *J. S. he is a Regrator*; becauſe the Offence of regrating does not render a Perſon liable to the Loſs of Life or Limb. 2 Show. 32. *Scoble* v. *Lee.*

55. It has likewiſe been holden, that an Action does not lie for publiſhing theſe Words of *J. S. he has ſtolen my Lord* Shaftſbury's *Deer*; becauſe the Puniſhment for this Offence is only Impriſonment. And by *Holt* Ch. J. An Action does not lie for publiſhing Words, whereby a Perſon is charged with having been guilty of an Offence, unleſs the Puniſhment for the Offence be of an infamous Kind, for he may be fined and impriſoned for a Treſpaſs. Salk. 696. *Turner* v. *Ogden.* Hil. 3 Ann.

56. The firſt of theſe Caſes is not Law, or at leaſt not in the Latitude there laid down; for by the 5 *Ed.* 6. *cap.* 14. a Regrator is liable to be ſet in the Pillory for the third Offence; and it is contrary to the Tenor of many Caſes, of equally good Authority with this, to ſay, that only Words importing the Charge of a Crime, which may be puniſhed with the Loſs of Life or Limb, are actionable.

57. And the latter Caſe does not ſeem to be Law; for by a Statute many Years antecedent thereto it is ordained, that a Perſon guilty of ſtealing Deer ſhall, in Default of paying the Penalty of 30 *l.* be ſet in the Pillory. 3 W. & M. c. 10.

58. But taking the Puniſhment for ſtealing Deer to have been, at the Time this Caſe was determined, only Impriſonment, the Caſe does not appear to be Law; in as much as it does not coincide with the Principle on which Actions for Words in themſelves actionable are founded; which is, that Words, which imply a Damage, are in themſelves actionable; and, ſurely, to charge a Perſon with having been guilty of an Offence, for which he may be impriſoned, does imply a Damage, for which he ought to have Satisfaction.

59. The Doctrine of this Caſe is moreover contrary to what is laid down in the three following Caſes, and in many others which might be mentioned.

60. In one of theſe it is laid down, that an Action lies for any Words which import the Charge of a Crime, for which the Perſon charged may be indicted. Freem. 46. *Mayne* v. *Diggle.*

61. In another it is laid down, that an Action lies, for charging a Woman with being the Mother of a Baſtard, in caſe the Baſtard has been chargeable to a Pariſh; becauſe ſhe is liable to ſuffer Impriſonment, under the 18 *Eliz. cap.* 3. Salk. 694, 696. 1 Rol. Abr. 33.

62. In the other it is laid down, that an Action lies for any Words, by reaſon of which the Perſon of whom they are publiſhed may be impriſoned. 2 Ventr. 266. *Walden* v. *Mitchell.*

*63. No Action lies for publiſhing theſe Words of *J. S. he is a Rogue, a Villain*, or *a Varlet*; for theſe, and Words of the like Kind, are to be conſidered as Words of Heat. *Page 488 4 Rep. 15. *Stanhope* v. *Blith.* Str. 304.

64. But an Action lies for publiſhing theſe Words of *J. S. he is a Rogue of Record*; for a Perſon cannot be a Rogue of Record, unleſs he ſtand convicted upon Record. 1 Rol. Abr. 43. *Alleſly* v. *Mawdit.*

65. No Action lies for publiſhing theſe Words of *J. S. he is a cozening Knave.* Cro. Jac. 427. *Brunkard* v. *Segar.*

66. So none lies for publiſhing theſe Words, *he is a ſcurvy Fellow.* 1 Rol. Abr. 43. *Fiſher* v. *Atkinſon.*

2. Words which import the Charge of having a contagious Diſtemper.

67. Man being formed for Society, and ſtanding in almoſt conſtant need of the Advice, Comfort and Aſſiſtance, of his fellow Creatures, it is highly reaſonable, that any Words, which import the Charge of having a contagious Diſtemper, ſhould be in themſelves actionable; becauſe all prudent Perſons will avoid the Company of a Perſon having ſuch Diſtemper.

68. It makes no Difference, whether the Diſtemper be owing to the Viſitation of God, to Accident, or to the Indiſcretion of the Party therewith afflicted; for in every one of the Caſes, the being avoided, from whence the Damage ariſes, is the Conſequence.

Cro. Jac. 144. 69. An Action lies for publiſhing theſe Words of *J. S. he is a Leper*.

Taylor v. *Perkins*. 1 Rol. Abr. 44.

1 Rol. Abr. 43. 70. So it does for publiſhing theſe Words, *he has the great Pox*.

Milner v. *Reeve*.

12 Mod. 248. 71. So it does for calling a Woman *pockey Whore*.

Whitfield v. *Powell*.

3. Words which are diſgraceful to a Perſon in an Office.

72. As any Words publiſhed of a Perſon, who is in the Enjoyment of an Office of Honour, Profit or Truſt, which import a Charge of Unfitneſs to diſcharge the Duty of the Office, muſt be prejudicial to that Perſon; ſuch Words are in themſelves actionable.

Salk. 695. *How* v. *Prynn*. *Ib.* 698. 1 Rol. Abr. 65. 73. If a Perſon be in an Office of Profit, Words which, import a Charge of Inability, are as well actionable as thoſe which imply a Want of Integrity; but if the Office be an Office of Honour, no Action lies, unleſs the Import of the Words be a Charge of Want of Integrity; for, although a Perſon cannot help his Want of Ability, he may his Want of Integrity.

Cro. Jac. 557. *Fleetwood* v *Curl*. Hetl. 167. 1 Lev. 280. Ld. Raym. 1360. Stra. 618. 74. Wherever Words in themſelves not actionable become ſo, by being publiſhed of a Perſon in an Office, it muſt appear from the Words themſelves, or from the Pleadings, that they were publiſhed concerning him as an Officer; for the Ground of ſuch Words being actionable is the Prejudice to a Perſon in his Office.

1. *To a Perſon in a judicial Office.*

Hetl. 167. *Alleſton* v. *Moor*. 75. An Action lies for publiſhing theſe Words of a Lord Chief Baron, *My Lord Chief Baron cannot hear of one Ear*.

Hob. 140. *Thornton* v. *Johnſon*. 1 Rol. Abr. 59. 76. An Action lies for publiſhing theſe Words of a Juſtice of the Peace, *He is a common Barreter*.

*Page 489 1 Rol. Abr. 57. * 77. So it does for publiſhing theſe Words, *He is a corrupt Man*.

Biſhop of Coventry v. *Wortly*.

78. So it does for publiſhing theſe Words, *He is a forſworn Juſtice.* 1 Lev. 280. *Carne* v. *Oſgood.*

79. So it does for publiſhing theſe Words, *He is a falſe Juſtice.* Cro. Eliz. 358. *Wright* v. *Moorhouſe.*

80. So it does for publiſhing theſe Words, *He is but a half-eared Juſtice, he will hear but one Side.* Cro. Car. 223. *Maſham* v. *Bridge.*

81. So it does for publiſhing theſe Words, *I have often been with him for Juſtice, but never could get any at his Hand but Injuſtice.* Cro. Car. 14. *Iſham* v. *York.*

82. So it does for publiſhing theſe Words, *He did for Malice and Spleen many Times wreſt the Law, and pervert Juſtice to ſerve his own Turn.* Cro. Jac. 240. *Beaumond* v. *Haſtings.*

83. So it does for publiſhing theſe Words, *He is a debauched Man, and not fit to be a Juſtice of Peace.* 1 Rol Abr. 48. *Hammond* v. *Kingſmill.*

84. So it does for publiſhing theſe Words, *He covereth and hideth Felonies, and is not worthy to be a Juſtice of Peace.* 4 Rep. 16. *Stuckley* v. *Bulhead.*

85. So it does for publiſhing theſe Words, *He is a Rogue, a Raſcal, a Villain, and a Liar.* 8 Mod. 270. *Aſton* v. *Blagrave.* Ld. Raym. 1369.

86. But no Action lies for publiſhing theſe Words of a Juſtice of Peace, *He is an Aſs, and a Beetle-headed Juſtice*; becauſe theſe Words import only Want of Ability. Salk. 695. *How* v. *Prinn.*

87. No Action lies for publiſhing theſe Words of a Juſtice of Peace, *He is a Bloodſucker*; for it cannot be intended, what Blood he ſucked. Cro. Eliz. 306. *Hilliard* v. *Conſtable.*

88. If the actionable Words publiſhed of a Juſtice of Peace, appear to have been publiſhed concerning his Office of a Juſtice of the Peace, it is not neceſſary to alledge, that at the Time of publiſhing the Words there was a Colloquium concerning his Office. 1 Lev. 280. *Carne* v. *Oſgood.*

89. Wherever Words, for publiſhing of which an Action would lie, are ſpoken to a Juſtice of Peace, when he is in the Execution of the Office of Juſtice of the Peace, the Speaker may be proceeded againſt by Indictment or Information. Stra. 420, 1158. Comb. 46, 65, 66.

90. In an Action brought by *J. S.* who had pronounced a Sentence as Judge of a Court of Admiralty, for publiſhing theſe Words, *the ſaid Sentence was given corruptly*, it was holden, that the Action lay; although it was not averred, that the Sentence was given corruptly by *J. S.* and by the Court: It muſt be intended, that the Words were publiſhed of *J. S.* who gave the Sentence. Cro. Eliz. 305. *Cæſar* v. *Curſeny.*

2. *To a Perſon in an Office of Truſt.*

91. An Action lies for publiſhing theſe Words of a Perſon in a publick Office, *He is a common Barretor.* Hob. 140. *Thornton* v. *Jobſon.* 1 Rol. Abr. 59.

* 92. So it does for publiſhing theſe Words of a Commiſſioner for examining Witneſſes in a Cauſe in the Court of Chancery, *He is a corrupt Man.* * Page 490 Cro. Jac. 65. *Moor* v. *Foſter.*

1 Rol. Abr. 56. *Moor* v. *Foſter.*

93. So it does for publiſhing theſe Words of ſuch Commiſſioner, *He hath taken Bribes to favour one of the Parties.*

1 Rol. Abr. 57. *Parker* v. *Large.*

94. So it does for publiſhing theſe Words of ſuch Commiſſioner, *He hath altered the Depoſitions that were taken.*

1 Rol. Abr. 58. *Strode* v. *Holmes.* Cro. Eliz. 358.

95. If theſe Words are publiſhed of a Churchwarden, *He hath cheated the Pariſh*, an Action lies; for the Words import a Miſbehaviour in an Office of Truſt.

1 Rol. Abr. 56. *Fowel.* v. *Cowe.*

96. If theſe Words are publiſhed of the Steward of a Court, *He hath wronged me in his Court, and hath not performed his Office according to Law*, an Action lies; a Charge of great Miſbehaviour in an Office of Truſt being thereby imported.

Cro. Car. 480. *Seaman* v. *Bigge.*

97. If theſe Words are publiſhed of a Bailiff, or of any Servant who is to account for Money received, *He is a cozening Knave to the Perſon who employs and confides in him*, an Action lies; for the Words amount to a Slander in an Office of Truſt.

4. Words which are diſgraceful to a Perſon of a Profeſſion or Trade.

98. Words in themſelves not actionable become ſo, whenever any Perſon is thereby diſgraced in his Profeſſion or Trade; for although it may be difficult to prove the ſpecial Damage received from them, nothing is more clear, than that ſuch Words have a direct and certain Tendency, to injure the Perſon of whom they are publiſhed.

2 Saund. 307. Stra. 696, 1169. Cro. Jac. 557. Salk. 694.

99. But in all Actions for Words of this Kind, it muſt appear from the Words themſelves, or from the Pleadings, that at the Time of publiſhing the Words there was a Colloquium concerning the Profeſſion or Trade of the Perſon of whom they were publiſhed.

1. *To a Clergyman.*

All 63. *Dodd* v. *Robinſon.*

100. An Action lies for publiſhing theſe Words of a Clergyman, *He is a Drunkard*; Drunkenneſs being an Offence for which a Clergyman is liable to be deprived of his Preferment.

3 Lev. 17. *Cranden* v. *Walden.* 1 Rol. Abr. 58.

101. So it does for publiſhing theſe Words, *He preacheth nothing but Lies and Malice in the Pulpit.*

Comb. 253. *Pocock* v. *Naſh.*

102. So it does for publiſhing theſe Words, *He is a Rogue and a Dog, and will never be good till he is three Feet under Ground, I had rather my Son ſhould make Hay on a* Sunday, *than go to hear him preach.*

Stra. 946. *Muſgrave* v. *Bovey.*

103. So it does for publiſhing theſe Words, *He is an old Rogue, and a contemptible Fellow, and hated and deſpiſed by every Body.*

2. *To a Phyſician or a Surgeon.*

2 Ventr. 28. *King* v. *Lake.*

104. If a Barriſter bring an Action for the Publication of Words, which are diſgraceful to him in his Profeſſion, it muſt be averred, that, at the Time of publiſhing the Words, he was a practiſing Lawyer; for, unleſs he were at that Time a practiſing Lawyer, he could not be injured by the Words.

105. There

* 105. There has been, perhaps, no Determination upon the Point; but it seems equally necessary, that, if a Physician bring an Action for the Publication of Words, which are disgraceful to him in his Profession, he should aver, that, at the Time of publishing the Words, he was a practising Physician. * Page 491

106. An Action lies for publishing these Words of a Doctor of Physick, *He is no Scholar*, without averring, that, at the Time of publishing the Words, there was a Colloquium concerning his Profession; because no Man can be a good Physician, unless he be a Scholar. 1 Rol. Abr. 54. *Cawdry* v. *Chickley*. Cro. Car. 270.

107. So it does for publishing these Words, *He is an Empirick and Mountebank*. 1 Rol. Abr. 54. *Goddart* v. *Haselfoot*.

108. So it does for publishing these Words, *He is a Quacksalver*. 1 Rol. Abr. 54. *Allen* v. *Eaton*.

109. It has been holden, that no Action lies for publishing these Words of a Physician, *He hath killed a Patient with Physick*, unless it be added, that he did it knowingly and willingly; for, as a Physician may mistake a Case, and undesignedly give improper Medicines, these Words are no Disgrace to him in his Profession. Cro. Eliz. 620. *Poe* v. *Mounford*. M. 40 Eliz.

110. This Determination was contrary to the Opinion of *Clinch* J. and the Reason upon which it is founded is not apparent. It is certainly a Disgrace to a Physician in his Profession, to have it believed, that a Patient died by taking improper Medicines, prescribed by him; and, by comparing this Case with some later Cases, it seems clear, that Words, which imply Ignorance in the Art a Person professes, are actionable.

111. It is laid down in one Case, that an Action does as well lie for publishing Words, which import a Want of Knowledge in a Person of a Profession, as for Words which import a Want of Fidelity. Win. 40. *Auditor Curl*'s Case. M. 20 Jac.

112. In another Case it is laid down, that an Action lies for publishing these Words of a Surgeon, who had *J. S.* under his Care, *He killed J. S.* although it be not averred, that he did it knowingly or voluntarily. Hetl. 69. *Watson* v. *Vanderlash*, Mich. 3 Car.

113. And in another Case it is laid down, that an Action lies for publishing these Words of an Apothecary, *He killed a Patient with his Physick*. 11 Mod. 221. *Tutler* v. *Alwin*, Pasch. 8 Ann.

114. No Action lies for publishing these Words of a Surgeon, *He poisoned the Wound of J. S.* for it might be proper, in order to cure the Wound, to do this. Hetl. 175. *Suego*'s Case.

115. But if these Words are published of a Surgeon, *He poisoned the Wound of his Patient for Gain of Money*, an Action lies. 1 And. 268. Ca. 277.

3. *To a Barrister or an Attorney at Law.*

116. If a Barrister bring an Action for the Publication of Words, which are a Disgrace to him in his Profession, he must aver, that, at the Time of publishing the Words, he was a practising Lawyer; for if he were not at that Time a practising Lawyer, he could not be injured by the Words. 2 Ventr. 28. *King* v. *Lake*. Styles 231.

117. A Barrister, who brings such Action, must also aver, that, at the Time of publishing the Words, he was *homo conciliarius & eruditus in Lege*; it not being sufficient to aver, that he was *homo eruditus in Lege*. Poph. 207. *Cary*'s Case.

118. An Action lies for publishing these Words of a Barrister, *He has deceived his Client, and revealed the Secrets of his Cause*. Co. Entr. 22. *Snag* v. *Gray*. 1 Rol. Abr.

2 Ventr. 28. *King* v. *Lake.* 119. So it does for publiſhing theſe Words, *He will give you vexatious Council, and then milk your Purſe and fill his own Pocket.*

1 Rol Abr. 54. *Banks* v. *Allen.* 120. So it does for publiſhing theſe Words, *He is no Lawyer, he cannot make a Leaſe; they are Fools that go to him for Law.*

*Page 492 Cro. Car. 382. *Peard* v. *Johns.* 1 Rol. Abr. 55. * 121. So it does for publiſhing theſe Words, *He is a Dunce, and will get nothing by his Profeſſion.*

1 Lev. 297. *Powell* v. *Jones.* 122. An Action lies for publiſhing theſe Words of an Attorney at Law, *He cannot read a Declaration.*

Sid. 327. *Baker* v. *Morſue.* 123. So it does for publiſhing theſe Words, *He has no more Law than Mr. C.'s Bull, or no more Law than a Gooſe.*

Cro. Eliz. 589. *Martyn* v. *Barling.* 124. So it does for publiſhing theſe Words, *He will overthrow his Client's Cauſe.*

4 Rep. 16. *Byrchley's* Caſe. 125. So it does for publiſhing theſe Words, *He is well known to be a corrupt Man, and to deal corruptly.*

Hetl. 167. *Allſton* v. *Moor.* 1 Rol. Abr. 53. 126. So it does for publiſhing theſe Words, *He is a Cheat.*

1 Rol. Abr. 52. *Shaw* v. *Wakeman.* 127. So it does for publiſhing theſe Words, *He is a Rogue.*

Cro. Eliz. 171. *Proud* v. *Hawes.* Hob. 140. 128. So it does for publiſhing theſe Words, *He is a common Barretor.*

1 Rol. Abr. 52. *Nicholls* v. *Webb.* 1 Freem. 277. 129. So it does for publiſhing theſe Words, *He is a Knave.*

1 Rol. Abr. 55. *Stanley* v. *Beſwell.* 130. So it does for publiſhing theſe Words, *He is an Extortioner, and one told me he cozened him of ten Pounds in a Bill of Coſts*; it being contrary to the Oath of an Attorney, to be guilty of male Practice.

1 Rol. Abr. 55. *Smith* v. *Andrews.* Hob. 117. 131. So it does for publiſhing theſe Words, *He ſtirreth up Suits, and once promiſed me, that if he did not recover in a Cauſe for me, he would take no Charges of me*; becauſe ſtirring up Suits is Barretry, and undertaking a Suit no Purchaſe no Pay is Maintenance.

Stra. 1138. *Hardwick* v. *Chandler.* 132. So it does for publiſhing theſe Words, *He is a Rogue for taking your Money, and has done nothing for it, he is no Attorney at Law, and dares not appear before a Judge, what ſignifies going to him, he is only an Attorney's Clerk and a Rogue, he is no Attorney.*

Hob. 117. *Boxe* v. *Barnaby.* 1 Rol. Abr. 55. 133. So it does for publiſhing theſe Words, *He is a common Maintainer of Suits, and a Champertor, and I will have him thrown over the Bar next Term.*

Win. 40. *Auditor Curl's* Caſe. *Jo.* 90. 134. It has been holden that an Action does not lie for publiſhing theſe Words of an Attorney, *He made falſe Writings*; becauſe theſe Words, it not being the Buſineſs of an Attorney at Law to make Writings, are no Diſgrace to him in his Profeſſion.

135. But it is probable, that an Action would at this Day lie, for publiſhing ſuch Words of an Attorney; for, although it may not have been ſo heretofore, it is at this Day uſual for Attorneys at Law to make Writings.

4. *To*

4. *To a Perſon profeſſing an Art.*

136. An Action lies for publiſhing theſe Words of a Midwife, *Many have periſhed for her Want of Skill.* Cro. Car. 211. *Hower's* Caſe.

137. *A.* ſaid to *B.* who intended to ſend his Son to be under the Care of *C.* a Schoolmaſter, *Put not your Son to him, for he will come away as great a Dunce as he went.* It was holden, that the Words were actionable. Hetl. 71 *Watſon* v. *Vanderlaſt.*

138. If theſe Words are publiſhed of a Land-Surveyor, *He is a cheating Knave*, an Action lies; for, as Land-Surveying is an Art wherein Skill is required, theſe Words touch a Land-Surveyor in his Profeſſion, and Means of getting his Living. Cro. Jac. 504. *Blunden* v. *Euſtace.*

5. *To a Tradeſman.*

139. It is in the general true, that an Action does not lie for publiſhing Words, not in themſelves actionable, of a Tradeſman; unleſs it be averred, that at the Time of publiſhing the Words, there was a Colloquium concerning his Trade. Salk. 694. *Savage* v. *Robery.* 2 Saund. 307. Latch 114. 1 Lev. 115, 250. 2 Lev. 62. Stra. 696, 1169. Ld. Raym. 1417.

140. But if it appear, from the Words publiſhed of a Tradeſman, that they were publiſhed concerning his Trade, it is not neceſſary to aver, that, at the Time of publiſhing them, there was a Colloquium concerning his Trade. 1 Lev. 115, 250. 2 Lev. 62. 5 Mod. 398. Stra, 696. Ld. Raym. 1417.

* 141. If theſe Words are publiſhed of a Tradeſman, *Have a Care of him, do not deal with him, he is a Cheat, he has cheated all the Farmers at E. and now he is come to cheat at* F. an Action lies, although it be not averred, that, at the Time of publiſhing them, there was a Colloquium concerning his Trade; it being apparent, from the Words, that they were publiſhed concerning his Trade. * Page 493 2 Lev. 62. *Reeve* v. *Holgate.*

142. So it does for publiſhing theſe Words of a Tradeſman, *He is a ſorry pitiful Fellow, and a Rogue:* he compounded his Debts at ſix Shillings in the Pound; although it be not averred, that, at the Time of publiſhing them, there was a Colloquium concerning his Trade; for theſe Words, publiſhed of a Tradeſman, muſt greatly leſſen his Credit, and be very prejudicial to him. Ld. Raym. 1480. *Stanton* v. *Smith.*

143. In an Action upon the Caſe for publiſhing a Libel, the Plaintiff declared, that he was a Gunſmith, and that, it having been inſerted in the *Craftſman*, that he had the Honour to preſent the Prince of *Wales* with a Gun two Feet ſix Inches long, which would ſhoot as far as one a Foot longer, and to kiſs his Royal Highneſs's Hand, upon being appointed his Gunſmith, the Defendant, with Intent to ſcandalize him in his Trade, publiſhed an Advertiſement in theſe Words, "Whereas there was an Ac-"count in the *Craftſman* of *John Harman*, Gunſmith, making Guns two "Feet ſix Inches long to exceed any made by others of a Foot longer, (with "whom it is ſuppoſed he is in Fee), this is to adviſe all Gentlemen to be "cautious, the ſaid Gunſmith not daring to engage with any Artiſt in Town, "nor ever did make ſuch an Experiment (except out of a Leather Gun) as "any Gentleman may be ſatisfied of at the *Croſs Guns* in *Long-Acre.*" It was holden, that an Action lay for this Advertiſement. Stra. 898. *Harman* v. *Delany.*

144. If

Cro. Car. 282. *Collis* v. *Malin.*

144. If an Action be brought, for publiſhing Words of a Tradeſman concerning his Trade, it muſt be averred, that at the Time of publiſhing them he was in Trade; for, if he were not at that Time in Trade, his Credit could not be hurt by the Words.

Cro. Jac. 222, *Tuthill* v. *Milton.*

145. In an Action for publiſhing Words of a Tradeſman, upon the firſt Day of *May*, it was averred, that, for five Years preceding the firſt Day of *May*, the Plaintiff had exerciſed the Trade of a Draper. It was objected, that it ought to have been averred, that he did exerciſe the Trade on the Day the Words were publiſhed; but by the Court: It is well enough, for it ſhall be intended that he did.

1 Lev. 115. *Terry* v. *Hooper.*

146. It was holden, that an Action lies for publiſhing theſe Words of a Limeburner, *He is a cheating Knave*; and by the Court: If ſlanderous Words are publiſhed, concerning the Trade of a Tradeſman, it is not material of how low a Kind the Trade is.

Cro. Car. 585. *Squire* v. *Johns.*

147. An Action lies for publiſhing theſe Words of any Perſon who ſeeks his Living by buying and ſelling, *He is a Bankrupt Knave, and not worth three Halfpence.*

Cro. Car. 31. *Crumpe* v. *Barne.*

148. An Action lies for publiſhing theſe Words of a Shoemaker, *He is a Bankrupt*; for, as the Gain of a Shoemaker does not ariſe from manual Labour only, but great Part thereof from buying Leather, and ſelling it again, when manufactured into Shoes, he may be a Bankrupt.

Sid. 299. *Emmerſon's* Caſe.

149. If a Perſon bring an Action for the Publication of theſe Words of him, *He is a Bankrupt*, he muſt aver, that he ſeeks his Living by buying and ſelling; for it is not ſufficient to aver, that he gets divers Gains by buying and ſelling.

Ld. Raym. 1480. *Stanton* v. *Smith.*

150. An Action lies for publiſhing theſe Words of a Tradeſman, *He is a ſorry pitiful Fellow, and a Rogue, and compounded his Debts at five Shillings in the Pound.*

*Page 494 Carth. 330. *Cook* v. *Tucker.*

* 151. An Action lies, for publiſhing theſe Words of a Tradeſman, *He is a pitiful Fellow, and not able to pay his Debts.*

1 Rol. Abr. 59. *Porte* v. *Cook.*

152. So it does for publiſhing theſe Words, *He takes Goods of his Cuſtomers, and pawns them, and is not a Man to be truſted.*

1 Rol Abr. 60. *Smith* v. *Rookes.*

153. So it does for publiſhing theſe Words, *He is not able to pay ſixpence in the Pound to his Creditors of their Debts.*

1 Rol. Abr. 63. *Fairbank* v. *Maſon.*

154. An Action lies for publiſhing theſe Words of a Leatherſeller, *He hath cozened you; he ſold you Lamb ſkins for Shamois ſkins; do not go to him, for he will cozen you*, the Words being a Charge of a Fraud in the Courſe of Trade.

1 Rol. Abr. 62. *Peck's* Caſe.

155. An Action lies for publiſhing theſe Words of a Goldſmith, *He is a cozening Knave, he ſold a Copper Chain for a Gold one.*

Ld. Raym. 1417. *Ludwell* v. *Hole.*

156. An Action lies for publiſhing theſe Words of a Tradeſman, *He is a cheating old Rogue, and has cheated the Fatherleſs and the Widow.*

1 Rol. Abr. 62. *Bray* v. *Haynes.*

157. An Action does not lie for publiſhing theſe Words of *J. S. He cozened* J. N *in the Sale of Barley*, unleſs it be averred, that *J. S.* did ſeek his Living by buying and ſelling Barley; for, if he did not, he could not be injured by the Words.

1 Rol. Abr. 55. *Ticknell* v. *Snelling.*

158. If theſe Words are publiſhed of a Blackſmith, *He cozened* J. S. *in a Tire of Wheels*, an Action does not lie; for it might be in the Price; and it may be ſaid of every Tradeſman, who has ſold a Thing for more than it is Worth, that *he cozened in the Price of that Thing.*

159. An

159. An Action does not lie for publiſhing theſe Words of a Carpenter, *He has charged* J. S. *for forty Day's Work, and received the Money for the Work, that might have been done in ten Days, and he is a Rogue for his Pains.* Stra. 797. *Lancaſter* v. *French.*

(C) Some Words which become actionable by reaſon of the Damage received from them.

1. IF *J. S.* have received a temporal Damage, from the Publication of theſe Words of him, *He is a Baſtard*, an Action lies; although the Words, being only a ſpiritual Defamation, are not in themſelves actionable. 4 Rep. 17. *Ann Davis*'s Caſe.

2. In an Action upon the Caſe the Plaintiff declared, that he was Heir apparent to his Father, who was ſeiſed in Fee of Land of the Value of forty Pounds a Year; that it was the Intention of his Father to ſuffer this Land to deſcend upon him; and that the Defendant, with an Intent to cauſe the Diſinheritance of the Plaintiff, publiſhed theſe Words of him, *He is a Baſtard:* By reaſon whereof, the Plaintiff's Father had ſignified a Deſign of diſinheriting him. It was holden, that the Actions lay on Account of the temporal Damage. 1 Rol. Abr. 38. *Humphries* v. *Strutfield.*

3. In an Action upon the Caſe the Plaintiff declared, that Land was ſettled upon his Grandfather and the Heirs of his Body; that his Father left divers Sons, of which he is the youngeſt; that his elder Brothers are living; that *J. S.* being about to purchaſe the Land, did offer him a Sum of Money to join in a Conveyance thereof; and that the Defendant publiſhed theſe Words of him, *He is a Baſtard:* By reaſon whereof, *J. S.* did now refuſe to give him the Money, for joining in a Conveyance of the Land, which he had before offered. Judgment being given for the Plaintiff, a Writ of Error was brought in the Exchequer Chamber; in which it was aſſigned for Error, that, as the Plaintiff had not at the Time of publiſhing the Words any Title to the Land, the Action does not lie. The Judgment was affirmed; and by the Court: Although the Plaintiff had not at the Time of publiſhing the Words any Title to the Land, he is in Poſſibility inheritable thereto. It does moreover appear, that by reaſon of the Publication of the Words, *J. S.* does now refuſe to give the Money to the Plaintiff, for joining in a Conveyance of the Land, which he did before offer; and conſequently the Plaintiff has ſuſtained a preſent Damage. Cro. Jac. 213. *Vaughan* v. *Ellis.*

4. In an Action upon the Caſe the Plaintiff declared, that he was ſeiſed of the Manor of *A.* which was purchaſed by him in Fee of *George* Lord *Audley*, that he was in Treaty with *J. S.* for a Leaſe of the Manor at the Rent of one hundred Pounds a Year; and that the Defendant, knowing of the Treaty, publiſhed theſe Words, *I have a Leaſe of the Manor of A. for ninety Years*, and did moreover publiſh a Leaſe for ninety Years, ſuppoſed to be made by the Grandfather of *George* Lord *Audley* to *Edward Dickenſon*, the Defendant's late Huſband; which he affirmed to be a good Leaſe, and offered to ſell as ſuch; whereas the Truth is, that the Leaſe was counterfeited by her Huſband, and that ſhe knew the Leaſe to be a counterfeit Leaſe: By reaſon of which Words, and the Publication of the Leaſe, *J. S.* did not proceed in the Treaty for a Leaſe. The Defendant by her Plea traverſed, that ſhe knew the Leaſe to be a counterfeit Leaſe. Upon a Demurrer to this Plea, it was holden, that, as the Defendant's Knowledge of the Leaſe being a counterfeit Leaſe, is 4 Rep. 18. *Gerrard* v. *Mary Dickenſon.*

is not traverſable, it muſt be intended, that ſhe knew the Leaſe to be a counterfeit Leaſe. It was moreover holden, that the Action lay; becauſe the Treaty with *J. S.* for a Leaſe was broken off by the Defendant's Words, and by her Publication of the Leaſe, as a good Leaſe, which ſhe knew to be a counterfeit Leaſe.

2 Leon. 111. *Williams* v. *Linford.*

5. In an Action upon the Caſe the Plaintiff declared, that he was in Treaty with *J. S.* for his Manor of *D.* and that during the Treaty, the Defendant ſpoke theſe Words to *J. N. Williams is worth nothing, and do you think the Manor of* D. *is his? it is but a Compact between his Brother* Thomas *and him:* By reaſon whereof *J. S.* was deterred from proceeding in the intended Purchaſe. A Queſtion ariſing, Whether, as the Words were not ſpoken to *J. N.* the Action did lie? It was holden that it did; and by the Court: If the Title of a Perſon to Land be ſo ſlandered by Words ſpoken, that he cannot make Sale thereof, it is not material, whether Words were ſpoken to the Party, who was about to purchaſe the Land, or to a Stranger.

4 Rep. 18. *Gerrard* v. *Mary Dickenſon.*

6. An Action does not lie for the Publication of Words, whereby the Right of a Perſon to Land is denied; although the Sale of the Land be thereby prevented; in caſe the Speaker did, at the Time of publiſhing the Words, ſay, that he had himſelf a Right to the Land, notwithſtanding the Speaker had not in Truth any Right thereto; for if an Action did in ſuch Caſe lie, no Perſon could lay Claim to Land, or commence a Suit for the Recovery thereof, without being liable to an Action.

Cro. Jac. 165. *Earl of Northumberland* v. *Burt.*

7. But if, during a Treaty for the Sale of Land by *J. S.* Words denying the Right of *J. S.* to the Land are publiſhed by *J. N.* whereby the Sale is prevented, an Action lies, notwithſtanding *J. N.* did at the Time of publiſhing the Words ſay, that *A. B.* had a Right to the Land; for, although it were lawful for *J. N.* to ſay, that he had himſelf a Right to the Land, it was not lawful for him to ſay, that *A. B.* had a Right thereto.

4 Rep. 17. *Ann Davis's* Caſe.

8. An Action does not lie for publiſhing theſe Words of a Clergyman, *He is an Heretic*; the Words being only a ſpiritual Defamation: But if it be averred, that by reaſon of the Words he loſt a Benefice, to which he would otherwiſe have been preſented, an Action lies for the temporal Damage.

Lit. Rep. 193 *Bridge* v. *Langford.*

9. An Action does not lie for publiſhing theſe Words of a ſingle Woman, *She is a burſten bellied Queen, and her Guts hang down to her Garters*; the Words not being in themſelves actionable: But if it be averred, that by reaſon of the Words ſhe loſt a Marriage, an Action lies.

4 Rep. 17. *Ann Davis's* Caſe.

10. An Action does not lie for publiſhing Words of a ſingle Woman, which amount to a Charge of Incontinence; the Words being only a ſpiritual Defamation: But if it be averred, that by reaſon of the Words ſhe loſt a Marriage, an Action lies for temporal Damage.

Cro. Jac. 323. *Matthew* v. *Croſs.* Latch 218. Cro. Jac. 422.

11. An Action does not lie for publiſhing theſe Words of *J. S. He is a Whoremaſter*; *for he lay with* Brown's *Wife, and had to do with her againſt a Chair*; the Words being only a ſpiritual Defamation: But if it be averred, that by reaſon of the Words *J. S.* loſt a Marriage, an Action lies for the temporal Damage; a Loſs of Marriage being as great a Damage to a Man as it is to a Woman.

1 Rol. Abr. 36. *Norman* v. *Symons.*

12. It was found by a ſpecial Verdict, that the Defendant had preferred a Libel in the ſpiritual Court againſt the Plaintiff, in which ſhe charged him with coming often to her in the Night under a Pretence of being a Suitor to her for Marriage, and lying with her, and getting her with Child; that ſhe afterwards falſely and injuriouſly, at the Quarter-Seſſions, charged him with being the Father of a Child begotten upon her

her Body; and that by reaſon thereof all Perſons of good Credit did, and ſtill do, refuſe to ſuffer any Woman of their Daughters or Relations to be joined with him in lawful Wedlock. It was holden, that as it was not found, that the Plaintiff had loſt a particular Marriage, the Action did not lie; the Charge, that all Perſons of good Credit refuſed to let him marry into their Families, being too general.

13. In an Action for publiſhing theſe Words of a ſingle Woman, *She was with Child by* J. S. it was averred, that by reaſon thereof ſhe incurred the Diſpleaſure of her Parents, and was in Danger of being turned out of Doors. It was holden, that the Action did not lie; in as much as, the Words are not in themſelves actionable, and it is not averred, that the Plaintiff loſt a Marriage. 1 Lev. 261. *Barnes* v. *Studd.*

14. In this Caſe, the Caſe of *Medhurſt* v. *Balam.* 1 *Roll. Abr.* 35. in which an Action had been holden to lie, for publiſhing theſe Words of a ſingle Woman, *She is with Child, and has taken Phyſick for it*, by reaſon whereof ſhe loſt her Reputation and the Friendſhip of her Neighbours, was denied to be Law.

(D) Certain Circumſtances, which are to be regarded in the Conſtruction of Words.

1. The Time when the Words were publiſhed.

1. AS the ſame Words are not at all Times underſtood in the ſame Senſe, Words which were once actionable may not now be ſo; and on the other Hand an Action may now lie, for Words, for which an Action would not heretofore have been.

2. The Conſequence to an Agent of doing the ſame Thing may, at leaſt in the Eye of human Law, which in puniſhing an Action conſiders only how far Society is thereby prejudiced, at different Periods of Time be very different. An Act of Witchcraft, heretofore a capital Offence, is by a late Statute declared to be no Offence; and many Offences are at this Day Felonies, which were formerly no more than Treſpaſſes. It follows, that the lying of Action for the Publication of Words, which import the Charge of an Offence, does in a great Meaſure, if not altogether, depend upon the State of the Law as to that Offence, at the Time they were publiſhed.

* 3. The Senſe of the Words, for which Action is brought, at the Time they were publiſhed, is not only to be regarded, in conſtruing them; but the Rule of conſtruing thoſe Words, which did at that Time prevail, is likewiſe to be regarded. *Page 497.

4. In ancient Times, Actions for Words were very rare; an Action of this Kind being ſeldom brought, except the Slander was great, and of dangerous Conſequence. 4 Rep. 15. *Stanhope* v. *Blith.*

5. Afterwards, Actions for Words were brought ſo frequently, that the Judges, in Conformity to a very ſenſible Maxim, *Malitiæ hominum eſt obviandum*, made it a Rule, to conſtrue the Words, *in mitiori ſenſu.*

6. As the Miſchief, notwithſtanding this Rule was carried very far, did continue it was declared by a Statute, "That in an Action upon the Caſe "for ſlanderous Words, if the Jury do find or aſſeſs the Damages under "forty Shillings, the Plaintiff ſhall recover only ſo much Coſts, as the "Damages found or aſſeſſed amount unto." 21 Jac. c. 16. Coſts

7. After

7. After the making of this Statute, Actions upon the Caſe for Words grew leſs frequent; for, as the Judges, for ſome Time, adhered to the Rule of conſtruing the Words *in mitiori ſenſu*, the injured Party, inſtead of obtaining Satisfaction, was frequently put to the Expence of paying his own Coſts.

8. This being perceived, ſuch Licenciouſneſs, both in Speaking and Writing, prevailed, that it became neceſſary for the Judges, in Conformity to the Maxim, on which the contrary Practice had been eſtabliſhed, to encourage Actions for Words.

10Mod. 198. *Harriſon* v. *Thornborough.* 9. Of late Years, the Rule has been, to conſtrue Words in that Senſe, which is moſt natural and obvious; it having been found by Experience, that, unleſs Men can obtain a Satisfaction by Law, for the Damage ſuſtained from the Publication of ſlanderous Words, they will take it themſelves.

2. The Place where the Words were publiſhed.

10. If Words, which have a ſlanderous Signification, in a certain Place, are publiſhed in that Place, an Action lies; although it would not, for publiſhing the ſame Words in another Place.

Cart. 214. *Anniſon* v. *Bloſield.* 11. If theſe Words, *He is a Daffidown-Dilly*, are publiſhed of a Barriſter in the North of *England*, where the Words *Daffidown-Dilly* ſignify *Ambidexter*, an Action lies.

Cro. Eliz. 250. *Coles* v. *Haviland.* 12. If theſe Words, *He has ſtrained a Mare*, are publiſhed of *J. S.* in that Part of the Kingdom, where the Words, *ſtrained a Mare*, ſignify *carnally known a Mare*, an Action lies.

Hob. 126. Anon. 13. If theſe Words, *He is a Healer of Felons*, are publiſhed of *J. S.* in one of the Weſtern Counties, wherein the Words, *a Healer of Felons*, ſignify a *Concealer of Felons*, an Action lies.

Hob. 126. *Slater* v. *Franks.* 14. If theſe Words, *He is mainſworn*, are publiſhed of *J. S.* in one of the Northern Counties, wherein the Word *mainſworn* ſignifies *perjured*, an Action lies.

1 Rol. Abr. 86. pl. 1. 15. It is not neceſſary to aſcertain the Meaning of ſuch *Engliſh* Words, as have a local Signification, by an Averment; for it is to be preſumed, that the Judge, before whom the Action for the Words is tried, does underſtand the Meaning of ſuch *Engliſh* Words; and, if he do not, it may be learned from the Witneſſes.

3. The Language the Words were publiſhed in,

*Page 498

1 Rol. Abr. 74. *Jones* v. *Dawkes.* 16. An Action does not lie for ſlanderous Words, unleſs they were publiſhed in a Language which was underſtood by one Perſon who heard them; for if the Words were not underſtood by any Perſon, no Damage can be received from the Publication thereof.

Cro. Eliz. 855. *Price* v. *Jenkins.* *Ib.* 496. 17. But if the Meaning of the Words were underſtood by one Perſon, an Action lies, although they were publiſhed in a foreign Language; for the Conſequence is equally bad to the Perſon, to whom they relate, as if the Words had been *Engliſh*.

Hob. 126. Anon. 18. An Action lies for publiſhing theſe Words of *J. S. He is an Idoner*; the Word *Idoner* being a *Welch* Word, which, in *Engliſh*, means *perjured*.

1 Rol. Abr. 59. *Delaporte* v. *Cook.* 19. If ſlanderous Words are publiſhed of *J. S.* in the *French* Language, an Action lies.

Hob. 126. Anon. 20. It is not neceſſary to ſhew by an Averment, what the Meaning of Words publiſhed in a foreign Language is in *Engliſh*; it being the Duty of

of the Judge, before whom the Action for the Words is tried, to receive Information, as to the Meaning of the Words in *Engliſh*, from Perſons who know it.

4. The Occaſion of publiſhing the Words.

21. The Occaſion of publiſhing ſlanderous Words is much to be regarded; for *ſenſus Verborum ex cauſa dicendi accipiendus eſt.* 4 Rep. 14. Lord *Cromwell*'s Caſe.

22. A Barriſter may, in pleading his Client's Cauſe, ſpeak Words, for which, if publiſhed on another Occaſion, an Action would lie; for it is the Duty of an Advocate to ſay every Thing he is informed of, which is material for his Client, and an Action would lie againſt him for not doing his Duty: But if an Advocate ſpeak ſlanderous Words, which are not material to the Iſſue, he is liable to an Action. Cro. Jac. 90. *Brook* v. *Montague.* Trin. 3 Jac.

23. In another Report of this Caſe, 1 *Roll. Abr.* 87. it is laid down, that what an Advocate ſays for his Client, in Mitigation of Damages, is juſtifiable; although it be not preciſely material to the Iſſue.

24. In a ſubſequent Caſe, it was holden, that an Action does not lie, for any Words ſpoken by an Advocate for his Client, in Mitigation of Damages; although the Words were not directly material to the Iſſue: Becauſe they were ſpoken in his Profeſſion, and for the Good of his Client. Hob. 328. *Hughe*'s Caſe. Paſch. 18 Jac.

25. Another Caſe, ſubſequent to both theſe, goes ſtill farther. In this it is laid down, that no Action lies againſt an Advocate, for ſpeaking ſlanderous Words in defending his Client's Cauſe; it being his Duty to ſpeak for his Client, and it ſhall be intended, that he ſpoke according to his Inſtructions. Styles 462. *Wood* v. *Gunſton*, Mich. 7 Car. 2.

26. *Prick*, a Clergyman, in preaching a Sermon, recited the following Story, out of *Fox*'s Martyrology; namely, that one *Greenwood*, being a perjured Perſon, and a great Perſecutor, had great Plagues inflicted upon him, and was killed by the Hand of God. An Action being brought for theſe Words, by *Greenwood*, who was preſent at the Sermon, it was ruled, By *Wray*, Ch. J. before whom the Cauſe was tried, that, as the Words had only been recited as a Story, *Prick* was not guilty of publiſhing them maliciouſly; and he was found Not guilty. The Opinion of *Wray*, Ch. J. was afterwards affirmed to be good Law; and Judgment was given for the Defendant. Cro. Jac. 91. *Prick*'s Caſe.

5. The Intention in publiſhing the Words.

27. An Action does not lie for the Publication of ſlanderous Words, if it appear, that the Publiſher had no Intention to injure the Perſon, to whom they relate: *Quiæ quæ ad unum finem locuta ſunt, non debeat ad alium detorqueri.* 4 Rep. 14. Lord *Cromwell*'s Caſe.

28. It was holden, that an Action did not lie for publiſhing theſe Words, *I have heard* J. S. *was hanged for ſtealing a Horſe*; becauſe it appeared, that they were publiſhed out of Concern, and not with an Intent to ſlander *J. S.* 1 Lev. 82. *Crawford* v. *Middleton.*

29. If *A.* ſay to *B. You are forſworn*, and *B.* reply, *Will you ſay I am perjured?* and *A.* anſwer *Yes, if you will have it*, no Action lies; for the Explanation of the Word *forſworn*, is rather drawn from *A.* than ſpoken with Deſign. Cro. Eliz. 297. *Livermore* v. *Martin.*

* 30. An Action does not lie for ſpeaking theſe Words, *I will give my Mare a Quarter of a Peck of Malt, and let her drink, and ſhe ſhall piſs as good* * Page 499 1 Rol. Abr. 58. *Fenn* v. *Dixie.*

good Beer as J. S. *a Brewer brews*; for it ſhall be intended, that the Words were ſpoken in Jeſt, and not with Intent to injure *J. S.*

(E) In what Caſes, Words publiſhed in a Courſe of Juſtice are actionable.

1. TO prevent Perſons being deterred, by the Fear of Actions, from doing what Juſtice requires, Words otherwiſe actionable, are not ſo when publiſhed in a Courſe of Juſtice.

2. Another Reaſon may be given, why an Action does not lie, for Words publiſhed in a Court of Juſtice; namely, that if the Words are not true, the Publiſher may be indicted for Perjury.

Cro. Eliz. 247. *Buckley* v. *Wood.* 3. It is in one Caſe laid down, that an Action does not lie for ſlanderous Words, contained in a Complaint in a Courſe of Juſtice, although it would for publiſhing the ſame Words upon an extrajudicial Occaſion.

3 Leon. 138. 4 Rep. 14. CroEliz. 247. 1 Saund. 132. 4. It is in divers Books laid down, that an Action does not lie, for ſlanderous Words contained in a Bill of Indictment.

1 Rol. Abr. 43. *Baſy* v. *Child.* 5. If *A.* ſay to *B. I charge you with Felony*, an Action lies.

4 Rep. 14. *Cutler* v. *Dixon.* Hob. 82. 6. But if *A.* charge *B.* with Felony before a Juſtice of the Peace, an Action does not lie; for, if an Action did in ſuch Caſe lie, Felons would frequently eſcape for Want of Proſecution.

1 Rol. Abr. 87. *Moulton* v. *Clapham.* 2 Jon. 431. 7. If *J. S.* exhibit Articles of the Peace, in the Court of King's Bench againſt *J. N.* and *J. N.* being in Court ſay in the Hearing of the Court, *There is not a Word of Truth in thoſe Articles, and I will prove it by forty Witneſſes*, no Action lies; although the Words amount to a Charge of Perjury, the Articles having been exhibited upon Oath; becauſe they were ſaid by *J. N.* in Defence of himſelf.

Cro. Eliz. 230. *Buckley* v. *Wood.* 8. An Action does not lie againſt a Witneſs for ſpeaking ſlanderous Words, in giving Evidence, this being in a Courſe of Juſtice.

1 Rol. Abr. 43. *Allier* v. *Redgwit.* 4 Rep. 14. 9 If a Bailiff, having a Warrant to arreſt *J. R.* upon a Writ iſſuing out of the Court of Chancery, make an Affidavit, that he did arreſt him, and that he was reſcued by *J. S.* and *J. S.* be thereupon committed to the *Fleet*, no Action lies; becauſe the Affidavit was made in a Courſe of Juſtice.

1 Saund. 133. *Lake* v. *King.* 10. If *J. S.* after having preſented a Petition to the Houſe of Commons, in which ſlanderous Words are contained, deliver printed Copies thereof to the Members of that Houſe, no Action lies; it being agreeable to the Order and Courſe of Parliament, to deliver Copies of ſuch Petitions.

4 Rep. 14. *Cutler* v. *Dixon.* 11. No Action lies for ſlanderous Words, contained in Articles of the Peace; notwithſtanding the Perſon, againſt whom the Articles were exhibited, was put to the Expence of entering into a Recognizance for keeping the Peace.

1 Rol. Abr. 23. *Weſtower* v. *Dabbinet.* 12. *A.* who had exhibited a Libel in a Spiritual Court againſt *B.* for Defamation, produced *C.* as a Witneſs. Hereupon *B.* made an Allegation in Writing, as the Courſe of ſuch Court is, that *C.* was perjured in a Cauſe between *E.* and *F.* at the Aſſizes at *G.* in order to prevent *C.* being admitted as a Witneſs. It was holden, that, as the Court had Juriſdiction

riſdiction in the original Matter, an Action did not lie againſt *B.* for that, if an Action did in ſuch Caſe lie, it would prevent the Detection of bad Witneſſes.

13. If *J. S.* had, when that Court was in Being, charged *J. N.* with Felony or Piracy, by a Bill in the Court of Star-Chamber, an Action would have lain; becauſe, as that Court had no Juriſdiction in either of theſe * Offences, the Exhibiting of the Bill was not a Proceeding in a Courſe of Juſtice. 4 Rep. 14. *Buckley* v. *Wood.* *Page 500

14. Upon the whole it appears, that no Action lies for the Publication of ſlanderous Words in a Courſe of Juſtice: But, if the Publication be accompanied with any Circumſtance of Malice, an Action upon the Caſe in the Nature of a Writ of Conſpiracy lies; and it is highly reaſonable ſuch Action ſhould lie, otherwiſe a bad Man would, under the Pretence of doing what Juſtice requires, have it in his Power to publiſh the vileſt Slander.

(F) In what Caſes, Words in the paſt or future Tenſe are actionable.

1. IT is in the general requiſite to the making of Words actionable, that they ſhould be in the preſent Tenſe; but an Action does ſometimes lie, although the Words are in the paſt or future Tenſe. The Diſtinction ſeems to be, that where it is probable, that the Party, to whom the Words relate, will receive the ſame or nearly the ſame Damage from Words in the paſt or future Tenſe, as if they had been in the preſent Tenſe, the Words are actionable; but that where this is not probable, they are not ſo.

2. An Action lies for publiſhing theſe Words of *J. S. He was perjured* or *he hath committed Perjury*; for a Man may at any Diſtance of Time be proſecuted for Perjury. 1 Rol. Abr. 39. *Rayner* v. *Grimſtone.*

3. So it does for publiſhing theſe Words of *J. S. I think in my Conſcience, if he may have his Will, he will kill the King*; for the Words may be the Occaſion of his Ruin. 1 Rol. Rep. 427. *Sidnam* v. *Mayo.* 1 Rol. Abr. 49.

4. So it does for publiſhing theſe Words of a Tradeſman, *He will within two Days become a Bankrupt*; for the Words may ruin his Credit. Latch 114. *Hill's* Caſe. 1 Rol. Abr. 49.

5. But no Action lies for publiſhing theſe Words of *J. S. He has had the Pox*; for it is probable that he is cured, and then no Perſon will avoid his Company. Stra. 1189. *Taylor* v. *Hall.* 1 Rol. Abr. 48.

6. So none lies for publiſhing theſe Words of a Juſtice of Peace, *He was a debauched Man, and was not fit to be a Juſtice of Peace*; for he might formerly have been debauched and unfit, but may not be ſo now. 1 Rol. Abr. 48. *Hammond* v. *Kingſmill.*

(G) How far Words muſt be affirmative, in order to render them actionable.

1. IN order to render Words actionable, they muſt to a certain Degree be affirmative; but it is not neceſſary that they ſhould be directly ſo.

2. An

Cro. Eliz. 348. *Smith* v. *Wiſdome.*

2. An Action lies for publiſhing theſe Words of *J. S. I think, or I dreamed he committed a certain Felony*; for, although the Words are not directly affirmative, *J. S.* may by reaſon of the Words be arreſted, upon Suſpicion of having committed that Felony.

*Page 501 Cro. Car. 407. *Sidnam* v. *Maye.* 1 Rol. Abr. 49.

* 3. So it does for publiſhing theſe Words, *I think in my Conſcience, if* J. S. *might have his Will, he would kill the King.*

Brownl. 3. *Harris* v. *Adams.*

4. If *A.* ſpeak theſe Words to *B. If you had your Deſerts, you had been hanged for Felony*, an Action lies; for, although a Condition be annexed, the Words amount to a Charge of Felony.

1 Rol. Abr. 43. *Hake* v. *Moulton.* *Ib.* pl. 5.

5. But if *A.* ſay to *B. Thou deſerveſt to be hanged*, or *thou haſt done that for which thou deſerveſt to be hanged*, no Action lies; for the Words do not amount to a Charge of any particular Crime; they being only a general Declaration of the Opinion which *A.* entertains of *B.*

Cro. Eliz. 639. *Redſtone* v. *Pomfreict.* 1 Lev. 261.

6. An Action lies for publiſhing theſe Words of a Woman, *She hath had a Child, and if ſhe hath not a Child ſhe hath made it away*, for they import a Charge of Murder.

Com. 267. *Upton* v *Fold.*

7. If theſe Words are ſpoken to *J. N. You are as great a Rogue as* J. S. *who ſtole Quilts*, an Action lies; for notwithſtanding the Words are comparative, they amount to a Charge, that *J. N.* did ſteal Quilts.

Cro. Jac. 687. *Foſter* v. *Browning.*

8. So it does, for ſaying to *J. N. You are as arrant a Thief as any in* England.

Sid. 53. *Darcy* v. *Clinch.*

9. So it does for publiſhing theſe Words, *As ſure as God governs the World, and King* James *this Kingdom*, J. N. *hath committed Treaſon.*

1 Lev. 65. *Orton* v. *Fuller.*

10. So it does for publiſhing theſe Words, *J. S. ſays I am a perjured Rogue, he is perjured as well as I.*

2 Lev. 150. *Snell* v. *Webling.*

11. An Action lies for publiſhing theſe Words, *I know what I am, and I know what* Snell *is, I never buggered a Mare*; for the Words amount to a Charge of Buggery.

Ld. Raym. 1185. *Speed* v. *Perry.* Salk. 697.

12. If *J. N.* ſpeak theſe Words to *J. S. You are a Raſcal, you have forgot ſince you lived in* Black Bull-Yard, *there you could procure broad Money for Gold, and clip it when you had done, and then the Shears could go*, an Action lies; for the Words amount to a Charge of having been guilty of clipping, the Power to clip having been the ſame in any other Place as in *Black Bull-Yard*

1 Rol. Abr. 48. *Hunt* v. *Thimblethorpe.* Cro. Jac. 568.

13. If it be ſaid to *J. S. When wilt thou bring home the nine Sheep thou ſtoleſt from* J. N.? the Words are actionable; for, although ſpoken interrogatively, they amount to a Charge of ſtealing Sheep.

12 Rep. 134. Earl of *Northampton*'s Caſe.

14. An Action lies for ſaying to *J. N. Did you hear that* J. S. *is guilty of Treaſon?*

1 Rol. Abr. 50. *Haywood* v. *Nayler.*

15. If *A.* the Wife of *B.* be aſked by *C. Why will you hang D.?* and ſhe anſwer, *for breaking our Houſe in the Night, and ſtealing our Goods*, the Words are actionable; for, notwithſtanding they are ſpoken in Anſwer to a Queſtion, they amount to a Charge of ſtealing Goods.

1 Rol. Abr. 50. *Webb* v. *Poor.* Cro. Eliz. 569.

16. An Action lies for publiſhing theſe Words, *I will prove*, or *I make no Doubt to prove, that* J. S. *has committed a certain Felony*; for the Words amount to a much ſtronger Affirmation, than if the Words had been, *J. S. has committed a certain Felony.*

Rol. Abr. 80. *Hendey*'s Caſe.

17. So it does for ſaying to *A. Go tell* B. *he is a Thief.*

18. So

18. So it does for ſpeaking theſe Words to *J. S. You brought Fire, to ſet the Houſe which was burnt on Fire.* Hutton 123. *Glaſier* v. *Heliar.*

* 19. An Action lies for publiſhing theſe Words of *J. S. He was whipped for ſtealing Sheep*; for the Words are tantamount to the Words *J. S. was convicted of ſtealing Sheep.* *Page 502 1 Rol. Abr. 50. *Churley* v. *Hill.*

20. It has been holden, that no Action lies, for publiſhing theſe Words of *J. S. He is in Gaol for Horſeſtealing*; for an innocent Perſon may be ſuſpected and impriſoned. Hob. 177. *Steward* v. *Biſhop*, Trin. 14 Jac.

21. But it was holden, in a ſubſequent Caſe, that an Action lies for publiſhing theſe Words of *J. S. I will bring him to Gaol for ſtealing a Mare*; in as much as they contain a Charge of Felony; and the Caſe of *Stewart* v. *Biſhop* was denied to be Law. 1 Lev. 82. *Crawford* v. *Middleton*, M. 14 Car. 2.

22. If *A.* ſay to *B. One of us two are perjured, and it is not I*; the Words are as muuch actionable, as if *A.* had ſaid to *B. you are perjured.* 1 Rol. Abr. 75. *Coe* v. *Chambers.*

23. An Action lies for publiſhing theſe Words of *J. S. We will have him ſtand in the Pillory, and have his Ears for Perjury*; for they amount to an Affirmation, that *J. S.* has been guilty of Perjury. 1 Rol. Abr. 50. *Pell* v. *Fellow.*

24. So it does for publiſhing theſe Words of *J. S. He gave ten Pounds to* A. *for forſwearing himſelf in Chancery*; for they amount to a Charge of Subordination of Perjury. 1 Rol. Abr. 41. *Ewer's* Caſe.

(H) How far Words muſt be certain, in order to render them actionable.

1. IT is to a certain Degree neceſſary, to the rendering of Words actionable, that the Meaning of the Words be certain; and that the Perſon, to whom the Words relate, be deſcribed with Certainty. 1 Rol Abr.

2. It is not actionable to publiſh theſe Words of *J. S. He is no true Subject of the King*; for the Word *true* is of uncertain Signification, and no Perſon is ſo true a Subject as he ought to be. 69. *Smith* v. *Turner.*

3. It has been holden, that an Action does not lie for publiſhing theſe Words of *J. S. He is a Rebel*; in as much as a Commiſſion of Rebellion may have iſſued againſt him from the Court of Chancery. 1 Rol. Abr. 69. *Redſtone's* Caſe.

4. It has been holden, that no Action lies, for publiſhing theſe Words of *J. S. He has ſtolen Furze*; for the Publiſher might mean Furze growing, the ſtealing of which is only a Treſpaſs. 1 Rol. Abr. 70. *Gibbert's* Caſe. M. 9 Car. 1.

5. But an Action would, at this Day, lie for ſuch Words, the Perſon, who unlawfully cuts Furze, having, by a Statute made ſince this Caſe, been rendered liable to the Puniſhment of Whipping. 15 Car. 2. c. 2.

6. It has been holden, that no Action lies, for ſaying to *J. S. Thou getteſt thy living by ſwearing and forſwearing*; for, as a Man may be intitled to the Fines ſet upon Perſons guilty of Perjury, the Words do not import a Charge of Perjury. Cro. Eliz. 888. *Stankope's* Caſe.

7. It has likewiſe been holden, that if *A.* ſay to *B. Thou art forſworn, and didſt take a falſe Oath at the Aſſize at* Hertford, no Action lies; for the Oath may have been taken in a private Houſe, and not in a Court. 1 Rol. Abr. 42. *Prichard* v. *Smith.*

8. Theſe two Caſes were determined, when the Rule of conſtruing Words *in Mitiori ſenſu* was carried very far: But there is no Doubt, that it would, at this Day, be holden, that an Action would lie in both Caſes. 8 Mod. 24. 4 Rep. 15. Ld. Raym. 959.

9. No

Cro. Eliz. 500. *Brown* v. *Michell.*

9. No Action lies for publiſhing theſe Words of *J. S. He hath delivered Untruths upon Oath, in his Anſwer to a Bill in Chancery*, the Charge being uncertain; for many Things in the Bill might not be material to the Matter in Queſtion, and the giving of a falſe Anſwer to ſuch Things was not Perjury.

3 Leon. 231. Anon.

10. No Action lies for ſaying to *J. N. Thou haſt forged my Hand*, unleſs it be added, to what Writing; the Charge being too general.

*Page 503 1 Rol. Abr. 71. *Brown* v. *St. John.*

* 11. No Action lies for ſaying to *J. S. Thou haſt committed Burglary, in breaking his Houſe, and taking his Goods*, it being uncertain, as no Perſon is named, whoſe Houſe and Goods were meant.

1 Rol. Abr. 81. *Brown's* Caſe.

12. If three Men have given Evidence, and *J. S.* ſay to them, *One of you three is perjured*, neither of them can maintain an Action againſt *J. S.* it being uncertain, which of the three *J. S.* did mean.

Cro. Jac. 107. *Wiſeman* v. *Wiſeman.*

13. So if theſe Words are publiſhed by *J. N. One of my Brothers is perjured*, no Action lies; it being uncertain, which of his Brothers was intended.

(I) By what Means the Want of Certainty, ſufficient to render Words actionable, may be ſupplied.

1. By the Intention of the Speaker.

1. THE Want of Certainty, ſufficient to render Words actionable, may, as to the Meaning of the Words, be ſupplied by the Intention of the Publiſher.

1 Rol. Abr. 66. *Roote* v. *Molyn.*

2. If theſe Words are publiſhed of a Woman, *She lay with a Weaver in a Ditch, and his Breeches were down, and they were at it*, an Action lies; in as much as, the Publiſher muſt mean, that the Weaver had carnal Knowledge of her.

Cro. Jac. 430. *Miller's* Caſe. 1 Rol. Abr. 66.

3. An Action lies for publiſhing theſe Words of a Woman, *She is a Whore, and hath had the Pox, and hath Holes one may turn his Finger in; Mr.* Ring *the Apothecary gave her a Drink for it; take heed how you drink with her*; the Great Pox being apparently intended by the Publiſher.

1 Rol. Abr. 67. *Prekington's* Caſe.

4. So it does, for ſaying to *J. S. Thou art a pockey Rogue; and the Pox haunts thee twice a Year*; for, as only the Great Pox does more remarkably affect Perſons therewith afflicted in the Spring and Fall, the Speaker muſt mean that Pox.

Cro. Car. 382. *Peard* v. *Johns.* 1 Rol. Abr. 55.

5. Upon a Motion in Arreſt of Judgment, for publiſhing theſe Words of a Barriſter, *He is a Dunce, and will get little by the Law*, it was inſiſted, that although Dunce ſignifies a Perſon of ſlow Parts, ſuch Perſon may have ſolid Judgment; and that the other Words do only mean, *that he will not give himſelf the Trouble to practiſe the Law.* Judgment was given for the Plaintiff; and by the Court: Words are to be conſtrued in their uſually received Senſe. The Word *Dunce*, in the common Acceptation thereof, means *a Perſon of dull Apprehenſion, and not fit to be a Lawyer*; and the obvious Meaning of the Words, *he will get little by the Law*, is, *he will deſerve to get little by the Law.*

Stra. 142. *Morgan* v. *Williams.*

6. It was inſiſted, in order to Arreſt of Judgment, That theſe Words, *Thou art a Thief of every Thing*, are not actionable; becauſe, as the ſtealing of ſome Things, for Inſtance, of Fruit growing on a Tree, is not Felony

Felony, a Perſon cannot be a Thief of every Thing. Judgment was given for the Plaintiff; and by the Court: The Publiſher muſt mean, that the Plaintiff was a Thief of every Thing, of which he could be a Thief.

7. An Action lies for publiſhing theſe Words of *J. S. He is perjured*; for the Intention of the Publiſher muſt be, to charge *J. S.* with having ſworn falſely in a Court of Juſtice. 2 Bulſ. 150. *Croford* v. *Bliſſe.*

* 2. By an Averment. *Page 504

8. The Want of Certainty, ſufficient to render Words actionable, may, as to the Deſcription of the Perſon, to whom the Words relate, be ſupplied by an Averment; it being a Maxim, that *Certum eſt quod certum reddi poteſt.*

9. If theſe Words are publiſhed, *That perjured Rogue and Villain* Potter, any Perſon of the Name of *Potter* may maintain an Action; if it be averred, that, at the Time of publiſhing the Words, there was a Colloquium concerning him; and that they were publiſhed of him. 1 Rol. Abr. 85. *Potter* v. *Loveday.*

10. If theſe Words are publiſhed, *Captain* Nelſon *is a Thief*, an Action lies for *Robert Nelſon*, if it be averred, that there was, at the Time of publiſhing the Words, a Colloquium concerning him, and that they were publiſhed of him; it not being neceſſary to aver, that he was, at that Time, a Captain, or uſually called ſo. 1 Rol. Abr. 85. *Nelſon* v. *Smith.*

11. If it be ſaid by *J. S.* in a Colloquium concerning ſix Defendants to a Bill in Chancery, *Theſe Defendants are thoſe who helped to murder* J. S. any one of the Defendants may maintain an Action; if it be averred, that, at the Time of ſpeaking the Words, there was ſuch Colloquium; and that he was one of the Defendants. 1 Rol. Abr. 75. *Foxcroft* v. *Lacy.*

12. If theſe Words are publiſhed, in a Colloquium concerning *J. S. Mr.* Deceiver *has deceived the King*, *J. S.* may maintain an Action, if it be averred, that, at the Time of publiſhing the Words, there was ſuch Colloquium; and that he was, at that Time, one of the King's Receivers; although it be not averred, that, at the Time of publiſhing the Words, there was a Colloquium concerning his Office of Receiver; for, as it is averred, that, at the Time of publiſhing the Words he was one of the King's Receivers, it ſhall be intended, that they were publiſhed concerning his Office of Receiver; and if an Action could be avoided, by the Trick of calling a Perſon, Mr. *Deceiver*, inſtead of Mr. *Receiver*, Slander would often go unpuniſhed. Cro. Jac. 557. *Fleetwood* v. *Curle.* 1 Rol. Abr. 57.

13. If *A. B.* ſay to *C. D.* before whom *E. F.* is walking, *He that goeth before thee is perjured*, an Action lies, if it be averred, that only *E. F.* was walking before *J. N.* at the Time of ſpeaking the Words, and that they were ſpoken of him. 1 Rol. Abr. 81. *Aiſh* v. *Geriſh.*

14. If it be ſaid by *J. S.* to *J. N. Thy Maſter* Brown *hath robbed me*, any Perſon of the Name of *Brown*, if it be averred, that the Words were ſpoken of him, may maintain an Action, although it be not averred, that he was the Maſter of *J. N.* of whom the Words were ſpoken; for it ſhall not be intended, that *J. N.* had more than one Maſter of the Name of *Brown.* Cro. Jac. 444. *Brown* v. *Lowe.* 1 Rol. Abr. 79.

15. In an Action upon the Caſe the Plaintiff declared, that the Defendant, being his natural Brother, publiſhed theſe Words of him, *My Brother is perjured.* Upon a Motion in Arreſt of Judgment, *Yelverton*, J. was of Opinion, that the Action did not lie; and by him: Words, in order to render them actionable, ought to be ſo certain, as to the Deſcription of the Perſon to whom they relate, that every Perſon who hears them may know of whom they are publiſhed. The Defendant may have Cro. Jac. 107. *Wiſeman* v. *Wiſeman.*

ſeveral Brothers; and it would be very unreaſonable, that every one of them ſhould maintain an Action, by averring that the Words were publiſhed of him. *Williams* J. was of Opinion, that the Action lay; and by him: As the Plaintiff has averred, that the Words were publiſhed of him, and the Jury have found the Defendant Guilty, the Court is aſcertained, that the Words were publiſhed of the Plaintiff. *Tanfield*, J. was likewiſe of Opinion that the Action lay; and by him: If the Words had been, *One of my Brothers is perjured*, an Action would not have lain, becauſe it would then have appeared to the Court, that the Defendant had more than one Brother, and the Want of Certainty, to which Brother the Words related, would not have been cured by the Averment and the Verdict: But as it does not now appear to the Court, that the Defendant had any other Brother than the Plaintiff, and it is averred that the Words were publiſhed of him, and the Jury have found the Defendant Guilty, the Plaintiff ought to have Judgment. The Cauſe being afterwards moved in full Court, it was reſolved by all the Juſtices, that the Action did lie; and Judgment was given for the Plaintiff.

Cro. Jac. 241. *Beaumond* v. *Haſtings.*

16. In an Action upon the Caſe, the Plaintiff declared, that the Defendant publiſhed theſe Words of him, being a Juſtice of the Peace, *He for Malice and Spleen did many Times wreſt the Law, and pervert Juſtice, to ſerve his own Turn.* It was objected, in order to arreſt Judgment, that it doth not with ſufficient Certainty appear, that the Words were publiſhed of the Plaintiff; it not being averred, that at the Time of publiſhing them there was a Colloquium concerning him. Judgment was given for the Plaintiff; and by the Court: It is the uſual Courſe, and ſufficient, to aver, that the Words were publiſhed of the Plaintiff. The Judgment was affirmed upon a Writ of Error.

Cro. Jac. 673. *Smith* v. *Ward.*

17. In an Action upon the Caſe the Plaintiff declared, that the Defendant publiſhed theſe Words of him, *He is a Thief.* It was objected, in order to arreſt Judgment, that the Words cannot be applied to the Plaintiff more than to any other Perſon; it not being averred, that at the Time of publiſhing them, there was a Colloquium concerning the Plaintiff. Judgment was given for the Plaintiff; and by the Court: It is ſufficient to aver, that the Words were publiſhed of the Plaintiff, and the Jury by finding a Verdict for the Plaintiff, have found that the Words were publiſhed of him, which helps the Caſe; for otherwiſe, they would have found the Defendant not guilty.

1 Rol. Abr. 85. *Biſhop* v. *Fitzherbert.*

18. If it be averred, that, in a Colloquium between the Plaintiff and Defendant, the Defendant ſaid, *Thou art a Thief*, an Action lies, although it be not averred, that the Words were ſpoken of or to the Plaintiff; for, as they were ſpoken in a Colloquium between the Plaintiff and Defendant, it muſt be intended, that they were ſpoken to the Plaintiff.

Page 505 (K) **In what Caſes, doubtful Words are to be conſtrued** in mitiori ſenſu.

1 Rol. Abr. 71. *Gardiner* v. *Spardane.*

1. WHEREVER doubtful Words will fairly bear one Senſe in which they are not actionable, and another in which they are, they ought to be conſtrued in that Senſe in which they are not actionable.

2. The Rule, of conſtruing doubtful Words *in mitiori ſenſu*, does not only coincide with the general Tenderneſs of the *Engliſh* Law; but it is authorized by the two following Maxims, *Benignior ſenſus in generalibus & dubiis præferendus. Verba ſunt accipienda in mitiori ſenſu.*

3. No Action lies for ſpeaking theſe Words to *J. S. Thou art a Corn-ſtealer, and haſt ſtolen my Corn off my Land*; for it is doubtful, whether the Speaker meant Corn cut, or Corn growing; and by conſtruing the Words *in mitiori ſenſu* they mean Corn growing, the ſtealing of which is only a Treſpaſs. 1 Rol. Abr. 70. pl. 50.

4. No Action lies for publiſhing theſe Words of *J S. He did burn my Barn*; for that, by conſtruing the Words in *mitiori ſenſu*, they mean a Barn which had no Corn in it, nor was Parcel of a Manſion-houſe, the burning of which is not Felony. 4 Rep. 20. *Barham's* Caſe.

5. It has been holden, that no Action lies for publiſhing theſe Words of an Innkeeper, *He is a Maintainer of Thieves, and keepeth none but Thieves in his Houſe, and I will prove it*; becauſe the Publiſher did not add, that the Innkeeper knew the Perſons whom he maintained to be Thieves; for a Perſon may have Thieves in his Houſe and maintain them without knowing them to be Thieves, which is no Offence. Cro. Eliz. 746. *Ball* v. *Bridges.*

6. It has likewiſe been holden, that no Action lies for publiſhing theſe Words of *J. N. He hath poiſoned* J. S. Innuendo *quendam* J. S. *adtunc defunctum, and it ſhall coſt me a hundred Pounds, but I will hang him*; for the Words *adtunc defunctum*, beſides being contained in the *innuendo*, can only relate to the Time of the Declaration, and conſequently it is not averred, that *J. S.* was dead at the Time of publiſhing the Words. Cro. Jac. 343. *Jacob* v. *Mills.* Hob. 6. S.C.

7. It has been holden, that no Action lies for publiſhing theſe Words, *Sir* Thomas Holt *ſtruck his Cook on the Head with a Cleaver and cleaved his Head; the one Part lay on one Shoulder and another Part on the other*: becauſe it is not averred that the Cook was killed; and by the Court: Slander ought to be direct, againſt which there ought not to be any Intendment: But in this Caſe, notwithſtanding the Wounding, the Cook may be living, and then it is only a Treſpaſs. Cro. Jac. 184. *Holt* v. *Aſtgrigg.*

8. At the Times the three laſt Caſes were determined, the Rule of conſtruing Words *in mitiori ſenſu* was carried very far: But it is doubtful whether any one of them be at this Day Law.

(L) In what Caſes, doubtful Words are not to be conſtrued in mitiori ſenſu.

1. HOWEVER agreeable it may be to the general Tenderneſs of the *Engliſh* Law, that doubtful Words ſhould be conſtrued *in mitiori ſenſu*, yet ſuch Conſtruction is only to be made, where the Meaning of the Words, in the uſual Acceptation thereof, is doubtful; for, if in the uſual Acceptation of the Words they are ſlanderous, a forced Conſtruction ſhall not be put upon them, in order to render them not actionable. 1 Rol. Abr. 71. *Gardiner* v. *Spurdance.* Skin. 364. *Somers* v. *Houſe.*

2. If it be ſaid to a Woman, *Thou haſt poiſoned thy Huſband, and I will juſtify it*, the Words, if it be averred that her Huſband is dead, are actionable; for altho' it be poſſible, that ſhe might give him Poiſon involuntarily or ignorantly; or that * he might not die thereof; or that he might live a Year and Day after taking it, theſe are foreign Intendments; for the Meaning of the Words, in the uſual Acceptation thereof, is that ſhe gave him Poiſon voluntarily, knowing it to be Poiſon, and that he died thereof in a ſhort Time. 1 Rol. Abr. 71. *Gardiner* v. *Spurdance.* *Page 506

3. If theſe Words are ſpoken to *J. N. Thou haſt killed* J. S. an Action lies; for although the Killing may have been as an Executioner or by Accident, the Words, in the uſual Acceptation thereof, mean a felonious Killing. 1 Rol. Abr. 72. *Gardiner* v. *Spurdance.*

Stra. 1130. *Rivers* v. *Lite.*

4. In an Action for publiſhing theſe Words, *You did ſhut up my Siſter and murder her, and I will prove it*; the Judgment of the Court of Common Pleas was for the Plaintiff; and the Judgment, notwithſtanding many old Caſes were cited to the contrary, was affirmed in the Court of King's Bench.

Cro. Car. 510. *Ceely* v. *Hoſkins.*

5. An Action lies for ſpeaking theſe Words to *J. S. Thou art forſworn in a Court of Record*, although the Speaker did not add, in giving Evidence; for it ſhall not be intended, unleſs this be ſhewn in the Pleadings, that *J. S.* was forſworn in ordinary Diſcourſe in ſome Court of Record.

Cro. Jac. 158. *Harris* v. *Dixon.*

6. So it does for ſaying to *J. N. You have procured* J. S. *to come thirty Miles to commit Perjury before my Lord of* Wincheſter, *and have given him ten Pounds for that Purpoſe*, although it be not averred that *J. S.* did commit Perjury; or that the Biſhop of *Wincheſter* was a Perſon before whom it could be committed; for the Words ſhall be taken in the worſt Senſe.

Cro. Jac. 166. Lev. *Sanders.*

7. If theſe Words be ſpoken to *J. S. You have ſtolen my Wood*, an Action lies; for the Word *Wood*, according to the old Rule, *Arbor dum creſcit, lignum dum creſcere neſcit*, means Wood cut down.

Ld. Raym. 959. *Baker* v. *Pierce.*

8. It has been holden, that an Action lies for publiſhing theſe Words, *John Baker ſtole my Box Wood and I will prove it*; and by *Holt*, Ch. J. "wherever Words tend to ſlander a Man and to take away his Reputation, "I ſhall be for ſupporting Actions for them, for the Preſervation of the "Peace. I remember a Story told by Mr. Juſtice *Twiſden* of a Man who "had brought an Action for ſlanderous Words, who, being in Court when "the Rule for arreſting Judgment in the Action was made abſolute, de-"clared in Court, that if he had thought he ſhould not have recovered in "his Action, he would have cut the Defendant's Throat."

Sayer 265. *Gardiner* v. *Atwater.*

9. Upon a Motion in Arreſt of Judgment in an Action for Words it appeared, that the Words in one Count were, *Thou art a Sheep-ſtealing Rogue*; that the Words in another Count were, *It ſounds every where that thou art a Sheep-ſtealer*; and that there was a general Verdict. Judgment was given for the Plaintiff; and by the Court: Divers old Caſes have been cited, in which it is laid down, that if Words can be conſtrued by the Court in ſuch Senſe as not to be actionable, they ought to be ſo conſtrued: But it is at this Day ſettled; that Words are to be conſtrued by the Court in that Senſe wherein they are generally underſtood.

Hutt. 58. *Maſon* v. *Thompſon.* 2 Lev. 51. 2 Ventr. 213.

10. It was heretofore holden that an Action did not lie for publiſhing theſe Words, *I charge* J. S. *with Felony for taking Money out of my Pocket, and I will prove it:* for that as the Words do not expreſly charge the Taking to be felonious, it may be intended, that it was not a felonious Taking.

Ld. Raym. 959. *Baker* v. *Pierce.*

11. But in a modern Caſe, this Caſe is expreſly denied to be Law; and by *Holt* Ch. J. *Taking of Money out of a Perſons Pocket, muſt mean a felonious Taking.*

Cro. Car. 277. *Laurance* v. *Woodward.* 1 Rol. Abr. 74.

12. If theſe Words be ſpoken to *J. S. Thou didſt violently upon the Highway take my Purſe from me, and four Shillings and two Pence in it; and didſt threaten to cut me off in the midſt, but I was forced to run away to ſave my Life*, an Action lies; for, although it be not expreſsly ſaid, that *J. S.* did rob the Speaker, or that he took his Purſe feloniouſly, the Words, in the common Acceptation thereof, amount to a Charge of a Robbery.

Cro. Jac. 162. *Morriſon* v. *Cade.*

13. An Action lies for ſpeaking theſe Words of a Widow, *I have had the Uſe of her Body*; for it ſhall not be intended, that the Words mean the Uſe of her Body as a Phyſician, or that ſhe had done ſome bodily Labour

Labour for the Speaker; but the Words ſhall be conſtrued in their uſual Senſe, which is very ſlanderous.

14. If theſe Words are publiſhed of a Woman, *She is a lewd and common Woman of her Body, and has the Pox*, an Action lies; it being apparent, that the Speaker meant the *French* Pox. 1 Rol. Abr. 66. pl. 14.

---

* (M) In what Caſes, adjective Words are actionable. *Page 507

1. AN Action does not in the general lie for the Publication of adjective Words.

2. If theſe Words are publiſhed of *J. S. He is a ſeditious Knave*, an Action does not lie; becauſe the Words do only import a Charge of an Inclination to be guilty of ſome ſeditious Act, and ſuch Inclination is not puniſhable at the Common Law. 4 Rep. 19. *Britridge's* Caſe.

3. If theſe Words are publiſhed of *J. S. He is a thieviſh Rogue*, an Action does not lie; becauſe the Words do not import a Charge of being a Thief. Cro. Jac. 600. *Stamp* v. *White.*

4. But if adjective Words are publiſhed, which import a Charge of having been guilty of a criminal Act, an Action does lie.

5. If theſe Words are publiſhed, *I accuſe* J. S. *of poiſoning his Aunt*, an Action lies; becauſe the Words import a Charge of having poiſoned his Aunt. 1 Rol. Abr. 49. pl. 6.

6. If theſe Words are ſpoken to *J. S. Thou art a buggering Rogue and I could hang thee*, an Action lies; becauſe the Words import a Charge of having committed the Act of Buggery. Sid. 373. *Collier* v. *Burrel.*

7. If theſe Words are publiſhed to *J. S. He was whipped about* Taunton *Caſtle for ſtealing Sheep*, an Action lies; becauſe the Words not only import a Charge of having ſtolen Sheep, but likewiſe that *J. S.* was convicted of that Offence. 1 Rol. Abr. 50. *Churley* v. *Hill.*

8. If theſe Words are ſpoken to *J. S. Thou art a Sheep-ſtealing Rogue*, an Action lies; becauſe the Words import a Charge of Felony. Sayer 265. *Gardiner* v. *Atwater.*

9. If adjective Words are a Diſgrace to a Perſon in an Office, or to a Perſon of a Profeſſion or Trade, an Action lies; although they do not import a Charge of having done any Act.

10. If theſe Words are publiſhed of a Perſon in an Office, *He is a corrupt Officer*, an Action lies; the Words being a Diſgrace to him in his Office. 4 Rep. 19. *Britridge's* Caſe.

11. If theſe Words are publiſhed of a Tradeſman, *He is in a breaking Condition*, an Action lies; becauſe his Credit, which is of the utmoſt Conſequence to a Tradeſman, may be thereby hurt. Styles 425. *Walkenden* v. *Haycock.*

---

* (N) In what Caſes, Words which import only an Intent are actionable. *Page 508

1. IT is ſaid to have been determined, upon great Deliberation, that no Action lies, for Words, which only import the Charge of a Purpoſe, or an Intent to commit a Crime; ſuch Purpoſe or Intent not being puniſhable. 4 Rep. 16. *Eaton* v. *Allen.*

2. An

1 Rol. Abr. 51. *Lock* v. *Lock*

2. An Action does not lie for publiſhing theſe Words of *J. S. He keepeth Men to rob me*; in as much as theſe Words do only import a Charge of an Intention to rob.

1 Rol. Abr. 51. *Pott's* Caſe

3. And, for the ſame Reaſon, an Action does not lie, for ſpeaking theſe Words to *J. N. You would have killed me.*

1 Rol. Abr. 51. *Scot* v. *Hilliers.*

4. If theſe Words are publiſhed of a Woman, *She would have cut her Huſband's Throat, and did attempt to do it*, an Action lies; for the Attempt being a criminal Act, the Words are a great Slander.

Ld. Raym. 1185. *Speed* v. *Parry.* Salk. 695.

5. An Action lies for ſaying to *A. B. You are a Raſcal and Villain; you have forgot ſince you lived in the* Black Bull-Yard; *there you could procure Broad Money for Gold, and clip it when you had done, and then the Shears could go*; for, where the Power to do an Act is, by the Words, confined to a particular Place, they imply that the Act was done, the Power being the ſame in all Places.

1 Rol. Abr. 50. *Lock* v. *Lock*

6. So it does for publiſhing theſe Words, *J. N. lay in wait on* Shooter's Hill *to rob* J. S. for the lying in wait was a criminal Act.

Cro. Eliz. 710. *Laverſage* v. *Smith.*

7. Upon a Motion in Arreſt of Judgment, in an Action for publiſhing theſe Words of *J. N. He would have robbed the Houſe of* J. S. *if* J. D. *would have conſented unto it; he perſuaded* J. D. *unto it, and told him he would bring him where he ſhould have Money enough*, it was ſaid, theſe Words do not import any Act, for which the Plaintiff could be called in Queſtion. Judgment was given for the Plaintiff; and by the Court: The Words are a great Diſcredit and Slander.

(O) In what Caſes, Diſjunctive or Copulative Words are actionable.

1. IF the Words publiſhed of any Perſon are in the Diſjunctive, and Part thereof be not actionable, no Action lies.

Cro. Eliz. 780. *Griffith's* Caſe.

2. If it be ſaid to *J. S. Thou haſt ſtolen my Mare, or didſt conſent to the ſtealing of her*, no Action lies; becauſe the latter Words are not actionable.

Cro. Jac. 530. *Sparham* v. *Pye.*

3. It was holden, that an Action did not lie for publiſhing theſe Words, *Sparham did ſteal a Mare, or elſe* Godwin *is forſworn*, notwithſtanding there was an Averment, that *Godwin* never ſwore any ſuch Matter; and by the Court: The Words do not import a Charge ſufficiently direct to make them actionable.

*Page 509

* 4. If ſome Words, which are not actionable, be connected by a Copulative with others which are ſo, an Action lies.

Win. 45, 102. *Crompton* v. *Philpot.*

5. If theſe Words be publiſhed of *J. N. He did ſteal, and cozened ſeven Quarters of my Barley*, an Action lies; notwithſtanding the Words, *he cozened ſeven Quarters of my Barley*, would not alone have been actionable.

(P) In what Caſes, an Action does not lie, by reaſon of Repugnancy in the Words.

1. AS the Ground of an Action for publiſhing Words, is the Damage to the Perſon of whom they were publiſhed, it follows, that, if there be in the Words themſelves, or in what appears upon the Record,

Record, ſuch Repugnancy, that no Damage can enſue to the Perſon of whom they were publiſhed, the Words are not actionable.

2. It has been holden, that if a Feme Covert ſay to *J. S. You have ſtolen my Goods*, the Words are not actionable; becauſe the Words, in as much as a Feme Covert, who has no Goods, cannot be robbed of any, are in themſelves repugnant. 1 Rol. Abr. 74. b. pl. 1. Anon. Paſch. 11 Jac.

3. But the contrary has been holden, in two other Caſes; one of which was ſubſequent, the other antecedent to this Caſe.

4. In an Action brought againſt Huſband and Wife, for the Publication of theſe Words by the Wife, *My Turkeys are ſtolen, and* Charmel *hath ſtolen them*, it was objected, in order to arreſt Judgment, that, in as much as the Wife could have no Turkeys, it could not be true, that the Plaintiff had ſtolen her Turkeys; and conſequently the Words could not be any Diſcredit to him. Judgment was given for the Plaintiff; and by the Court: The Wife did charge the Plaintiff with ſtealing Turkeys; and if a Perſon, who had no Horſe were to publiſh theſe Words, *J. S. hath ſtolen my Horſe*, the Diſcredit would be as great to *J. S.* as if the Publiſher had had a Horſe; for every Perſon who heareth the Words, might not know, whether he had a Horſe. Cro. Eliz. 279. *Charnel's* Caſe. Paſch. 34 Eliz.

5. In an Action brought againſt Huſband and Wife, for the Publication of theſe Words by the Wife, *J. S. hath ſtolen my Faggots*, it was objected, in order to arreſt Judgment, that the Words are repugnant; in as much as a married Woman cannot have any Goods which can be ſtolen. Judgment was given for the Plaintiff; and by the Court: The Words, which are to be underſtood according to common Intendment, amount to a Charge of ſtealing the Huſband's Faggots; and wherever an Action is brought, for Words importing a Charge of ſtealing Goods, it is not material whoſe the Goods were. Cro. Jac. 600. *Stamp* v. *White and Wife*. Mich. 18 Jac.

6. If in an Action for Words, which import a Charge of killing it appear from the Declaration, that the Perſon who is ſaid to have been killed is living, no Action lies: in as much as it is no Slander to any Perſon, to charge him with having killed a Perſon who is not dead; becauſe there can be no Danger from a Proſecution in ſuch Caſe. 4 Rep. 16. *Snagg* v. *Gee*.

7. It has been holden, upon a Writ of Error in the Exchequer Chamber, that no Action lies for ſpeaking theſe Words to *J. K. Thou haſt killed the Servant of* J. S. unleſs it be averred, that ſome Servant of *J. S.* was killed. Cro. Jac. 331. *Barton* v. *Bell*.

8. But in divers of the Caſes, ſome of which are antecedent, others ſubſequent to this Caſe, it is laid down, that Words importing a Charge of having killed a Perſon, are actionable; although it be not averred, that the Perſon was killed; unleſs it appear from the Words themſelves, or from the Record, that he is living. Cro. Eliz. 569, 823. Sid. 53. 1 Ventr. 117, 149.

(Q) In what Caſes, an Action lies for repeating Words which were publiſhed by another Perſon.

1. IT was heretofore the Practice, in an Action for repeating Words, which had been publiſhed by another Perſon, to aver, that the Words were not publiſhed by that Perſon.

2. In an Action brought by a Woman againſt *A.* for ſaying that *B.* had reported, *that he had had the Uſe of her Body*, it was averred that *B.* had never made ſuch Report. *Page 510 Cro. Jac. 162. *Merriſon* v. *Cade*.

3. In

Cro. Jac. 406. *Lewis* v. *Walter.*

3. In an Action brought by *Lewis* againſt *Walter* for theſe Words, *Piers* did ſay, that *Lewis* did ſay, *there is no Prince in* England, it was averred, that *Piers* did never ſay, that *Lewis* did ſay, *there is no Prince in* England.

Sayer 266. *Gardiner* v. *Atwater.*

4. But in a modern Caſe, upon a Motion, in Arreſt of Judgment, theſe Words, *Thou art a Sheep-ſtealing Rogue, and Farmer* Parker *told me ſo*, were holden to be actionable; although it was not averred, that Farmer *Parker* did not tell the Defendant ſo; and by *Denniſon* Juſtice: ſuch Averment is by no Means neceſſary; it not being material, whether Farmer *Parker* did or did not tell the Defendant ſo.

(R) In what Caſes, actionable Words are rendered not actionable; or Words not actionable are rendered actionable, by ſubſequent Words.

1. AS the Intention of publiſhing of Words is to be collected from the whole Words, it muſt ſometimes happen, that the Senſe of Words, which would have been actionable if no others had been publiſhed at the ſame Time, is ſo changed by ſubſequent Words, as to be rendered not actionable.

2. When this is the Caſe, the ſubſequent Words are ſaid to be explanatory.

4 Rep. 19. *Brittridge's* Caſe.

3. If theſe Words are publiſhed *Maſter* Brittridge *is a perjured old Knave*; *and that is to be proved by a Stake parting the Land of* J. S. *and* J. D. no Action lies; for, although the former Words would have been actionable, their Meaning is ſo explained by the ſubſequent Words, as to make it evident, that a falſe Swearing in a Court of Juſtice was not intended.

4 Rep. 19. *Brittridge's* Caſe.

4. If theſe Words are ſpoken to *J. S. Thou art a Thief*; *for thou haſt ſtolen my Apples out of my Orchard*, no Action lies; it appearing from the latter Words, that the whole Words do only import a Charge of a Treſpaſs.

1 Rol. Abr. 51. *Wilk's* Caſe.

5. If it be ſaid to *J. N. Thou art a Thief*; *for thou tookeſt my Beaſts by reaſon of an Execution, and I will hang thee*, no Action lies; for, however the Speaker might be miſtaken as to the Nature of the Offence, it appears from the latter Words, that the whole Words do only import a Charge of a Treſpaſs.

Cro. Jac. 674. *Smith* v. *Ward.*

6. If *J. S.* ſay to *J. N. Thou art a Thief*; *and haſt ſtolen my Trees*, no Action lies, it appearing from the latter Words, that the whole Words do only import a Charge of a Treſpaſs.

Cro. Jac. 666. *Ridges* v. *Mills.*

7. If *J. S.* ſay to *J. N. Thou haſt raviſhed a Woman*; *and I will make thee ſtand in a white Sheet*, no Action lies; it appearing from the latter Words, that only ſuch Offence as is puniſhable in a ſpiritual Court was intended by the Speaker.

8. It muſt on the other Hand ſometimes happen, that the Senſe of Words which would not have been actionable, if no others had been publiſhed at the ſame Time, is ſo changed by ſubſequent Words, as to be rendered actionable.

9. When this is the Caſe, the ſubſequent Words are ſaid to be accumulative.

10. No

10. No Action lies for ſpeaking theſe Words to *J. S. You are a Rogue:* But if the Words had been, *You are a Rogue of Record*, an Action would have lain; in as much as, the whole Words would then have imported a Charge of having been convicted of a Crime. 1 Rol. Abr. 43. *Alleſley* v. *Mawdit.*

* 11. No Action lies for ſpeaking theſe Words to *J. N. Thou art a Rebel:* But if the Words had been, *Thou art a Rebel, and all that keep thee Company are Rebels, and thou art not the Queen's Friend*, an Action would have lain; in as much as, it would have appeared from the whole Words, what Kind of Rebel the Speaker intended. *Page 511 Cro. Eliz. 638. *Redſtone* v. *Elliot.* 1 Rol. Abr. 69.

12. No Action lies for ſaying to *A. B. Thou art forſworn:* But an Action would have lain, if the Words had been, *Thou art forſworn, and I will ſet thee on the Pillory*; for it would then have appeared, that ſuch forſwearing was meant, as *A. B.* may be ſet on the Pillory for. 1 Rol. Abr. 70. pl. 46.

13. If theſe Words are ſpoken to *J. S. thou art a Clipper, and thy Neck ſhall pay for it*, an Action lies; in as much as, it appears from the whole Words, that a Clipper of Money was intended. 3 Lev. 166. *Maden* v. *Micocke.*

14. It was, in two Caſes, holden, that for ſpeaking theſe Words to *J. N. Thou art a Thief, for thou haſt ſtolen a Tree*, no Action did lie; becauſe the latter Words were explanatory, and only ſhewed the Reaſon of calling Thief; but that, if the Words had been, *Thou art a Thief and haſt ſtolen a Tree*, an Action would have lain; in as much as the Word *and* would have made two diſtinct Sentences of the Words, in which Caſe the latter Words would have been accumulative. Cro. Jac. 114. *Minors* v. *Leeford.* Hil. 3 Jac. Cro. Jac. 231. *Gyer* v. *Ormſted,* Trin. 7 Jac.

15. But in a ſubſequent Caſe, wherein theſe Words were ſpoken to *J. N. Thou art a Thief, and haſt ſtolen twenty Load of my Furze*, it was holden, that no Action did lie; and by the Court: The Words, *and thou haſt ſtolen*, and the Words, *for thou haſt ſtolen*, do, according to the common Acceptation of the Words, mean the ſame Thing. Hob. 331. *Clerk* v. *Gilbert*, Trin. 17 Jac. 1.

16. The Doctrine laid down in the Caſe of *Clerk* v. *Gilbert*, has been ſince adhered to. Ld. Raym. 960. *Baker* v. *Pierce.*

(S) Of the Pleadings in an Action for Words.

1. In the general.

1. IF two Perſons have publiſhed Words, for which an Action lies, an Action cannot be maintained againſt them jointly; the Publication of one not being the Publication of the other. Cro. Jac. 647. *Chamberlain* v. *White and another.* Palm. 313.

2. If Words, for which an Action lies, have been publiſhed of two Perſons, they cannot join in an Action againſt the Publiſher; the Damage to one not being a Damage to the other. Dyer 19. Yelv. 129. Cro. Car. 512.

3. It is by the 21 *Jac.* 1. *cap.* 16. enacted, "That all Actions upon "the Caſe for Words ſhall be brought within two Years after the Words "ſpoken, and not after."

4. It has been holden, that this Statute does not extend to an Action for Words, which become actionable by reaſon of the ſpecial Damage received from them. 1 Sid. 95. Cro. Car. 193. Salk 206.

5. In the Declaration in an Action upon the Caſe, it was alledged, that the Defendant ſpoke of the Plaintiff divers falſe and ſcandalous Words, of which the Tenor follows: *Thou art an arrant Whore, and an old worm-eaten Jade, and one of thy Sides hath been eaten out with the Pox.* It was holden, upon a Motion in Arreſt of Judgment, that the Declaration Cro. Eliz. 857. *Garford* v. *Clark.*

tion

tion is bad, becauſe it is not alledged expreſsly, that the Defendant ſpoke theſe Words; and by the Court: Some Words, which would, perhaps, have rendered the reſt not actionable, may have been omitted. It is ſuf-
*Page 512 * ficient to plead a Deed or Record by way of Recital, becauſe the Recital may be compared with the Deed or Record: But if there be a Miſtake in the Recital of Words ſpoken, no Recourſe can be had to any Thing, by which the Miſtake may be corrected.

3 Lev. 338. *Cotteril* v. *Matthews.* 2 Lev. 193. 6. In the Declaration in an Action upon the Caſe, it was alledged, that the Defendant ſpoke certain Words, which were actionable; and then the Declaration went on, *cumque etiam poſtea* the Defendant ſpoke other Words, which were likewiſe actionable. A Verdict being found for the Plaintiff, and entire Damages been given, it was objected, in order to arreſt Judgment, that the latter Words are not alledged poſitively, but by way of Recital; and divers Caſes were cited, where Judgment had been arreſted in Actions of Treſpaſs; becauſe it was only alledged, *cum* the Defendant committed the Treſpaſs. Judgment was given for the Plaintiff; and by the Court: This being an Action upon the Caſe, and the former Words being laid poſitively, the latter ſhall be intended to be poſitive. The Words *cumque etiam* are, in divers Dictionaries, ſaid to mean the ſame as *porro*, and in that Senſe they are uſed by ſome of the beſt *Latin* Authors.

1 Keb. 273. *Motley* v. *Slaney.* 7. Upon a Motion in Arreſt of Judgment in an Action upon the Caſe, it was inſiſted, that it was only alledged in the Declaration, that the Defendant ſpoke *hæc ficta falſa verba*; whereas it ought to have been alledged, *quod ficte & falſo dixit*. The Declaration was holden to be well enough.

Noy 35. *Mercer* v. *Sparks.* Owen 51. 8. A Writ of Error being brought upon a Judgment, in an Action for Words in themſelves actionable, it was aſſigned for Error, that it is only alledged, that the Words were ſpoken *falſely*; whereas it ought to have been alledged, that they were ſpoken *falſely* and *maliciouſly*; but by the Court: This is no Error, for ſuch Words imply Malice.

Cro. Eliz. 861. *Taylor* v. *How.* 9. It is ſufficient to alledge in the Declaration in an Action for Words, that the Defendant ſpoke the Words *palam & publice*; for the Words *palam & publice* imply that the ſpeaking was *in præſentia et auditu aliorum.*

2 Lev. 193. *Mors* v. *Thacker.* 10. If the Plaintiff in an Action upon the Caſe declare for the ſpeaking of two Sets of Words, and only the firſt Set are alledged to have been ſpoken *in præſentia & auditu quamplurimorum*, the *præſentia & auditu quamplurimorum*, which is alledged as to the firſt Set, ſhall go to the ſecond.

Cro. Eliz. 486. *Hall* v. *Henneſley.* Noy 57. 11. If it be alledged in the Declaration in an Action upon the Caſe, that the Words were ſpoken *in præſentia diverſorum*, it is well enough; although it be not alledged, that the ſpeaking was *in auditu diverſorum*; for, as the Words are alledged to have been ſpoken *in præſentia diverſorum*, it ſhall be intended, that they were ſpoken *in auditu diverſorum.*

12. It is uſual to alledge in the Declaration in an Action for Words, that the Plaintiff is of good Fame: But this is not traverſable.

Stiles 118. *Strachey's* Caſe. 13. In the Declaration in an Action for Words, it was alledged, that the Plaintiff was of good Fame. The Defendant pleaded, that at the Time of publiſhing the Words, the Plaintiff was not of good Fame. The Plea was holden to be bad; in as much as, it only anſwers to a Matter of Inducement, which did not require any Anſwer.

*Page 513 4 Rep. 13, 14, 19. Cro. Car. 510. * 14. As the Senſe of Words is to be collected from the Conſideration of the whole Words, and of all the Circumſtances which attended the Publication of them if any of the Words, or any Circumſtance which attended the Publication of them, be omitted in the Declaration of the Plaintiff, the Defendant may in his Plea ſet out ſuch of theſe as are material for him.

15. In

15. In an Action for calling the Plaintiff *perjured Man*, the Defendant pleaded in his Juſtification, that the Plaintiff was *perjured* in a certain Cauſe, and Judgment was for him. Another Action being brought by the Plaintiff for the ſame Words, the Defendant pleaded this Judgment in Bar, and it was holden to be a good Plea. 2 Brownl. 49. *Styles* v. *Baxter.*

16. After Judgment for the Defendant in an Action for theſe Words, *He is a raſcally Alderman, a factious Alderman, and a Lampooner*, a ſecond Action was brought for the ſame Words, with an Averment, that the Word *Lampooner* means *Libeller*. The Defendant pleaded in Bar, that a former Action was brought for the ſame Words, except that the Word *Lampooner* is, in the Declaration in the preſent Action, averred to mean *Libeller*. Upon a Demurrer to this Plea, it was inſiſted, that, by the Explanation of the Word *Lampooner*, the preſent Action is become a different Action; but by the Court: As the Plaintiff has been once barred in an Action for the ſame Words, he ſhall never intitle himſelf to another Action by an Explanation of one of the Words. 1 Lev. 248. *Gardiner* v. *Helvis.*

17. If the Words alledged in the Declaration are not actionable, no additional Words in the Replication can make them ſo; for the Defendant cannot rejoin to any Words in the Replication, which are not contained in the Declaration. Styles 70. Anon.

18. It is very dangerous for the Defendant in an Action for Words to demur to the Declaration; for he may, after taking the Chance of trying the Fact, avail himſelf of any Matter in Arreſt of Judgment, which would have been good upon a Demurrer. 4 Rep. 14. a. Doct. pl. 186.

2. In what Caſes, an Averment is neceſſary.

19. It was heretofore doubted, whether an Action did lie, for publiſhing Words which import a Charge of Murder; unleſs there was an Averment, that the Perſon ſaid to be murdered is dead. Yelv. 21. Sid. 53.

20. But it has been long ſettled, that an Action does lie, for publiſhing Words which import a Charge of Murder; although it be not averred, that the Perſon ſaid to be murdered is dead; for that this ſhall be intended; unleſs it appear in the Pleadings, that he is alive. Cro. Eliz. 569, 823. CroCar. 489. Sid. 53. 1 Ventr. 117, 149.

21. In an Action upon the Caſe the Plaintiff declared, that the Defendant, being his natural Brother, publiſhed theſe Words of him, *My Brother is perjured.* Upon a Motion in Arreſt of Judgment. *Yelverton*, J. was of Opinion, that the Action did not lie; and by him: Words, in order to render them actionable, ought to be ſo certain, as to the Deſcription of the Perſon to whom they relate, that every Perſon who hears them may know to whom they do relate. The Defendant may have ſeveral Brothers; and it would be very unreaſonable, that every one of them ſhould be able to maintain an Action, by averring that the Words were publiſhed of him. *Williams* J. was of Opinion, that the Action lay; and by him: As the Plaintiff has averred, that the Words were publiſhed of him, and the Jury have found the Defendant Guilty, the Court is aſcertained, that the Words were publiſhed of the Plaintiff. *Tanfield*, J. was likewiſe of Opinion that the Action lay; and by him: If the Words had been, *One of my Brothers is perjured*, an Action would not have lain, in as much as it would then have appeared to the Court, that the Defendant had more than one Brother, and the Want of Certainty, to which of the Brothers the Words did relate, could not have been cured by the Averment and the Verdict: But as it does not now appear to the Court, that the Defendant had any other Brother than the Plaintiff, and it is averred that the Words were publiſhed of him, and the Jury have found the Defendant Cro. Jac. 107. *Wiſeman* v. *Wiſeman.*

Defendant Guilty, the Plaintiff ought to have Judgment. This Cauſe being afterwards moved in full Court, it was reſolved by all the Juſtices, that the Action did lie; and Judgment was given for the Plaintiff.

1 Rol. Abr. 85. *Nelſon* v. *Smith.*

22. If theſe Words are publiſhed, *Captain* Nelſon *is a Thief*, an Action lies for *Robert Nelſon*, if it be averred, that there was, at the Time of publiſhing the Words, a Colloquium concerning him, and that they were publiſhed of him; it not being neceſſary to aver, that he was, at that Time, a Captain, or uſually called a Captain.

Cro. Jac. 444. *Brown* v. *Lowe.* 1 Rol. Abr. 79.

23. If it be ſaid by *J. S.* to *J. N. Thy Maſter* Brown *hath robbed me*, any Perſon of the Name of *Brown*, if it be averred, that the Words were ſpoken of him, may maintain an Action, although it be not averred, that he was the Maſter of *J. N.* of whom the Words were ſpoken; for it ſhall not be intended, that *J. N.* had more than one Maſter of the Name of *Brown*.

Cro. Jac. 673. *Smith* v. *Ward.*

24. In an Action upon the Caſe the Plaintiff declared, that the Defendant publiſhed theſe Words of him, *He is a Thief.* It was objected, in order to arreſt Judgment, that the Words cannot be applied to the Plaintiff more than to any other Perſon; it not being averred, that, at the Time of publiſhing them, there was a Colloquium concerning the Plaintiff. Judgment was given for the Plaintiff; and by the Court: It is ſufficient to aver, that the Words were publiſhed of the Plaintiff, and the Jury, by finding a Verdict for the Plaintiff, have found that the Words were publiſhed of him, which helps the Caſe; for otherwiſe, they would have found the Defendant Guilty.

1 Rol. Abr. 85. *Biſhop* v. *Fitzherbert.*

25. If it be averred, that, in a Colloquium between the Plaintiff and Defendant, the Defendant ſaid, *Thou art a Thief*, an Action lies, although it be not averred, that the Words were ſpoken of or to the Plaintiff; for, as they were ſpoken in a Colloquium between the Plaintiff and Defendant, it muſt be intended, that they were ſpoken to the Plaintiff.

Cro. Jac. 241. *Beaumond* v. *Haſtings.*

26. In an Action upon the Caſe, the Plaintiff declared, that the Defendant publiſhed theſe Words of him, being a Juſtice of the Peace, *He for Malice and Spleen did many Times wreſt the Law, and pervert Juſtice, to ſerve his own Turn.* It was objected, in order to arreſt Judgment, that it doth not with ſufficient Certainty appear, that the Words were publiſhed of the Plaintiff; it not being averred, that at the Time of publiſhing them there was a Colloquium concerning him. Judgment was given for the Plaintiff; and by the Court: It is the uſual Courſe, and ſufficient, to aver, that the Words were publiſhed of the Plaintiff. The Judgment was affirmed upon a Writ of Error.

Cro. Jac. 557. *Fleetwood* v. *Curle.* 1 Rol. Abr. 57.

27. If theſe Words are publiſhed, in a Colloquium concerning *J. S. Mr.* Deceiver *has deceived the King*, *J. S.* may maintain an Action, if it be averred, that, at the Time of publiſhing the Words, there was ſuch Colloquium; and that he was, at that Time, one of the King's Receivers; although it be not averred, that, at the Time of publiſhing the Words, there was a Colloquium concerning his Office of Receiver; for, as it is averred, that, at the Time of publiſhing the Words, he was one of the King's Receivers, it ſhall be intended, that they were publiſhed concerning his Office of Receiver.

28. As the Caſes are not reconcilable as to the Point, whether an Action lies for publiſhing diſgraceful Words of a Tradeſman concerning his Trade; unleſs it be averred, that, at the Time of publiſhing the Words, the Plaintiff did exerciſe the Trade, it will be proper to mention the principal Caſes upon the Point.

Cro. Eliz. 273. *Jordan* v. *Lyſter*, Paſch. 34 Eliz.

29. In one Caſe it was holden to be ſufficient for the Plaintiff in ſuch Actions to aver, *quod fuit mercator, per magnum tempus.*

30. In

30. In another Case, wherein the Plaintiff in such Action declared, *quod per multos annos jam retroactos fuit mercator*, the Court doubted, whether, as it is not precisely alledged, it should be intended from the Words, *per multos annos jam retroactos fuit mercator*, it should be intended that the Plaintiff was a Merchant at the Time of publishing the Words. Cro. Eliz. 794. *Dotter* v. *Ford.* Trin. 42 Eliz.

31. In another Case, wherein the Plaintiff in such Action declared, that for five Years preceding the first Day of *May* he had exercised the Trade of a Draper, Judgment was given for the Plaintiff. It was objected upon a Writ of Error, that the Declaration is not good; because it is not precisely alledged, that, at the Time of publishing the Words, the Plaintiff was a Draper. The Judgment was affirmed; and the Court agreed; that the following Distinction taken by *Yelverton* was well founded; namely, that if an Action be brought by a Person in an Office, which he holds during the King's Pleasure, for Words which are disgraceful to him in his Office, it must be expresly alledged, that the Plaintiff was in the Office, at the Time the Words were published; but that, if an Action be brought by a Person of a Profession or Trade, for Words which are Disgrace to him in his Profession or Trade, it is sufficient to aver, that he has for some Years past exercised the Profession or Trade; for it shall not be intended, that he has discontinued his Profession or Trade. Yelv. 159. *Tuthill* v. *Milton.* Trin. 7 Jac. Cro. Jac. 222. S. C.

32. In the last Case, the Case of *Gardener* v. *Hopwood*, *Trin.* 38 *Eliz.* was cited; in which it was holden to be sufficient, for a Plaintiff in such Action to aver in his Declaration, *quod per multos annos jam retroactos artem merchandizandi exercuit.*

33. In another Case, wherein the Plaintiff in such Action declared, *quod per magnum tempus usus fuit* the Art of a Drover; the Declaration was holden to be bad; because it is not averred, that, at the Time of publishing the Words, the Plaintiff was a Drover. Cro. Car. 282. *Collis* v. *Malin.* Mich. 8 Car. 1 Jon. 304. S. C.

34. In another Case, wherein the Plaintiff in such Action declared, that he had been a Merchant for the Space of twenty Years, without adding the Words, *last past*; the Declaration was holden to be good; and by the Court: It shall be intended, notwithstanding there are Opinions to the contrary, that the Plaintiff continued to be a Merchant. Sid 425. *Drake* v. *Hill.* Mich. 21 Car. 2.

35. It is in the general true, that an Action does not lie for publishing disgraceful Words of a Tradesman concerning his Trade; unless it be averred, that, at the Time of publishing the Words, there was a Colloquium concerning his Trade. Salk. 694. 2 Saund. 307. Latch 114. 1 Lev. 115, 250. 2 Lev. 62. Stra. 696, 1169. Ld. Raym. 1417.

36. But if it appear from the Words published of a Tradesman, that they were published concerning his Trade, it is not necessary to aver, that, at the Time of publishing them, there was a Colloquium concerning his Trade. 1 Lev. 115, 250. 2 Lev. 62. 5 Mod. 398. Stra. 696. Ld. Raym. 1417.

37. If these Words are published of a Tradesman, *Have a Care of him, do not deal with him, he is a Cheat, he has cheated all the Farmers at* E. *and now he is come to cheat at* F. an Action lies; although it be not averred, that, at the Time of publishing them, there was a Colloquium concerning his Trade; it being apparent from the Words, that they were published concerning his Trade. 2 Lev. 62. *Reeve* v. *Holgate.*

38. If three Men have given Evidence at a Trial, and *J. S.* say to them *One of you three is perjured*, no Action lies; for there is in these Words such a total Want of Certainty that it cannot be cured by any Averment. *Page 514. 1 Rol. Abr. 81. *Brown's* Case.

1 Rol. Abr. 75. *Foxcroft* v. *Lacy.*

39. But if in a Converſation concerning ſix Defendants to a Bill in Chancery, it be ſaid by *J. S. Theſe Defendants are thoſe who helped to murder* J. N. every Defendant may maintain an Action; if it be averred, that, at the Time of ſpeaking the Words, there was ſuch Colloquium, and that he was one of the Defendants.

Cro. Jac. 331. *Radcliffe* v. *Michael.*

40. No Action lies for ſaying to *J. N. You are as bad as your Wife, when ſhe ſtole my Cuſhion*; unleſs it be averred, that the Felony alluded to was committed.

Com. 267. *Upton* v. *Pinfold.*

41. So no Action lies for ſaying to *J. S. You are as great a Rogue as* J. N. *who ſtole Quilts*, except it is averred, that *J. N.* did ſteal Quilts.

Cro. Jac. 687. *Foſter* v. *Browning.* Hutt. 73.

42. It has been holden, that no Action lies for publiſhing theſe Words of *J. S. He is as arrant a Thief as any in England*, unleſs it be averred, that there is a Thief in *England.*

Sid. 53. *Dacy* v. *Clinch.*

43. But this Caſe does not ſeem to be Law; for it is laid down in another Caſe, that if theſe Words are ſpoken to *J. N. As ſure as God governs the World, or King* James *this Kingdom, you are a Thief*, an Action lies; although it be not averred, that God governs the World, or King *James* this Kingdom; becauſe a Thing ſo apparent as either of theſe is need not be averred.

1 Lev. 65. *Orton* v. *Fuller.*

44. If *J. N.* have publiſhed theſe Words, *J. S. ſays I am a perjured Rogue, he is a perjured Rogue as well as I, J. S.* may maintain an Action, without averring, that the Defendant is a perjured Rogue; for the Words *as well as I*, amount to a Confeſſion of his being ſo.

Comb. 247. *Smith* v. *Williams.*

45. If theſe Words are publiſhed of *J. N. He robbed the* Hockley *Butcher*, there is no Neceſſity to aver, in the Declaration in an Action brought by *J. N.* that there was a *Hockley* Butcher; for the Words themſelves imply that there was.

Hob. 126. Anon.

46. It is not neceſſary to aver, what the Meaning of Words publiſhed in a foreign Language is in *Engliſh*; it being the Duty of the Judge, before whom the Cauſe is tried, to inform himſelf of this from thoſe who underſtand it.

1 Rol. Abr. 86. pl. 1.

47. It is not neceſſary to aſcertain the Meaning of ſuch *Engliſh* Words, as have a local Signification, by an Averment; for it is to be preſumed, that the Judge, before whom the Cauſe is tried, does underſtand the Meaning of ſuch *Engliſh* Words; and, if he do not, it may be learned from the Witneſſes.

*Page 515

* 3. In what Caſes, a Colloquium is neceſſary.

48. A Colloquium is a Converſation, which was had at the Time of publiſhing the Words for which an Action is brought.

49. It is in the general true, that an Action does not lie for Words, on Account of their being diſgraceful to a Perſon in his Office, Profeſſion, or Trade; unleſs it be averred, that, at the Time of publiſhing the Words, there was a Colloquium, concerning the Office, Profeſſion, or Trade of the Plaintiff.

2 Saund. 307. *Todd* v. *Haſtings.*

50. In an Action upon the Caſe the Plaintiff declared, that he was a Draper, and that he gained his Living by buying and ſelling Cloths and other Goods; and that the Defendant, intending to ſlander the Plaintiff in his good Name and Credit, ſpoke theſe Words to him, *You are a cheating Fellow, and keep a falſe Book; and I will prove it.* It was objected, in order to arreſt Judgment, that it is not averred, that, at the Time of ſpeaking the Words, there was a Colloquium concerning the Plaintiff, or concerning his Dealing by way of buying and ſelling; and conſe-

consequently, that the Words are not disgraceful to him in his Trade. Judgment was arrested.

51. In an Action upon the Case the Plaintiff declared, that he was a Trader; and that the Defendant spoke these Words to him, *You are a Cheat, and have been a Cheat for divers Years.* Upon the first Motion in an Arrest of Judgment, *Holt*, Ch. J. was of Opinion; that, as the Words must be understood of the Plaintiff's Way of living, it was not necessary to aver, that, at the Time of publishing them, there was a Colloquium concerning the Trade of the Plaintiff; but he afterwards changed his Opinion, and Judgment was arrested. Salk. 694. 5 Mod. 398. S. C.

52. It was holden, that an Action did not lie for speaking these Words to the Plaintiff, *You cheated the Lawyer of his Linen, and stood Bawd to your Daughter to make it up with him; you cheat every Body; you cheated me of a Sheet; you cheated Mr.* Saunders, *and I will let him know it*; because it is not averred, that, at the Time of publishing the Words, there was a Colloquium concerning the Trade of the Plaintiff. Stra. 1169. *Davis* v. *Miller.*

53. In an Action upon the Case the Plaintiff declared, that the Defendant spoke these Words to him, *You are a cheating old Rogue, and have cheated the Fatherless and Widow.* Judgment was arrested; because it is not averred, that at the Time of publishing the Words there was a Colloquium concerning the Trade of the Plaintiff. Ld. Raym. 1417. *Ludwell* v. *Hole.*

54. But if an Action be brought for Words, on Account of their being disgraceful to a Person in his Office, Profession, or Trade, and it appears from the Words themselves, that they are disgraceful to the Plaintiff in his Office, Profession, or Trade, the Action lies; although it be not averred, that, at the Time of publishing the Words, there was a Colloquium concerning the Office, Profession or Trade of the Plaintiff.

55. In an Action upon the Case the Plaintiff declared, that the Defendant published these Words of him, being a Justice of the Peace, *He is a forsworn Justice, and not fit to set upon the Bench.* Upon a Motion in Arrest of Judgment it was said, that it is not averred, that, at the Time of publishing the Words, there was a Colloquium concerning the Office of the Plaintiff as a Justice of the Peace. Judgment was given for the Plaintiff; and by the Court: Such Averment is not necessary; it appearing from the Words themselves, that they were published concerning his Office, as a Justice of the Peace. 1 Lev. 280. *Carne* v. *Osgood.*

56. An Action lies for publishing these Words of a Doctor of Physic, *He is no Scholar*; although it be not averred, that at the Time of publishing the Words, there was a Colloquium concerning his Profession; because no Man can be a good Physician, unless he be a Scholar. 1 Rol. Abr. 54. *Cawdry* v. *Chickley.* Cro. Car. 270. S. C.

57. If these Words are published of a Tradesman, *Have a Care of him, and do not deal with him; he is a Cheat, and will cheat you; he has cheated all the Farmers at* Epping, *and now he is come to cheat* Hatfield, an Action lies; although it be not averred, that, at the Time of publishing the Words, there was a Colloquium concerning the Plaintiff; it being apparent from the Words themselves, that they were published concerning his Trade. 2 Lev. 62. *Reeve* v. *Holgate.*

58. In an Action upon the Case the Plaintiff declared, that he is a Brewer, and has always paid his Debts to the full, without any compounding; and that the Defendant, intending to bring the Plaintiff into Discredit, published the following Words of him, *He is a sorry pitiful Fellow, and a Rogue; he compounded his Debts at five Shillings in the Pound.* Upon a Demurrer it was argued, that, the Words are not actionable; because it is not averred, that, at the Time of publishing them, there was a Colloquium concerning the Trade of the Plaintiff. Ld. Raym. 1480. *Stanton* v. *Smith.*

Judg-

Judgment was given for the Plaintiff; and by the Court: As the publiſhing of ſuch Words of a Tradeſman muſt greatly leſſen his Credit, they muſt be very prejudicial to him.

4. What is the Uſe of an Inuendo.

4 Rep. 17. *James* v. *Rutlech.*

59. Nothing, which would otherwiſe remain uncertain, can be reduced to Certainty by an *Inuendo*; for the Word *Inuendo*, which means the ſame as the Word *aforeſaid*, can only refer to ſomething that is before certain.

Cro. Car. 443. *Slocomb's* Caſe.

60. No Iſſue can be joined upon the Truth of Words, which are contained under an *Inuendo*; becauſe ſuch Words are never an expreſs Averment.

4 Rep. 17.

61. If it be averred, in the Declaration in an Action upon the Caſe, that the Defendant publiſhed theſe Words, *One of the Servants of* J. S. inuendo *J. N. a Servant of* J. S. *is a Thief*, the Action does not lie; for as

*Page 516

it is not averred, that the * Words were publiſhed of *J. N.* or that there was, at the Time of publiſhing them, a Colloquium concerning him, it ſhall not be collected from the *Inuendo*, that he was the Perſon intended by the Publiſher.

4 Rep. 20. *Barham's* Caſe. 1 Rol. Abr. 82. pl. 1.

62. If it be averred, in the Declaration in an an Action upon the Caſe, that the Defendant publiſhed theſe Words of *J. N. He did burn my Barn*, inuendo *a Barn with Corn in it*, the Action does not lie; becauſe the Words, *He did burn my Barn*, are not actionable; it not being Felony to burn a Barn which has no Corn in it, unleſs it be Parcel of a Manſion-houſe, and what is contained under the *Inuendo* ſhall not make them ſo.

63. An Action would, perhaps, at this Day lie, for Words which import a Charge of having burned a Barn, although the burning be not Felony: But, be that as it may, this Caſe applies ſtrongly to the Point for which it is adduced; namely, that, as the Barn does not appear, without the Help of the *Inuendo*, to have been a Barn with Corn in it, it ſhall not be from thence collected, that it was ſuch Barn.

1 Rol. Abr. 82. pl. 1.

64. If it be averred, in the Declaration in an Action upon the Caſe, that the Defendant publiſhed theſe Words of *J. S. He hath forſworn himſelf*, inuendo *before the Juſtice of Aſſize*, the Action does not lie; in as much as, it does not appear, without the Help of the *Inuendo*, that the Publiſher intended a forſwearing before the Juſtice of Aſſize.

1 Rol. Abr. 73. *Burgeſs* v. *Reeves.* 4 Rep. 17.

65. But if be averred, in the Declaration in an Action upon the Caſe, that the Defendant ſpoke theſe Words to the Plaintiff, *Thou*, inuendo *the Plaintiff, art a Thief*, the Action lies; becauſe it appears plainly, and without the Help of the *Inuendo*, that the Plaintiff was the Perſon intended by the Speaker.

Cro. Eliz. 609. *Corbet* v. *Hill.* 1 Rol. Abr. 83.

66. It has been holden, that an Action lies for publiſhing theſe Words of the Plaintiff, *He was perjured in his Anſwer in the Star-Chamber*, inuendo *in a certain Bill exhibited there by the Plaintiff*; although it be impoſſible, as ſuch Bill was never exhibited upon Oath, that *J. S.* could be perjured in exhibiting it; and by the Court: As the Words are actionable, without the Help of the *Inuendo*, that is void, and ought not to be regarded.

5. What may be pleaded in Juſtification of Words.

1 Rol. Abr. 87. *Cuddington* v. *Williams.*

67. If an Action be brought for calling the Plaintiff *Thief*, the Defendant may plead in his Juſtification, that the Plaintiff has been guilty of a certain Theft.

68. If

68. If the Words, for the Publication of which an Action is brought, be, *J. S. is a perjured Man*, the Defendant may plead in his Juſtification, that *J. S.* was perjured in a certain Cauſe. Bro. Action of the Caſe 104.

69. It is ſaid to have been agreed by the Court, in an Action for a Libel, that where ſlanderous Words are in Writing, the Truth of the Charge thereby imported can no more be juſtified in an Action upon the Caſe, than in a criminal Proſecution. But no other Caſe is to be met with, wherein the Doctrine of this Caſe is adhered to. *Ante* Vol. 3. 495 *Rex* v. *Roberts*, Mich. 8 Geo. 2.

70. In an Action for publiſhing theſe Words of the Plaintiff, *He is a Thief*, the Defendant pleaded, that the Plaintiff had been guilty of ſtealing ſomething. The Plaintiff replied, that after the Felony and before the Publication of the Words, he had been pardoned by a general Pardon. Upon a Demurrer, this Replication was holden to be good; in as much as the Guilt, as well as Puniſhment, is taken away by the Pardon. It was likewiſe holden, that it makes no Difference in ſuch Caſe, whether it was a general Pardon, or a ſpecial Pardon, of which the Defendant might have been ignorant; for that every Perſon, who publiſhes ſlanderous Words, does it at his Peril. Hob. 81. *Cuddington* v. *Wilkins.*

71. If the Plaintiff reply to a Plea of Juſtification, a general Pardon, it is incumbent upon him to ſhew, that he is not within any of the Exceptions therein contained. Raym. 23. *Harris's* Caſe.

* 72. In an Action for publiſhing theſe Words of the Plaintiff, *He ſtole Plate out of my Chamber*, the Defendant pleaded, that he had loſt Plate out of his Chamber; and that, ſuſpecting the Plaintiff to have ſtolen it, he did publiſh the Words. The Plea was upon a Demurrer holden to be bad; and by the Court: Sufpicion is not a ſufficient Juſtification for the Publication of ſlanderous Words. * Page 517 Cro. Car. 52. *Powell* v. *Plunkett.*

73. Common Fame will juſtify the arreſting of a Perſon upon Suſpicion of having committed a Felony, and the charging of him in a judicial Way with having been guilty thereof: But common Fame is not a Juſtification for ſuch Charge in an extrajudicial Way. 1 Rol. Abr. 43. *Buſy* v. *Child.* Hob. 82. Cro. Eliz. 248. Hutt. 13.

74. The preciſe Words, and all of them, for the Publication of which the Action is brought, muſt be confeſſed and juſtified by the Defendant's Plea, otherwiſe his Juſtification is bad. 4 Rep. 13, 14.

75. If an Action be brought for publiſhing theſe Words of the Plaintiff, *He is a Traitor*, it is not ſufficient for the Defendant to plead, that he only publiſhed theſe Words, *Such Things Traitors do.* Cro. Eliz. 153. *Billingham* v. *Minors.* 1 Rol. Abr. 83.

76 If the Plaintiff in an Action upon the Caſe declare, that whereas ſhe was of good Fame and Reputation, the Defendant publiſhed theſe Words of her, *She is a common Whore*, and the Defendant plead, that at the Time of publiſhing the Words the Plaintiff was not of good Fame or Reputation, the Plea is bad; in as much as, it is no Anſwer to the Words, and does only go to what is alledged by way of Inducement, which required no Anſwer. Styles 118. *Strachy's* Caſe.

77. If it be averred in the Declaration in an Action upon the Caſe, that the Defendant publiſhed certain Words of the Plaintiff, it is not a good Juſtification for the Defendant to plead that he heard another publiſh the Words, *quæ eſt eadem:* For it can never be the ſame Thing, to publiſh Words and to hear them publiſhed. 2 Rol. Rep. 284. *Scarlet* v. *Jennings.*

78. If it be averred, in the Declaration in an Action upon the Caſe, that the Defendant publiſhed theſe Words of the Plaintiff, *He is a Thief and hath ſtolen* 20 *l.* and the Defendant plead, that the Plaintiff did ſteal two Pullets, this is not a good Juſtification; it being no Anſwer to the Words. 2 Rol. Rep. 214. *Mercer* v. *Hilſden.*

79. In an Action for ſpeaking theſe Words to the Plaintiff, *Thou haſt played the Thief, for thou haſt ſtolen my Cloth and half a Yard of Velvet*, the Defendant Cro. Eliz. 239. *Johns* v. *Gittings.*

Defendant juſtified the ſpeaking of theſe Words, *Thou haſt ſtolen Part of the Velvet delivered to you.* The Juſtification was holden to be bad; becauſe it only goes to Part of the Words.

Cro. Jac. 578. *Upcher* v. *Betts.*

80. If the Words, for publiſhing of which an Action is brought, charge a Tradeſman with having been a Bankrupt upon the firſt Day of *April* 17 *Ja.* and the Defendant plead, that the Plaintiff was a Bankrupt upon the firſt Day of *April* 15 *Ja.* and that therefore he publiſhed the Words, the Plea is bad: Becauſe it is not averred, that the Plaintiff continued a Bankrupt to the Time of publiſhing the Words; for he might afterwards recover his Credit in Trade.

4 Rep. 13, 14, 19. Cro. Car. 510.

81. If any other Words were publiſhed, at the Time, the Words, which are contained in the Plaintiff's Declaration were publiſhed, or if any Circumſtance attend the Publication of thoſe Words, which would render them not actionable, the Defendant may in his Plea avail him thereof.

4 Rep. 13, 14. *Cromwell's* Caſe.

82. In an Action for ſpeaking theſe Words to the Plaintiff, *You are a Murderer*, the Defendant pleaded, that, in a Converſation with the Plaintiff concerning Poaching, the Plaintiff confeſſed he had killed a great Number of Hares; and that thereupon he ſaid to him, *You are a Murderer*, inuendo *a Murderer of Hares.* The Plea was holden to be good; and by the Court: As this Plea doth confeſs and juſtify the Words, it would be unreaſonable, to confine the Defendant to the general Iſſue.

* Page 518

* 83. The Publication of ſlanderous Words, for which an Action would in the general lie, may in certain Caſes be juſtified, although the Words are falſe.

Cro. Eliz. 230, 248. Hob. 82. Hutt. 113.

84. The Publication of Words, which import the Charge of a Crime, may notwithſtanding the Falſity of them be juſtified, if they have been only publiſhed in a Courſe of Juſtice.

1 Roll. Abr. 43. 4 Co. 14. b. 15. a. *Ante* 499.

Cro. Jac. 90. 1 Rol. Abr. 87. Styles 462. *Ante* 498.

85. A Barriſter may juſtify the ſpeaking of ſlanderous Words, in pleading his Client's Cauſe, although the Words are falſe; it being his Duty to ſpeak for his Client; and it being likewiſe in a Courſe of Juſtice.

Cro. Eliz. 230. *Buckley* v. *Wood.*

86. A Witneſs may juſtify the ſpeaking of ſlanderous Words in giving his Evidence which are falſe, this being in a Courſe of Juſtice.

MS. Rep. *Aſtley* v. *Young.* Trin. 32 G. 2. in *K. B.*

87 A Complaint having been made by the Plaintiff againſt the Defendant in the Court of King's Bench, he exhibited an Affidavit, wherein he charged the Plaintiff with having ſworn falſly againſt him. An Action being thereupon brought, the Defendant pleaded in his Juſtification, that the Words ſuggeſted to be libellous, were contained in an Affidavit made in his Defence, againſt the Complaint in this Court, and in Anſwer to an Affidavit made by the Plaintiff. The Queſtion upon a Demurrer to this Plea was, whether it were a good Plea? All the Juſtices were clearly of Opinion that it was; and by Lord *Mansfield*, Ch. J. if the denying in one Affidavit of what is ſworn in another ſhould be deemed a Libel, Actions for Libels would be endleſs; for an Action might be brought in every Caſe, wherein there are contradictory Affidavits. Witneſſes muſt be at Liberty to contradict each other; nor is there any Neceſſity for an Action in ſuch Caſe; for if ſlanderous Words, which are immaterial, are contained in an Affidavit, the Court has Power to do complete Juſtice to the Party injured, not only by ordering a Satisfaction to be made, but likewiſe by ordering the ſlanderous Words to be expunged.

88. If

88. If a Preacher, without an Intent to ſlander, recite a ſlanderous Story in his Sermon, which is falſe, the doing of this may be juſtified. Cro. Jac. 91. *Greenwood's* Caſe. 1 Rol. Abr. 87.

89. Heretofore the Truth of the Charge imported by the Words, for the Publication of which an Action was brought, was allowed to be given in Evidence, in Mitigation of Damages, upon the Plea of Not guilty: But at a Meeting of all the Judges it was agreed, not to allow this to be done for the Time to come; becauſe, unleſs the Truth of the Charge imported by the Words is pleaded in Juſtification, the Plaintiff cannot come prepared to ſhew the Falſity thereof. Stra. 1200. *Underwood* v. *Parks.*

(T) In what Kinds of Slanderous Words Spiritual Courts have Juriſdiction.

1. ALTHOUGH an Action upon the Caſe for the Publication of Words, does not lie, unleſs the Words are in themſelves actionable, or ſome ſpecial Damage has been received from them, the Party of whom they have been publiſhed is not in all other Caſes without Redreſs; for, if Words amount to a Spiritual Defamation, a Suit may be inſtituted in a Spiritual Court.

2. No Words amount to a Spiritual Defamation; unleſs they import a Charge of an Offence, which is conuſable in a Spiritual Court. Salk. 692. *Coxiter* v. *Parſons.*

2 Lev. 49. 2 Rol. Abr. 296. Sid. 393. Salk. 548. Stra. 946.

*3. It follows, that if no Suit can be inſtituted in a Spiritual Court for the Offence of which the Words import a Charge, none can be inſtituted for the Words. *Page 519. 4 Rep. 20. 8 Mod. 115. 11 Mod. 140, 208.

4. A Suit may be inſtituted in a Spiritual Court for publiſhing theſe Words of *J. S. He is an Heretick*; Hereſy being puniſhable in ſuch Court. 4 Rep. 17. Cro. Jac. 787.

5. It has been holden, that a Suit may be inſtituted in a Spiritual Court for publiſhing theſe Words of a Clergyman, *He preacheth nothing but Lies and Malice*; becauſe the Queſtion, whether a Clergyman have diſcharged his Duty properly, is fit to be tried in ſuch Court. 3 Lev. 17. *Crunden* v. *Walden.*

6. In a ſubſequent Caſe, wherein a Suit was inſtituted in a Spiritual Court for publiſhing theſe Words of a Clergyman, *He is an impudent ignorant Blockhead; his Spiritual Advice is not fit to be followed; he is not fit to adminiſter the Sacrament*, it was ſaid, in ſhewing Cauſe againſt a Rule to ſhew Cauſe why a Writ of Prohibition ſhould not be awarded, that theſe Words reflected upon him in his Profeſſion, and the Authority of the preceding Caſe was relied upon. A Prohibition was awarded; and by *Holt* Ch. J. Although theſe Words do reflect upon a Clergyman in his Profeſſion, they do not charge him with any Thing which is puniſhable in a Spiritual Court. 11 Mod. 140, 208. *Clark* v. *Prince.* Salk. 692.

7. A Suit may be inſtituted in a Spiritual Court for publiſhing theſe Words of *J. S. He is a Pander*; for a Pander may be puniſhed in a Spiritual Court. 2 Rol. Abr. 296. *Lewes* v. *Whitley.*

8. So it may for publiſhing theſe Words of a Woman, *She is a Bawd*; becauſe a Bawd is puniſhable in a Spiritual Court. Cro. Car. 229. *Hollingſhead's* Caſe. *Ib.* 261.

1 Freem. 300. 3 Lev. 18.

9. So it may for publiſhing theſe Words of *J. N. He is an Adulterer*; for Adultery is puniſhable in a Spiritual Court.

Salk. 692. *Smith* v. *Wood.* Cro. Jac. 323. 3 Lev. 350.

10. So it may for publiſhing theſe Words of *J. S. He is a Whoremaſter*; Fornication being puniſhable in a Spiritual Court.

Cro. Car. 111. *Eaton* v. *Ayloff*, Paſch. 4 Car. Sid. 433.

11. It has been holden, that it is not a Spiritual Defamation to publiſh theſe Words of a Woman, *She is a Whore*; for that, unleſs ſhe be at the ſame Time charged with ſome Act of Incontinency, the Words are to be conſidered as Words of Heat.

Sid 404. *Mellet* v. *Herbert*, Hil. 20 Car. 2. 1 Ventr. 7.

12. But in the Caſe of *Mellett* v. *Herbert*, which is ſaid to have been determined upon conſidering all the Caſes, it is laid down that a Suit may be inſtituted in a Spiritual Court, for calling a Woman *Whore*.

2 Lev. 63. *Betniff* v. *Popple*, Trin. 24 Car. 2. 1 Ventr. 220.

13. A few Years after it was again holden, and upon great Conſideration, after two Arguments at the Bar, that the Publication of theſe Words of a Woman, *She is a Whore*, is a Spiritual Defamation; for that ſuch Words, which render a Woman liable to ſuffer public Penance, ought not to be conſidered as Words of Heat.

Salk. 696. *Graves* v. *Blanchett.* 3 Lev. 193. Salk. 693.

14. The Doctrine of the two laſt Caſes, having been frequently recogniſed, it is now ſettled, that a Suit may be inſtituted in a Spiritual Court, for calling a Woman *Whore*.

Carth. 498. *Pliſſe* v. *Smith.* Stra. 471, 545, 555.

15. A Suit may be inſtituted in a Spiritual Court for any Words, which are tantamount to the calling of a Woman *Whore*, as well as for calling her *Whore*.

2 Lev. 66. *Teſer* v. *Davis.*

16. If theſe Words are publiſhed of a married Man, *He is a Cuckold*, he cannot maintain a Suit in a Spiritual Court, unleſs his Wife join in it; becauſe ſhe only is defamed by the Words.

Salk. 692. *Smith* v. *Wood.*

17. But if theſe Words have been publiſhed of a married Man, *He is a Wittal*, he may inſtitute a Suit in a Spiritual Court, without his Wife joining in it; in as much as, the Words imply his having conſented, or at leaſt his having been privy, to the Adultery of his Wife.

* Page 520

2 Rol. Abr. 298. *Motam* v. *Motam.* 10 Mod. 64.

* 18. A Wife may inſtitute a Suit in a Spiritual Court, without her Huſband joining in it, for Words which import the Charge of her having been guilty of Adultery; becauſe ſhe is liable to do Penance for this Offence.

3 Lev. 119. *Vincent* v. *Alpy.*

19. It has been holden, that if *A.* ſay to *B.* the Son of *C. You are a Son of a Whore*, the Son or Mother may either of them inſtitute a Suit in a Spiritual Court.

11 Mod. 113. *Hoſkins* v. *Lee.*

20. But in another Caſe it was holden, that only the Mother can inſtitute a Suit in a Spiritual Court for Words publiſhed of her Son, which are tantamount to calling him *Baſtard*; becauſe ſuch Words are not defamatory to the Son.

(U) In what Caſes, a Prohibition lies to a Suit in a Spiritual Court for Words.

1. Where actionable Words are coupled with Words which are a Spiritual Defamation.

1. IF Words, for which an Action would lie, are coupled with Words, which are a Spiritual Defamation, and a Suit is inſtituted in a Spiritual Court for the whole Words, a Prohibition lies. It would be vexatious to proceed both in a Spiritual and in a Temporal Court; and the injured Perſon, if he means to have Satisfaction for the Damage ſuſtained, muſt proceed by an Action in a Temporal Court, the Proceedings in a Spiritual Court being only *pro ſalute animæ*. 4 Rep. 20. *Palmer* v. *Thorpe.* Fitz. N. B. 53. Comb. 391. Carth. 213.

2. If a Suit be inſtituted in a Spiritual Court for publiſhing theſe Words of a Woman, *She is a pockey Whore*, a Prohibition lies; for as theſe Words import a Charge of her having the *Great Pox*, as well as being a Whore, an Action would lie. 12 Mod. 248. *Whitfield* v. *Powell.*

3. A Prohibition lies to a Suit in a Spiritual Court for publiſhing theſe Words of a Woman, *She is a Whore and a Thief*; becauſe an Action would lie for the Word Thief. Sid. 404. *Mellet* v. *Herbert.* 2 Rol. Abr. 295. Ld. Raym. 809.

4. So it does for publiſhing theſe Words of a Woman, *She is a Whore and keeps a Bawdy-Houſe*, becauſe an Action would lie for the latter Words. Salk. 552. *Galizard* v. *Rigault.*

5. Although only Words which are a Spiritual Defamation are contained in the Libel exhibited in a Spiritual Court, if it be ſuggeſted to a Temporal Court, having Power to award a Prohibition, that other Words for which an Action would lie, were coupled with thoſe contained in the Libel, a Prohibition lies. 2 Rol. Abr. 295. *Butler* v. *Bartlett.*

2. Where a Temporal Damage has been received from Words, which are a Spiritual Defamation.

6. If it be ſuggeſted to a Temporal Court, having Power to award a Prohibition, that a Temporal Damage has been received from Words which are a Spiritual Defamation, a Prohibition lies.

7. A Servant to the Abbot of St. *Albans* had, by the Direction of his Maſter, prevailed upon a married Woman to come to his Maſter's Chamber. As ſoon as the Abbot was alone with her, he began to find Fault with the Meanneſs of her Dreſs. The Woman anſwered, that her Dreſs was as good, as her Huſband could afford to buy for her. Upon this he told her, well knowing what Women ſet their Hearts upon, that if ſhe would ſubmit to his Will, ſhe ſhould go as well dreſſed as any Woman in the Pariſh. As ſhe would not comply with the Propoſal, he after aſſaulting her and making an Attempt to lie with her by Force, which did not ſucceed, locked her up in his Chamber, * hoping at another Time to accompliſh his Deſign. The Huſband being informed of all which had paſſed, ſpoke publickly of the Abbot's Behavior to his Wife, and threatened to bring an Action for the falſe Impriſonment. Hereupon the Abbot, intending to add Oppreſſion to Injury, inſtituted a Suit againſt the Huſband, in a Spiritual Court, for ſaying he had ſolicited his Wife's Chaſtity. The whole Matter being diſcloſed to a tem- 4 Rep. 20. *Palmer* v. *Thorpe.* *Page 521

a temporal Court having Power to award a Prohibition, a Prohibition was awarded; the Court being of Opinion, that as the Spiritual Defamation was coupled with the Aſſault upon and Impriſonment of the Wife, for which an Action would lie, it was not proper that the Suit in the Spiritual Court ſhould proceed.

Sid. 214. *Boys* v. *Boys.* 4 Rep. 17. 1 Lev. 134.

8. A Prohibition lies to a Suit in a Spiritual Court, for publiſhing theſe Words of a Woman, who has a Right to enjoy an Eſtate ſhe is in the Poſſeſſion of ſo long as ſhe lives chaſte, *She is a Whore*; for as ſhe may, by Reaſon thereof, be brought into Danger of loſing the Eſtate, an Action would lie.

1 Rol. Abr. 36. *Haſſell* v. *Cooper.* Comb. 138.

9. If a Suit be inſtituted in a Spiritual Court for publiſhing theſe Words of a Woman, who lives in *London*, *She is a Whore*, a Prohibition lies; becauſe, as, by a Cuſtom of that City, a Whore is liable to be carted, an Action would lie.

Lutw. 1039. *Houblon* v. *Miller.* Cro. Car. 339. Sid. 248.

10. It was formerly holden, that a Prohibition did not lie to a Suit in a Spiritual Court for publiſhing Words of a Woman, who lives in *London*, which import a Charge of Incontinence; for that only the Word *Whore* is within the Cuſtom.

Stra. 555. *Cooke* v. *Wingfield.* 8 Mod. 115.

11. But it has been ſince holden, that the Word *Strumpet* is within the Cuſtom, and conſequently that a Prohibition lies to a Suit in a Spiritual Court, for publiſhing theſe Words of a Woman, who lives in *London*, *She is a Strumpet.*

Stra. 471. *Vicars* v. *Worth.* *Ib.* 545.

12. A Prohibition lies to a Suit in a Spiritual Court for calling the Huſband of a Woman, who lives in *London*, *Cuckold*; for, as calling him *Cuckold* is tantamount to calling her *Whore*, the Word is within the Cuſtom.

4 Rep. 17.

13. If a Suit be inſtituted in a Spiritual Court for publiſhing theſe Words of a Clergyman, *He is an Heretick*, if by Reaſon thereof he loſt a Benefice, to which he was about to be preſented, a Prohibition lies, becauſe an Action would lie; the Loſs of the Benefice being a temporal Damage.

1 Rol. Abr. 34. *Davis* v. *Gardiner.* 4 Rep. 16. Cro. Jac. 162.

14. A Prohibition lies to a Suit in a Spiritual Court for publiſhing theſe Words of a Woman, *She had a Baſtard by* J. S. if by Reaſon thereof ſhe loſt a Marriage with *J. N* becauſe an Action would lie for the Loſs of the Marriage.

1 Rol. Abr. 35. *Matthew* v. *Croſs.* Cro. Jac. 323, 422. Latch 118. Cro. Car. 269.

15. So it does to a Suit in a Spiritual Court for publiſhing theſe Words of *J. S. He is a Whoremaſter*, if by Reaſon thereof he loſt a Marriage with *A D.* for the Loſs of a Marriage is as great a Damage to a Man as to a Woman.

4 Rep. 21.

16. If a Suit have been carried on in a Spiritual Court for a Spiritual Defamation, and the Defendant, after agreeing to commute the Penance to which he has been ſentenced, by paying a Sum of Money to the Party defamed, refuſe to pay the Money, a Prohibition does not lie to a Suit in that Court, for compelling him to pay it.

3. Where the Words, which are a Spiritual Defamation, import a Charge of an Offence not conuſable in a Spiritual Court.

17. As only Words, which import the Charge of an Offence which is conuſable in a Spiritual Court, are a Spiritual Defamation, a Prohibition lies to a Suit in a Spiritual Court for Words which do not import ſuch Charge. The Prohibition is in this Caſe founded upon that general Power,

Power, which the King's ſuperior Temporal * Courts have, to prohibit all other Courts, Spiritual as well as Temporal, from proceeding in a Cauſe, which is not within their Juriſdiction. *Page 52

18. If a Suit be inſtituted in a Spiritual Court for publiſhing theſe Words of a Clergyman, *He is a Fool, an Aſs, or a Gooſe*, a Prohibition lies; the Words being Words of Heat. 2 Lev. 49 *Newman* v *Ringerby.*

19. So if a Suit be inſtituted, for publiſhing theſe Words of a Clergyman, *He is a Dunce and a Blockhead; I wonder the Biſhop would ordain ſuch a Fellow; he deſerves to have his Gown pulled over his Ears*; a Prohibition lies; for a Clergyman is no more puniſhable in ſuch Court, becauſe he is a *Dunce and a Blockhead*, than another Man. It being ſaid, in this Caſe, that a Clergyman may be deprived of his Benefice for want of Learning, *Roll*, Ch. J. anſwered, if that ſhould be the Caſe, he muſt bring an Action at Law, Deprivation of a Benefice being a Temporal Damage. Salk. 692. *Coxiter* v. *Parſons.* 11 Mod. 140, 208.

20. So if a Suit be inſtituted, for ſpeaking theſe Words to a Clergyman, *You are an old Rogue and a Raſcal, and a contemptible Fellow, and hated and deſpiſed by every Body*, a Prohibition lies; the Words not being a Spiritual Defamation. Stra. 946. *Muſgrave* v. *Bovey.*

21. A Prohibition lies to a Suit in a Spiritual Court for publiſhing theſe Words of *J. S. He is a Knave*; becauſe the being a Knave does not make a Perſon liable to any Eccleſiaſtical Cenſure. Salk. 548. *Hawkins's* Caſe. 2 Rol. Abr. 206. Sid. 293.

22. Theſe Words, *He is as great a Rogue as ever was hanged, and deſerves hanging more than Doctor* Pims, were holden to be no Spiritual Defamation; and a Prohibition was granted to a Suit in a Spiritual Court for publiſhing them. 11 Mod. 112. *Hoſkins* v. *Lee.*

23. A Prohibition lies to a Suit in a Spiritual Court for calling a Man *Drunkard*; Drunkenneſs not being puniſhable in a Spiritual Court. 2 Rol. Abr. 296. *Haynes* v. *Poynter.*

24. If a Suit be inſtituted in a Spiritual Court, for calling a Woman *Quean*, a Prohibition lies; in as much as, the Meaning of the Word *Quean* is not well aſcertained, and it is moreover a Word of Heat. 2 Rol. Abr. 296. *Blackſhaw* v. *Stevens.*

*Page523

* SMUGGLING.

SMUGGLING conſiſts in the bringing on Shore, or in the carrying from the Shore, of Goods, Wares, or Merchandize, for which the Duty has not been paid, or of Goods of which the Importation or Exportation is prohibited.

This Offence is productive of various Miſchiefs to Society. The publick Revenue is thereby leſſened; the fair Trader is injured; and the Nation impoveriſhed: Rival, and perhaps hoſtile, States are thereby enriched; and the Perſons guilty thereof, being hardened by a Courſe of Diſobedience to, and Defiance of, Law, become at laſt ſo abandoned and daring, as not to heſitate at being guilty of the greateſt Offences.

It muſt be the Wiſh, and ought to be the Endeavour, of every Lover of his Country, that many of the preſent high Duties ſhould be lowered. This would be very advantageous to Trade; and it would, by removing in Part the Temptation, put ſome Stop to the pernicious Practice of Smuggling, which all the ſevere Laws made againſt it have not been found to do. In the mean Time, it is not only their Duty, but it highly concerns all Perſons of Property, and every Friend to Peace and Order, to cooperate in diſcountenancing this Offence, and in carrying the Laws made againſt it into Execution.

Under this Title, it will be proper to give ſome Account,

(A) Of Cuſtoms in the general.
(B) Of the Origin of Cuſtoms.
(C) Of the ancient State of certain Cuſtoms.

1. Of the Duties upon Wool, Wool-fells, and Leather.
2. Of the Duty of Tonnage.
3. Of the Duty of Poundage.

(D) Of the preſent State of the Cuſtoms.

1. Of the Duty of Tonnage.
2. Of the Duty of Poundage.
3. Of the Duties to which Aliens are liable.

(E) Of prohibited Goods.

*Page524

*(F) Of the pecuniary Penalties and Forfeitures incurred by Perſons guilty of Smuggling, or of ſuch Practices as have a direct Tendency thereto.

1. In Ships at Sea or hovering upon the Coaſt.

2. In

2. In the Shipping or Unſhipping of Goods at any Port, Member or Wharf, not lawfully appointed for ſuch Purpoſes.
3. In Ships in Port inward Bound.
4. In Ships in Port outward Bound.
5. In coaſting Veſſels.
6. In the Caſe of Certificate and prohibited Goods.
7. In divers other Caſes.

(G) Of the corporal Punishments to which Perſons, who have been guilty of Smuggling, or of ſuch Practices as have a direct Tendency thereto, are liable.

1. Impriſonment.
2. Whipping.
3. Tranſportation.
4. Death.

(A) Of Cuſtoms in the general.

1. AS a Part, and the moſt conſiderable Part of the Offence of Smuggling conſiſts in the bringing on Shore, or in the carrying from the Shore, of Goods, Wares, or Merchandize, without paying the Cuſtoms or Duties, which ought to be paid upon the Importation or Exportation of ſuch Goods, Wares, or Merchandize, it cannot be improper, to give ſome Account of the Cuſtoms in general.

2. Under the Word *Cuſtoms*, is comprized every Duty, which is to be paid upon the Importation or Exportation of Goods, Wares, or Merchandize.

3. Duties upon the Importation or Exportation of Goods, Wares, or Merchandize, were perhaps at firſt impoſed, for enabling the Crown to make and maintain commodious Ports and Harbours, and to keep up a Fleet for the Protection of the Ships of Merchants againſt Enemies and Pirates. As theſe Services were of a permanent Nature, it was reaſonable that the Duties appropriated for defraying the Expence thereof ſhould be ſo likewiſe; and it appears from the Practice of early Times, that this was the Caſe.

4. The firſt (*a*) Grant of a Cuſtom now extant was made to the King and his Heirs; and in the (*b*) great Charter, which was antecedent to this Grant, Mention is made of ancient Cuſtoms, as being due and having been conſtantly paid. It may likewiſe be fairly inferred, from the Fact of their having been paid for a Number of Years, without any new Demand of the Crown or Grant from the People, that the Impoſition of ancient Duties was for a Continuance. From the Length of Time ſome ancient Duties had been paid, in which they differed from ſuch Aids as were only paid during the Continuance of a particular Emergency, they did perhaps obtain the Name of cuſtomary Payments, or *Cuſtoms*: By which Name, all Duties afterwards impoſed upon Goods imported or exported have been called.

(a) Rot pat. m. 3 E. 1. m. 1. n. 1. Rot. Fin. 3 E. 1. m. 24. 2 Inſt. 59.

(b) Mag. Ch. c. 30. 51 H. 3. ſt. 5. 1. 6.

(B) Of

*Page 525

*(B) Of the Origin of Customs.

1. IT has been a much altercated Queſtion, whether the Right of impoſing Cuſtoms was heretofore in the Crown alone, or whether it was always in Parliament?

Dyer 43. b. 165. b. Dav. 9. a. b. 2. The Maintainers of the former Opinion diſtinguiſh between Subſidies and Cuſtoms. They admit, that the former were always aſſeſſed in Parliament: But it is inſiſted, that the King alone had heretofore a Right to impoſe Cuſtoms, in Conſideration of the Licence given by him, to export or import the Commodities upon which they are impoſed; of the Intereſt he has in the Sea, as being Guardian thereof, and Maintainer of its Ports and Harbours; and of the Protection given by his Ships to the Ships of Merchants againſt Enemies and Pirates.

3. The following Authorities have been likewiſe relied upon, in Support of this Opinion.

Dyer 92. a. Mich. 1 Mar. 4. A Patent for Life having been granted by *Edw.* 6. to a Merchant Alien, for the importing and exporting of Goods to a certain Value, paying to the King, his Heirs and Succeſſors ſo much as an *Engliſh* Merchant ought to pay, it was the Opinion of all the Juſtices in the Exchequer Chamber, that the Patent continued to be valid after the King's Death, for the old Cuſtoms wherein he had an Inheritance by his Prerogative; and that it was only void as to the Subſidy upon Goods, which by a Statute of Tonnage and Poundage had been granted to him for Life only.

2 Inſt. 62. Paſch. 1 Eliz. 5. A Judgment was given in the Court of Exchequer, in an Information againſt *German Ciol*, for a Duty of forty Shillings *per* Ton, impoſed by Queen *Mary* upon all Wines of the Growth of *France* brought into this Realm.

2 Inſt. 63. Mich. 38, 39 Eliz. 6. The Executors of *Smith* a Cuſtomer were charged in an Information for Money received by their Teſtator, on Account of an Impoſition of three Shillings and four Pence, ſet by Queen *Elizabeth*, under her Privy Signet, upon every hundred Weight of Allum made in the Pope's Dominions; and Judgment was given againſt them.

2 Inſt. 63. Paſch. 4 Jac. 7. In an Information againſt *John Bale*, for a Duty impoſed by the Crown upon Currants imported, Judgment was given for the King.

16 C. 1. c. 14. *Hampden's* Caſe. 8. Writs were iſſued commanding certain Ports, Towns, Cities and Counties, reſpectively, to provide a certain Number of Ships for his Majeſty's Service, and Suits were commenced againſt divers Perſons, who refuſed to pay the Sums aſſeſſed upon them by way of Contribution to this Service. A *Scire Facias* being iſſued againſt *John Hampden*, Eſq; to ſhew Cauſe, why he ſhould not be charged with certain Sums aſſeſſed upon him, he demurred to the Proceeding upon it. After divers ſolemn Arguments in the Exchequer Chamber, it was agreed by the Majority of the Judges, that he ought to pay the Sum aſſeſſed upon him; and there was Judgment againſt him.

9. The principal Reaſons aſſigned for this Judgment were; that, when the whole Kingdom is in Danger, the King may by Writs under the Great Seal command all the Subjects of his Kingdom, to provide and fit out at their own Expence ſuch a Number of Ships, with Men, Victuals and Proviſions, and for ſuch Time as he ſhall think it neceſſary for the Safety of the Kingdom; that the King may by Law, in Caſe of Refuſal, compel the doing thereof; and that the King is the ſole Judge of the Danger and of what is proper to be done to repel it.

10. It is very proper, that Merchants ſhould pay Cuſtoms: But it by no Means follows, that they ſhould be impoſed at the Diſcretion or arbi-

arbitrary Will of the reigning Prince; for, whatever ſeeming Difference there may be, there is no real Difference between Diſcretion and arbitrary Will.

* 11. The King may with as much Propriety be called Guardian of the Land as of the Sea; and if ſo, there is as much Reaſon for his having a Right to impoſe Taxes at his Pleaſure for the Defence of the one as of the other. A Right to do this would, beſides making a Parliament in a great Meaſure uſeleſs, make all private Property inſecure; for it would, in Caſe there were ſuch Right, depend entirely upon the Will of one Man, how much of this every other Man ſhould be ſuffered to enjoy. *Page 526

12. If the Circumſtances of the Times, when the three former of theſe Judgments were given, are conſidered, they will be found to have very little Weight; and it is notorious, that no one Thing contributed ſo much to the Troubles which ſoon after aroſe, and at length ended in the Death of the unfortunate Prince then on the Throne, as the laſt in favour of Ship-money did.

13. Inſtead, however, of merely defending the contrary Opinion, and being contented with repelling the Force of theſe Authorities, it is better, in ſo conſtitutional a Point, to act offenſively, and endeavour to ſhew, by Authorities of much greater Weight as well as more ancient, that by the *Engliſh* Conſtitution the Right of impoſing Cuſtoms was originally in Parliament.

14. Before I attempt to do this, I ſhall take Notice of a Miſtake as to this Point of Lord Chief Juſtice *Coke*'s; by which a very great Man ſeems to have been miſled. Vaugh. 161.

15. After mentioning divers Caſes, in which it had been holden, that certain Cuſtoms were due at the Common Law, and not originally impoſed in Parliament, *Vaughan* Ch. J. adds, "this was in thoſe ſeveral "Reigns the Opinion of all the Judges of the Times, whence we may "learn, how fallible even the Opinion of all the Judges is, when the "Matter to be reſolved muſt be cleared by Searchers not common, and "depends not upon Things vulgarly known by Readers of the Year-"Books; for ſince theſe Opinions it is known, that the Cuſtoms, called "the *Antiquæ Cuſtumæ*, were granted to King *Edward* the Firſt in the "third Year of his Reign as a new Thing, and were not due to the Crown "at Common Law."

16. He goes on to cite a Patent dated in the third Year of *Edward* the Firſt, which runs thus, *Cum Prælati, et Magnates, et tota Communitas Mercatorum Regni noſtri, nobis conceſſerint quandam novam Conſuetudinem de Lanis, Pellibus et Coriis, tam in Anglia quam in Hibernia et Wallia, regnum noſtrum exeuntibus, in perpetuum Nobis et hæredibus noſtris capiendam, ſicut in forma inde proviſa et communiter conceſſa plenius continetur.*

17. From the Date of this Patent he obſerves, that the Grant therein alluded to muſt have been by the Statute of Firſt *Weſtminſter*, becauſe no other Statute had been made, in the Reign of this Prince, before the Date of the Patent. In order to account for the Grant's not being now a Part of that Statute, he ſuppoſes, that it was annexed to the Roll of that Statute by way of Rider, and was afterwards caſually loſt from the Roll. Having thus aſcertained the Time of the Grant, he concludes, that the Cuſtoms upon Wool, Wool-fells and Leather, called from their great Antiquity *Antiquæ Cuſtumæ*, were not due at the Common Law, but were granted by the Statute of Firſt *Weſtminſter*.

18. By comparing what is ſaid by *Vaughan* with 2 *Inſt.* 59. it will evidently appear, that the Opinion of *Vaughan* was too haſtily formed from *Coke*'s Comment upon the Grant. It is ſcarce poſſible to be otherwiſe; for a Man of *Vaughan*'s ſound Judgment and acute Diſcernment muſt, upon

upon the leaſt looking into the Matter, have ſeen, that the Cuſtoms upon Wool, Wool-fells and Leather, exiſted long before.

Magn. Ch. c. 30. 19. It appears plainly from the Great Charter, that ſome Cuſtoms were due at the Time this was made, and ſuch as are therein called Old Cuſtoms.

51 H. 3. ſt. 5. ſ. 6. 20. By the Statute *de Scaccario* the Manner of accounting by the Collectors of the Cuſtoms upon Wool is aſcertained.

21. The Words, *quandam novam Conſuetudinem, de Lanis, Pellibus et Coriis*, contained in the Grant to *Edward* the Firſt, imply ſtrongly, that there was before a Cuſtom upon Wool, Wool-fells, and Leather.

*Page 527 * 22. This falſe Ground being removed, the next Endeavour ſhall be, to ſhew the true Ground, upon which the Poſition contended for is built; namely, that the Origin of Cuſtoms was with the Conſent of Parliament.

23. In order to diſcover the Origin of Cuſtoms, which are Taxes of a particular Kind, it will be proper to conſider the Origin of Taxes in the general.

2 Inſt. 533. 24. In that very ancient Record, *de modo tenendi Parliamentum tempore Regis Edw. Filii Ethelredi*, are theſe Words, *debent auxilia peti in pleno Parliamento.*

25. As the *Saxon* Laws were by this Prince, ſirnamed the Confeſſor, collected into a Body, it is very probable that the Method, practiſed in his Time, of granting Aids in full Parliament, was agreeable to thoſe Laws.

Wilk. Leg. Anglo-Sax. 200. Leg. Edw. 17. 26. In the Laws of the Confeſſor, which were afterwards confirmed by *William* the Conqueror, are theſe Words, *Debet etiam Rex omnia rite facere in Regno, et per judicium procerum regni.*

27. If all Things ought to be done by the King rightly in the Kingdom, and with the Advice of the great Men of the Realm, ſurely a Thing of ſo much Conſequence as that of impoſing Taxes ought to be ſo done.

Wilk. Leg. Anglo-Sax. 228. Leg. Guil. Conq. 52. 28. The fifty-ſecond Law of the Conqueror, by which the Feudal Law ſeems to have been introduced into *England*, the Terms thereof being quite feudal, run thus: *Statuimus ut omnes Liberi Homines fœdere et ſacramento affirment, quod infra et extra univerſum regnum Angliæ, quod olim vocabatur regnum Britanniæ, Willielmo Regi ſuo Domino fideles eſſe volunt, terras et honores illius fidelitate ubique ſervare cum eo, et contra inimicos et aliegenas defendere.*

Wilk. Leg. Anglo-Sax. 228. Leg Guil. Conq. 55. 29. The fifty-fifth Law of the Conqueror runs thus, *Volumus etiam ac firmiter præcipimus et concedimus, ut omnes liberi homines totius Monarchiæ regni noſtri prædicti habeant et teneant terras ſuas et poſſeſſiones ſuas bene et in pace liberas ab omni exactione injuſta, et ab omni* TALLAGIO, *ita quod nihil ab eis exigatur vel capiatur, niſi ſervitium ſuum liberum quod De jure novis facere debent et facere tenentur, et prout Statutum eſt eis, et illis a Nobis datum et conceſſum Jure hæreditario in perpetuum per Commune Concilium totius regni noſtri prædicti.*

30. As the Words, *per Commune Concilium totius Regni*, are not contained in the fifty-ſecond Law, it has been doubted, whether that Law were made with the Conſent of the *Commune Concilium totius Regni?* It is highly probable that it was; in as much as, it appears, from the fifty-fifth Law, that a Law, introductive of the Feudal Law, had been made during the Reign of the Conqueror with ſuch Conſent; and there is no Law extant, antecedent to the fifty-fifth, except the fifty-ſecond, by which the Feudal can be ſuppoſed to have been introduced. It is not material, whether the Feudal Law were introduced by the fifty-ſecond Law, or by ſome other Law, made during the Conqueror's Reign? for, if it were introduced by any Law, to which the *commune concilium totius Regni* did

did consent, that is sufficient to shew all that the present Question requires to be shewn; namely, that it was not introduced without such Consent.

31. If this be so, that the Feudal Law was not introduced without the Consent of the *commune concilium totius Regni*, it may be fairly inferred, that there was no Right in the King alone of introducing it without such Consent; for, if there had been such Right, it would in all Probability have been asserted by a Prince, whose best Title to the Crown, whatever other Title he might think proper to set up, appears to have been founded in Conquest.

32. By the fifty-fifth Law of the Conqueror it is declared, that all the Freemen of the Monarchy shall have and hold their Lands and Possessions free from all unjust Exaction, and from every TALLAGE, so that nothing shall be exacted or taken from them, except such free Services as they of Right owe and ought to do to the King.

33. The Word *Tallage*, derived from the *French* Word *Tailler*, which signifies to cut off Part of a Thing, is a most comprehensive Word; for it includes all Subsidies, Taxes, and Impositions whatsoever. * Page 528 Spelm. Gloss. 2 Inst. 531, 532.

34. Is it to be imagined, that unless the People had a Right to be free from the Imposition of any *Tallage* by the King alone, such Right, should be granted them by a Conqueror? A Conqueror may, for the Sake of making himself secure in a new Conquest, think it prudent to confirm their ancient Privileges to his conquered Subjects; but it is scarce to be hoped, that he should grant them any new Privilege.

35. By the Introduction of the Feudal Law, inferior Lords, and the King as supreme Lord, acquired a Right to divers Aids, which were incidental to Feudal Tenure. These were an Aid for making the Lord's eldest Son a Knight; another for the Marriage of his eldest Daughter; and a Third for the Ransom of his Person when taken Prisoner. Cust. de Norm. c. 35. Mad. Hist. Exch. 427.

36. Not content with these Aids, inferior Lords demanded an Aid to enable them to pay their Fines to the King, and another to enable them to pay their Debts; nay it became a Question in the Reign of *Henry* the Second, whether they might not demand an Aid whenever they entered upon any Military Expedition? Mad. Hist. Exch. 428.

37. While inferior Lords thus oppressed their Tenants under the Pretence of demanding Aids, the King in his Turn required from them divers Aids, to which they were not liable. This was at length carried so far, that the King did, upon the Occasion of any War, assess what Sums he pleased upon every Knight's Fee. Exactions of this Kind gave great Dissatisfaction, and became at length so grievous, that the People in the Reign of *John* flew to Arms; and being successful compelled him to sign a Charter. Mad. Hist. Exch. 419, 420, 421.

38. By a Clause in that Charter the People were restored to the Privilege of not being taxed without the Consent of Parliament, which they had enjoyed under their *Saxon* Monarchs; and which, except as to the Aids incidental to Feudal Tenure, had been recognized by the Conqueror. Matt. Paris 257.

39. The Clause runs thus. *Nullum Scutagium vel Auxilium ponam in in regno nostro, nisi per Commune Concilium regni nostri, nisi ad Corpus nostrum redimendum, et ad promegenitum filium nostrum militem faciendum, et ad filiam primogenitam semel maritandam, et ad hæc non fiet nisi rationabile Auxilium; et ad habendum commune Concilium regni de Auxilio Assidendo, aliter quam in tribus Casibus prædictis, summoneri faciemus Archiepiscopos*, &c.

40. By this Clause even the Aids incidental to Feudal Tenure were to be reasonable, and what was to be paid for two of these was afterwards ascertained by a Statute. The Third, for the Ransom of the King's Person, was in its Nature so uncertain, that the Value thereof could not 1 Westminster 38.

easily

eaſily be aſcertained. The aſcertaining, as far as it could be done, of the Aids, to which the King had clearly a Right as ſupreme Lord, ſhews how contrary it is to the Genius of the *Engliſh* Conſtitution, to have any Thing of this Kind depend upon the Will of the reigning Prince.

41. Under a Pretence that the Charter of *John* was extorted whilſt he was under Dureſs, no Regard was paid to it by his Son *Henry* the Third; and the Clauſe juſt mentioned was omitted in the great Charter. During the Reign of *Henry*, and during a great Part of the Reign of *Edward* the firſt his Succeſſor, the Practice of aſſeſſing Aids without the Conſent of Parliament was revived: But it occaſioned ſo much Diſcontent, that in the Twenty-fifth Year of his Reign *Edward* added ſome Chapters to the Great Charter, which did effectually ſupply the Place of the omitted Clauſe.

*Page 529 42. By one Statute, after reciting that divers People of the Realm had
25 E. 1. c. 5. before given to this Prince ſome Aids and Taſks, towards his War and other Buſineſſes of their own good Will, it is declared, "that ſuch Aids, "Taſks or Priſes ſhall not be drawn into a Cuſtom, for any Thing that "hath been done heretofore."

43. It is probable that the Recital in this Statute was more calculated to throw a Veil over ſome late Tranſactions, than to repreſent the real Truth of the Caſe; but however this was, it concludes againſt the Right of the King alone to impoſe Aids and Taſks.

Conf. Chart. 44. By another Statute it is declared, "that no Kind of Aid, Taſk or
25 E. 1. c. 6. "Priſe ſhall henceforth be taken for any Buſineſs but with the common "Aſſent of the whole Realm, and for the common Profit thereof, ſaving "the ancient Aids and Priſes due and accuſtomed."

2 Inſt. 532. 45. Not many Years after this Prince did, by his own Authority, impoſe a Tallage upon Cities, Towns, and Boroughs.

46. In the next Year this Prince required of all Freeholders, poſſeſſed of Land to the Value of twenty Pounds a Year, an Aid for carrying on a War in *Flanders*, which they refuſed to pay; becauſe it had not been aſſeſſed as was required by the 25 *E.* 1. *c.* 6. with the common Aſſent of the whole Realm.

47. The impoſing of this Tallage, and the Demand of this Aid occaſioned great Murmurings and Diſcontents amongſt the Commons. To prevent the ill Conſequences of theſe Murmurings and Diſcontents, and to quiet the Minds of the Commons, the Statute *de Tallagio non concedendo* was made in the Thirty-fourth Year of his Reign.

34 Edw. 1. ſt. 4. c. 1. 48. By this Statute it is declared, that no Tallage or Aid ſhall be impoſed or levied by us or by our Heirs in our Realm, without the good "Will and Aſſent of the Archbiſhops, Biſhops, Earls, Barons, Knights, "Burgeſſes and other Freemen of the Land."

49. No Words can be plainer, or more abſolute than the Words of this Statute are; but it ought to be obſerved in particular, that the Word *Tallage* is therein contained, which beſides being the moſt comprehenſive Word that could have been made Uſe of, is one of the Words contained in the Fifty-fifth Law of the *Conqueror*.

50. Upon the whole it appears almoſt beyond a Doubt, that the various Struggles of the People were not to amend the *Engliſh* Conſtitution; but to deliver themſelves from the Encroachments made at different Times thereupon. They obtained no more from *John*, when he was in their Power; they obtained no more at any Time ſince; they obtained no more at this Time than not to be taxed without the Conſent of Parliament. This they had a Right to, for it was Part of the Conſtitution; and had by the Conqueror, when in the Plenitude of his Power, been allowed ſo to be.

51. If this be ſo, that no Tax could conſtitutionally be impoſed without the Conſent of Parliament, it follows, that there never could have been in the King alone a Right of impoſing ſuch Taxes, as have obtained the Name of Cuſtoms.

52. Beſides the general Reaſons, which hold for the People's having always had the Privilege of not being taxed in any Caſe without the Conſent of Parliament, there are ſome particular ones for their having had it in this. As nothing was of more Conſequence to the People, and more eſpecially as they were Inhabitants of an Iſland, than the encouraging of foreign Trade, it highly concerned them to take Care, that this ſhould not be loaded with improper or exceſſive Duties. If moreover, as has been (*a*) obſerved, it was the Practice of the moſt early Times, to impoſe Cuſtoms for a Continuance, it was more neceſſary that they ſhould have been well conſidered in Parliament, before they were impoſed, than that other Taxes which were to laſt but a ſhort Time ſhould.

(*a*) *Ante* 524.

53. It was not only fit, for theſe and divers other Reaſons, that the People ſhould at all Times have had this Privilege: But there is a Circumſtance, which ſtrongly evinces that they in Fact always had it; namely, that the Right of impoſing Cuſtoms was given up by ſome Princes, who aſſerted a Right to that of impoſing other Taxes.

* 54. When *Henry* the Third granted the Great Charter, it is plain, from its being therein omitted, that he would not agree to the Inſertion of that Clauſe contained in the Charter granted by *John*, by which no Aids, except thoſe due by Tenure, were to be impoſed without the Conſent of Parliament. It is however declared by the Great Charter (*a*) "that all Merchants, if they were not openly prohibited before, ſhall "have their ſafe and ſure Conduct to depart out of *England*, to come "into *England*, to tarry in and go through *England*, as well by Land or "by Water, to buy and ſell without any Manner of evil Tolts, by the "old and rightful Cuſtoms."

*Page 530

(*a*) *Magn. Ch.* c. 30.

55. It is pretty clear, that by evil Tolts, as here oppoſed to old and rightful Cuſtoms, are meant Cuſtoms impoſed without the Conſent of Parliament; but if any Doubt remained as to the Meaning of thoſe Words, it is removed by a ſubſequent Statute.

56. The Words of this Statute are, "and foraſmuch as the greater "Part of the Commonalty of the Realm find themſelves ſore grieved, "with the evil Tolt of Wool, that is to ſay of forty Pence for every Sack "of Wool, and have made Petition to us to releaſe the ſame, we at "their Requeſts have clearly releaſed it, and have granted that we ſhall "not take ſuch Things without their common Aſſent and good Will, "ſaving to us and our Heirs the Cuſtoms of Wools, Wool-fells and "Leather, before granted by the Commonalty aforeſaid."

25 Ed. 1. ſt. 1. c. 7.

57. In the printed Statutes the Words *quarante ſoudz*, contained in this Statute, are tranſlated forty Shillings. This does not ſeem to be a juſt Tranſlation; for it is very improbable, that ſo large a Duty ſhould at that Time have been impoſed upon Wool. The Quantity of middling Wool, equal to what was anciently called a Sack, is not at this Day worth above nine Pounds; and if the Difference, between the preſent Value of Money and the Value of it at that Time, be conſidered, it will be found, that a Duty of forty Shillings was equal, or nearly ſo, to the whole Value of a Sack of Wool.

58. If from conſidering theſe two Statutes it appear, that by evil Tolts ſuch Cuſtoms as had been impoſed without the Conſent of Parliament were intended, it follows, that *Henry* the Third, who would not give up the Right of impoſing other Aids, has by the Great Charter admitted, that Cuſtoms, which are impoſed without ſuch Conſent, are not rightful.

59 From

Ante 526. 59. From a Patent of *Edward* the First, dated in the third Year of his Reign, which has been already cited to another Purpose, it is evident, that a Grant of a Custom upon Wools, Wool-fells and Leather, had been made by the *Prælati et Magnates, et tota Communitas Mercatorum*, to this Prince and his Heirs.

25Ed. 1. c. 6. 60. It was more than twenty Years after the Date of this Patent, before this Prince gave up, by the Statute called *Confirmatio Chartarum*, the Right of imposing Aids; and in the mean Time it is certain that he did in Fact exercise it. Can any good Reason be assigned, for his accepting a Grant of a Custom, which amounted to a Confession that without such Grant he could not have imposed it, so many Years before he gave up the Right of imposing Aids, except his being persuaded, that he had not so good a Right to impose Customs, as he had to impose Aids.

61. It must be submitted to the Consideration of the Reader, whether what has been said be sufficient to shew, that the Origin of Customs was the Consent of Parliament? but however that may be, it is certain, that if the People had not before the Privilege of being exempt from Customs imposed without such Consent, this Privilege was fully granted to them by the two Statutes of *Edward* the First (*b*) called *Confirmatio Chartarum*, and (*c*) *De Tallagio non concedendo.*

(*b*) 25Ed. 1. c. 6.

(*c*) 34Ed. 1. st. 4. c. 1.

62. It is not necessary to the present Question, to shew, by how many subsequent Statutes this Privilege has been confirmed: But it will not be improper to mention what happened in the Reign of *Edward* the Third.

4 Inst. 29. 63. A great Part of the Wool grown in *England* being, in the Reign of this Prince, manufactured into Cloth, a Question arose, whether a Duty, *Page 531 in * Proportion to the Quantity of Wool used in making Cloth, should be paid upon the Exportation of Woollen Cloth? It was resolved, that, as the Wool was by the Labour of Man changed into another Sort of Merchandize, no Custom ought to be paid; and therewith the King, as appeareth by the Record, in the Exchequer, held himself satisfied.

Orig. De Scacc. 24E. 3. Rot. 13. 27 E. 3. Rot. 4. 4 Inst. 30. 64. It appears, that by a Statute not in Print, made in the Twenty-first Year of this Prince's Reign, a Duty was granted him upon Woollen Cloth exported; and the Reason of granting it is said to be; *Quia Jam magna pars Lanæ regni nostri in eodem regno pannificitur, de qua Custuma aliqua non est soluta, per quod proficuum quod De Custumis et subsidiis Lanarum, si extra regnum ducerentur, percipere debemus multum diminuitur, &c.*

4 Inst. 30. 65. The following Remark of Lord Chief Justice *Coke* upon these Transactions is very proper. "If in any Case the King might by his "Prerogative have set an Imposition, he might have set one in this; for, "as it appeareth from the Record, by making of Cloth the King lost "his Custom of Wool."

(C) Of the ancient State of certain Customs.

1. Of the Duties upon Wool, Wool-fells, and Leather.

4 Inst. 29. Dyer 165. 1. IT does not appear from any Record now extant at what Time they were first imposed; but it seems clear, that the Duties upon Wool, Wool-fells and Leather, are the most ancient of all the Customs; for no Mention is made in the Records of the most early Times of any other.

51 H. 3. st. 5. f. 6. 2. The Statute *De Scaccario*, in directing how Collectors of the Customs shall account, does indeed say they shall account for every Charge in a Ship

Ship whereof Cuſtom is due; but nothing is therein particularly mentioned except Wool.

3. From a Patent of *Edward* the Firſt it appears, that a Grant was made in the third Year of his Reign to him and his Heirs, of the following Cuſtom: *De ſacco Lanæ dimid. Marc. De* 300 *pellibus Dimid. Marc. et de laſto corii xiii. ſ. iiii. d.* Rot. Pat. 3E. 1. m. 1. n. 1. *Rot. Fin.* 3E. 1. m. 24. 2 Inſt. 59.

4. Some Years after the Merchant Strangers, in Conſideration of ſome Privileges and Immunities obtained from this Prince, did by a Charter grant to him and his Heirs, *de quolibet ſacco Lanæ* 40 *d. de incremento ultra cuſtumam antiquam dimid. Marc. quæ prius fuerit perſoluta, et ſic pro laſto Coriorum dimid. Marc. & de trecentis pellibus lanatis* 40 *d. ultra certum illud, quod et antiqua Cuſtuma fuerit, prius datum.* *Chart. Mercatoria Rot. Chart.* 31 E. 1. n. 44. 2 Inſt. 59.

5. As this Charter ſpeaks only of theſe Commodities being, at the Time it was granted, liable to the Cuſtom granted to this Prince in the third Year of his Reign, it may very well be concluded, that all the old Cuſtoms upon them ceaſed from the Time of that Grant.

6. From this Time the Diſtinction, met with in the Books of *Antiqua Cuſtuma* and *Nova Cuſtuma*, ſeems to have been firſt made, that granted before to this Prince being called, probably becauſe it was given in Lieu of the ancient Cuſtom upon thoſe Commodities, *Antiqua Cuſtuma*, and this now granted by the Merchant Strangers being called *Nova Cuſtuma*.

7. In the Time of *Edward* the Third the Woollen Manufactures were ſo eſtabliſhed in *England*, that great Part of the Wool grown in the Kingdom was made into Cloth. In order to make Amends to the Crown, for the Loſs of the Cuſtom upon Wool hereby ſuſtained, a Duty was granted upon Woollen Cloth exported. *Orig. De Scaccar.* 24 Ed. 3. Rot. 13. 27 Ed. 3. Rot. 4. 4 Inſt. 30.

* 8. The Duties upon Wool and Woll-fells imported, after having been often varied, are now at an End; the Exportation of both being prohibited by divers Statutes. *Page 537 3 E. 4. c. 1. 4 E. 4. c. 1. 14 E. 4. c. 3. 13 & 14 C. 2. c. 18. 7 & 8 W. 3. c. 28. 9 & 10 W. 3. c. 40.

9. The Exportation of Leather was once prohibited. Liberty has been ſince given to export it; but, inſtead of reviving the old Duty, it was made ſubject to the general Duty of Poundage. 1 Eliz. c. 10. 12 C. 2. c. 4. ſ. 10.

10. The Duty upon Woollen Cloth exported, after having undergone various Changes, was in the Reign of *William* the Third entirely taken off, and with this all theſe ancient Duties ended. 11 & 12 W. 3. c. 20.

2. Of the Duty of Tonnage.

11. The Duty upon Wine imported is very ancient; it having been, as long ago as the Reign of *Henry* the Third, accounted for by the King's Butler under the Name of Priſage. 2 Inſt. 59. Rot. Bat. 40 H. 3.

12. The Practice antiently was to take for this Duty two Tons of Wine, from every Ship having Twenty Tons or more on Board, one before the Maſt the other behind it, paying twenty Shillings for each Ton. Flet. lib. 2. c. 22. Rot. Parl. 28. E. 1. Rot. Pat. 40. H. 3. 2 Bulſtr. 254. Davis 8. b. 4 Inſt. 30.

13. This Duty, becauſe the Wine was taken for the King's Uſe, obtained the Name, and ſtill retains the Name of Priſage. 4 Inſt. 30.

14. By the *Charta Mercatoria* the Merchant Strangers granted a Duty of two Shillings *per* Ton, to the King and his Heirs, upon Wines imported by them: But they were to be exempt from the Duty of Priſage, to which the *Engliſh* Merchants ſtill continued liable. *Chart. Merc.* 31 E. 1. n. 44. 2 Bulſtr. 254. 2 Inſt. 30.

4 Inſt. 30. 6 Geo. 1. c. 12. ſ. 8.

15. This Duty, from its being received by the King's Butler, obtained the Name of Butlerage, and has been ſince called by that Name.

4 Inſt. 32. Dav. 11. a.

16. In the Sixth Year of the Reign of *Richard* the Second, a Duty of two Shillings *per* Ton upon all Wine imported was granted to him; but it was only to continue for two Years.

17. This Duty obtained the Name of Tonnage; and all Duties ſince impoſed upon Wines have been ſo called.

2 Inſt. 32.

18. It appears from divers Records, that the Duty of Tonnage was afterwards ſometimes one Shilling and ſix Pence *per* Ton; ſometimes two Shillings; and ſometimes three Shillings; and that it was not granted for Life; but upon a particular Occaſion, or for one or more Years; and that Conditions, as to the Application thereof, were frequently annexed to the Grants.

Rot. Parl. 3H. 5. n. 9.

19. In the third Year of *Henry* the Fifth a Duty of three Shillings *per* Ton was granted during his Life.

31H. 6. c. 8.

20. After the Death of this Prince, the Cuſtom of granting the Duty of Tonnage for a few Years only was revived, it not being granted to his Succeſſor *Henry* the Sixth for Life, until the thirty-firſt Year of his Reign.

Rot. Parl. 4E. 4. 12E. 4. c. 3. Rot. Parl. 1 H. 7. Rot. Parl. 1 H. 8.

21. It was afterwards granted to *Edward* the Fourth, *Henry* the Seventh, *Henry* the Eighth, *Mary*, *Elizabeth*, and *James* the Firſt, for their reſpective Lives; and to all of them, except *Edward* the Fourth, in the firſt Years of their reſpective Reigns.

6 H. 8. c. 14. 1 E. 6. c. 13. 1 Mar. c. 18. 1 Eliz. c. 19. 1 Jac. c. 33.

*Page 533 16C. 1. c. 8, 12, 22, 25, 29, 31, 36.

* 22. The Duty of Tonnage was not granted to *Charles* the Firſt until the ſixteenth Year of his Reign; and it was then only granted from Time to Time, and for very ſhort Spaces of Time.

3. Of the Duty of Poundage.

23. The Duty of Poundage is ſo called, from its being paid at the Rate of a certain Sum in the Pound.

Rot Chart. 31E. 1. n. 44. 27E. 3. ſt. 2. c. 26. 2 Inſt. 59.

24. The firſt Inſtance upon Record of this Duty is a Grant of three Pence in the Pound, made to *Edward* the Firſt, upon the Goods imported by Merchant Strangers.

4 Inſt. 32. Rot Parl. 47E. 3. n. 14 Dav. 10. b.

25. In the Forty-ſeventh Year of the Reign of *Edward* the Third, a Duty of Six-pence in the Pound was impoſed upon all Goods exported and imported, except Wools, Wool-fells, Leather and Wines; and *Engliſh* Merchants as well as Merchant Strangers were made liable thereto.

Rot. Parl. 14R. 2. n. 12. 17R. 2. n. 14.

26. In the fourteenth Year of the Reign of *Richard* the Second, this Duty was raiſed to one Shilling in the Pound; but it was three Years afterwards reduced to ſix Pence.

Rot. Parl. 2 H. 4. n. 9. 4H. 4. n. 28.

27. It was raiſed to eight Pence in the Pound, in the ſecond Year of the Reign of *Henry* the Fourth; and in the fourth Year of the ſame Prince's Reign to one Shilling.

4 Inſt. 32. 12C 2. c. 4.

28. From this Time, to the ninth Year of the Reign of *William* the Third, it continued at one Shilling in the Pound.

Rot. Parl. 6R. 2. n 13. 4 Inſt. 32.

29. Since the ſixth Year of the Reign of *Richard* the Second, this Duty, except in a very few Inſtances, has been comprized in the ſame Grant with that of Tonnage; and has been granted, upon a particular Occaſion, for one or more Years, or for Life, and Conditions, as to the Application thereof, have been frequently annexed.

30. Here-

30. Heretofore Credit was given to a Merchant's Papers for the Value of the Goods ſubject to this Duty; nor was he obliged to ſwear to this, unleſs he neglected to produce a Bill of Lading. 27 E. 3. ſt. 2. c. 26.

31. Many Frauds being diſcovered, a Power was given to the Officers of the Cuſtoms to open and examine Goods, in order to come at the true Value; but no Oath was enjoined. 12 E. 4. c. 3.

32. The Practice of our Anceſtors, in not enjoining an Oath as to the Value of the Goods, ſeems worthy of Imitation. Many conſiderate Perſons have been of Opinion, that the introducing of ſo many Cuſtom-houſe Oaths has not been of Uſe, even to prevent Frauds in the Revenue; for that, although a few Perſons may be conſcientious, and ſwear truly, more is loſt by relying upon Oaths, and of Courſe not examining ſo ſtrictly, than is thereby ſaved. If this be ſo, it appears to be high Time, that many if not all Cuſtom Oaths ſhould be laid aſide; for nothing has ſo much contributed, as theſe Oaths have, to take off that reverential Awe which ought to be had for an Oath, and conſequently to open the Sluices of Perjury, which have ſo deluged the Land.

33. The Method, of aſcertaining the Value of the Goods ſubject to this Duty by a Book of Rates, was practiſed in the Reign of *James* the Firſt, and in ſome of the preceding Reigns. 4 Inſt. 33.

---

* (D) Of the preſent State of the Cuſtoms.

* Page 534

1. UNDER this Head no more is intended, than to give a general Account of the preſent State of the Cuſtoms. To give a particular Account, of the various Duties impoſed by divers Statutes on the different Kinds of Goods, would be tedious, unentertaining and foreign to the Deſign of this Work. It would too be unneceſſary; for this has been already done with great Care and Accuracy by Mr. *Crouch* and Mr. *Saxby*: In whoſe Books, profeſſedly written upon the Subject, ſuch Perſons, as deſire to have a complete Knowledge of this Part of the publick Revenue, will meet with Satisfaction.

2. Much the greater Part of the Duties at this Day payable are comprized under the Denominations of Tonnage and Poundage.

3. Soon after the Reſtoration, the Practice of granting a Subſidy of theſe Duties to the King for Life was revived; and has been ever ſince continued.

4. In Proceſs of Time divers other Subſidies of Tonnage and Poundage were granted: But of all that are now paid, only that called the further Subſidy, which was firſt granted in the Reign of *William* the Third, is granted to his preſent Majeſty for Life, the Reſt being appropriated to divers Uſes. 9 W. 3. c. 23. 1 G. 2. ſt. 1. c. 1.

5. By the 6 *Anne*, *c.* 26. *Par.* 17. It is enacted, "that all and every Act "of Parliament made in *England*, and in force there, touching and con- "cerning any Cuſtom or Subſidies there, which are not contrary to or in- "conſiſtent with the Articles of the Union of the two Kingdoms of *Eng-* "*land* or *Scotland*, or any of them, ſhall extend to *Scotland*."

1. Of the Duty of Tonnage.

6. The ancient Duty of Priſage upon Wine imported does ſtill continue.

Hard. 477. 7. It has been frequently holden in the Court of Exchequer, for the Sake of preventing Frauds in this Duty, that ſingle Priſage ſhall be paid for nine Tons and a Half of Wine, and double Priſage for nineteen Tons, although *Stricti Juris* no Duty was to be paid for leſs than ten Ton. If only nine Tons have been imported, Priſage has been ſeldom allowed, without a Proof of Fraud; and if the Quantity imported has been leſs than nine Tons, it has been never paid.

Hard. 301. 8. By a Charter granted to the City of *London*, in the firſt Year of the Reign of *Edward* the Third, the Citizens are exempted from the Duty of Priſage. The Words of it are, *et quod de Vinis Ipſorum Civium nulla Priſa fiat per aliquem Miniſtrum noſtrum, vel Hæredum Noſtrorum, ſeu alterius contra eorum voluntatem; viz. de uno Dolo ante Malum et alio dolo retro, nec aliquo alio Modo, ſed inde perpetuo ſint Quieti.*

Hard. 310, 311. *Waller v. Travers.* 9. The Conſtruction of this Charter has been, that the Exemption extends only to ſuch Citizens as are Inhabitants of the City, and only to ſuch Wines as are imported in the Port of *London*; except a Ship be by Streſs of Weather driven into any other Port.

10. Heretofore the Duty of Tonnage was the ſame upon all Wines imported: But in ſome modern Statutes this is different upon Wines of different Kinds; and there is in the general a much larger Duty paid in the Port of *London*, than in the out Ports.

11. The different Subſidies of Tonnage are, from the Time or Manner of their having been impoſed, thus diſtinguiſhed.

12. That impoſed by the 12 *C.* 2 *c.* 4. is called the old Subſidy.

13. That impoſed by the 9 & 10 *W.* 3. *c.* 23. is called the further Subſidy.

*Page 535 * 14. That imported by the 2 *Anne*, *c.* 9. is called the one third Subſidy.

15. That impoſed by the 3 *Anne*, *c.* 5. is called the two thirds Subſidy.

16. That impoſed by the 18 *G.* 2. *c.* 9. is called the Subſidy of one thouſand ſeven hundred and forty-four.

17. All theſe Subſidies were at firſt impoſed for a Time; but the ſeveral Acts, by which they were impoſed have been from Time to Time continued, and are all now in force.

18. Beſides theſe Subſidies, to which all Wines imported are liable, there are Duties impoſed upon divers Kinds of Wines by particular Acts of Parliament.

19. Before the Reſtoration only Wines were liable to a Duty of Tonnage: But ſince that Time divers other Liquors are, by particular Acts of Parliament, rendered liable to a Duty of Tonnage.

Priſage Wines exempted from Duty. 20. By 12. *C.* 2. *c.* 4. *par.* 15. It is provided, "that the Priſage of "Wines, or Priſe Wines, ſhall not be charged with the Payment of any "Cuſtom, Subſidy or Sum of Money, impoſed upon Wines by this Act."

Priſage Wines made liable to Duty. 21. By 1 *Jac.* 2. *c.* 3. *par.* 6. It is enacted, "that no Merchant ſhall be "charged with any Duty impoſed by this Act for the Priſage Wine which "he imports; but that it ſhall be received, and taken from the Perſon who "hath or enjoyeth the Benefit of the ſaid Priſage Wine."

22. As the 9 & 10 *W.* 3. *c.* 23. by which a Subſidy of Tonnage is impoſed upon Wines imported, is quite ſilent as to Priſage Wine, the Conſtruction has been, that Priſage Wine is chargeable with the Duty of Tonnage impoſed by this Statute.

Salk. 617. *Paul v. Shaw.* 23. In an Action of *Aſſumpſit* for 500 Pounds received to the Plaintiff's Uſe, it was found by a ſpecial Verdict, that the Defendant claimed the Priſage of all Wine imported under a Grant from *Charles* the Firſt; and that by Virtue of the Grant he was to hold the ſaid Priſage Wine diſcharged

charged of all Aids and Taxes; and the Queſtion was, Whether the Grantee ſhould pay the Subſidy of Tonnage impoſed upon Wine imported by the 9 & 10 *W.* 3. for Priſage Wine? After Judgment for the Grantee in the Court of Exchequer, a Writ of Error was brought in the Exchequer Chamber. It was inſiſted for the Grantee, that Priſage Wine was a Part of the ancient Royal Revenue; that if it were now in the Hands of the Queen, ſhe could not pay a Duty for her own Priſage Wine; and that the Grantee, who claims under the Crown, ought to have the ſame Exemption; and the rather, becauſe the Priſage of all Wine imported was granted to him, with an Immunity from Aids and Taxes. It was on the other Side admitted, that, if the Wine had remained in the Hands of the Queen, no Duty ought to have been charged upon it; it being abſurd, that the Queen ſhould be chargeable with a Duty to herſelf for her own Wine: But it was ſaid, that, as the Wine come into the Hands of a Subject, who may pay a Duty for it, there is no Abſurdity in his being charged with the Duty. It was likewiſe ſaid, that the Clauſe of Immunity could only extend to the Duty of Tonnage, then ſubſiſting, and not to any Duty, which might be granted by a future Act. It was holden by all the Judges, that, immediately upon Importation, the Subſidy of Tonnage, impoſed by the 9 & 10 *W.* 3. *cap.* 23. attaches upon all the Wine; and that the Grantee receives whatever Part he takes for Priſage chargeable therewith. And the Judgment was reverſed.

2. Of the Duty of Poundage.

24. The different Subſidies of Poundage are, from the Time or Manner of their having been impoſed, thus diſtinguiſhed.

25. That impoſed by the 12 *C.* 2. *c.* 4. is called the old Subſidy.

26. That impoſed by the 9 & 10 *W.* 3. *c.* 23. is called the further Subſidy.

27. That impoſed by the 2 *Anne*, *c.* 9. is called the one third Subſidy.

28. That impoſed by the 3 *Anne*, *c.* 5. is called the two thirds Subſidy.

29. That impoſed by the 21 *G.* 2. *c.* 1. is called the Subſidy of one thouſand ſeven hundred and forty-ſeven.

30. By the 12 *C.* 2. *c.* 4. *par.* 1. it is enacted, "That a Subſidy called "Poundage, that is to ſay, of all Manner of Goods and Merchandizes of "every Merchant, Natural born Subject, Denizen and Alien, to be car- "ried out of this Realm or any your Majeſty's Dominions to the ſame be- "longing, or to be brought into the ſame by Way of Merchandize, of the "Value of every twenty Shillings of the ſame Goods and Merchandizes, "according to the ſeveral and particular Rates and Values of the ſame "Goods and Merchandizes, as the ſame are particularly and reſpectively "* rated and valued in a Book of Rates herein after mentioned and re- "ferred unto, twelve Pence, and ſo after that Rate, except and foreprized "out of this Grant of Subſidy of Poundage all Manner of Woollen Cloths, "made or wrought or to be made or wrought within this Realm of *Eng-* "*land*, commonly called old Draperies, and all Wines before limited to "pay Subſidies of Tonnage, and all Manner of Fiſh *Engliſh* taken and "brought by *Engliſh* Bottoms into this Realm, and all Manner of freſh "Fiſh and Beſtial that ſhall come into this your Realm, and all other "Goods and Merchandizes, which in the ſaid Book of Rates are men- "tioned to be Cuſtom free."

The old Subſidy on Goods exported and imported.

*Page 536

31. By

The Subſidy to be paid, as Goods are rated in the Book of Rates.

31. By *par.* 6. it is enacted, "that the Rates, intended by this Act, ſhall be the Rates mentioned and expreſſed in one Book of Rates, intitule "*the Rates of Merchandize, as they are rated and agreed on by the Commons Houſe of Parliament, ſet down and expreſſed in this Book, to be paid according to the Tenor of the Act of Tonnage and Poundage, and ſubſcribed with the Hand of Sir* Harbottle Grimſtone *Bart. Speaker of the Houſe of Commons*, which ſaid Book of Rates compoſed and agreed upon by your Majeſty's ſaid Commons, and alſo every Article, Rule, and Clauſe therein contained, ſhall be and remain as effectual to all Intents and Purpoſes, as if the ſame were included particularly in the Body of this preſent Act."

The Value of Goods, not rated in the Book of Rates, to be aſcertained by Oath of the Importer.

32. In the Book of Rates it is provided, "that if there ſhould happen to be brought in or carried out of this Realm any Goods liable to the Payment of Cuſtoms or Subſidies, which either are omitted in this Book, or are not now uſed to be brought in or carried out, or by Reaſon of the great Diverſity of the Value of ſome Goods could not not be rated; that in ſuch Caſe every Cuſtomer or Collector for the Time being ſhall levy the ſaid Cuſtom and Subſidy of Poundage according to the Value or Price of ſuch Goods, to be affirmed upon the Oath of the Merchant, in the Preſence of the Cuſtomer, Collector, Comptroller and Surveyor, or any two of them."

The further Subſidy on Goods imported.

33. By the 9 & 10 *W.* 3. *c.* 23. *par.* 4. It is enacted, "that one further Subſidy called Poundage, that is to ſay of all Manner of Goods and Merchandizes, of every Merchant, natural born Subject, Denizen, and Alien, to be imported or brought into this Realm, or any one of his Majeſty's Dominions to the ſame belonging, by Way of Merchandize, of the Value of every twenty Shillings of the ſame Goods and Merchandizes, according to the ſeveral and particular Rates and Values of the ſame Goods and Merchandizes, as the ſame are particularly and reſpectively rated and valued in the Book of Rates referred to by the 12 *Car.* 2. *c.* 4. twelve Pence, and ſo after that Rate; and if there ſhall happen to be brought into this Realm any Goods liable to the Payment of the Subſidy by this Act granted, which are not particularly rated in the ſaid Book of Rates, every Cuſtomer or Collector for the Time being ſhall levy the Subſidy by this Act granted, according to the Value or Price of ſuch Goods, to be affirmed upon the Oath of the Merchant, in the Preſence of the Cuſtomer, Collector, Comptroller and Surveyor, or any two of them."

Goods excepted.

34. By this Statute, beſides all the Goods excepted in the 12 *C.* 2. *c.* 4. all Goods and Merchandizes uſed in dying are excepted; and by *par.* 5. it is enacted, "That all Drugs chargeable by this Act, which ſhall be imported directly from the Place of their Growth in *Engliſh* built Shipping, and all Spicery except Pepper, which ſhall be imported directly from the Place of its Growth in *Engliſh* built Shipping, ſhall be rated to pay by this Act one third Part of what is charged in the ſaid Book of Rates and no more; and that this Act ſhall not extend, to charge Linen or wrought Silks imported with the additional Duty of one Moiety of the Rate mentioned in the ſaid Book of Rates; or to charge Tobacco, of the *Engliſh* Plantations, with the additional Duty of one Penny *per* Pound, over and above the Subſidy mentioned in the ſaid Book of Rates."

*Page 537

The one third Subſidy on Goods imported.

* 35. By the 2 *Anne*, *c.* 9 *par.* 1. it is enacted, "That one other Subſidy, called Poundage, of all Manner of Goods and Merchandizes to be imported or brought into this Realm, or any of her Majeſty's Dominions to the ſame belonging, by way of Merchandize; that is to ſay, one third Part of ſuch or the like ſeveral and reſpective Duties, as by an Act, of the ninth Year of the Reign of *William* the Third,

" Third, are impoſed or payable for or upon the ſame Goods and Mer-
" chandizes reſpectively, except the ſaid Goods and other Merchandizes,
" as by the ſaid Act are exempted from the Payment of the Subſidy
" thereby granted."

36. By the 3d of *Anne*, *c.* 5. *par.* 1. it is enacted, " That one other
" Subſidy called Poundage, of all Manner of Goods and Merchandizes to
" be imported or brought into this Realm, or any of her Majeſty's Domi-
" nions to the ſame belonging, by way of Merchandize; that is to ſay
" two third Parts of ſuch or the like ſeveral and reſpective Duties, as by
" an Act of the ninth Year of the Reign of *William* the Third were
" granted, and are payable for and upon the ſame Goods and Merchan-
" dizes reſpectively, except Tobacco and ſuch Currants as ſhall be im-
" ported in *Engliſh*-built Shipping navigated according to the Laws
" now in Force, and Sugar from the *Engliſh* Plantations; and ſuch
" Goods and other Merchandizes, as by the ſaid Act are exempted from
" the Payment of the Subſidy thereby granted." The two thirds Subſidy on Goods imported.

37. No Goods, Wares or Merchandize exported were liable to any of the Subſidies already mentioned, except the old Subſidy, and ſome Goods liable to that Subſidy, had by the Acts impoſing the other Subſidies been exempted therefrom.

38. It is moreover enacted by the 8 *G.* 1. *c.* 15. *par.* 7. " That for the
" further Encouragement of the *Britiſh* Manufactures, the ſeveral and re-
" ſpective Subſidies and Duties whatſoever, payable to his Majeſty his
" Heirs or Succeſſors by any Law now in Force, upon the Exportation
" of any Goods, or Merchandizes, of the Produce or Manufacture of
" *Great-Britain*, ſhall ceaſe, determine, and be no longer due or payable,
" for ſo much of the ſaid Goods or Manufactures as ſhall from thence-
" forth be exported." The Duties on the Exportation of Goods of *Britiſh* Produce or Manufacture taken off.

39. But by *par.* 8. it is provided, " That this Act or any Thing herein
" contained ſhall not extend or be conſtrued to extend, to determine, al-
" ter or leſſen, the ſeveral or reſpective Subſidies of Poundage, or other
" Duties, payable upon the Exportation of Allom, Lead, Lead Ore,
" Tin, Leather tanned, Copperas, Coals, Wool, Cards, white Woollen
" Cloths, *Lapis Calaminaris*, Skins of all Sorts, Glew, Coney Hair or
" Wool, Hares Wool, Hair of all Sorts, Horſes and Litharge of Lead,
" any Thing herein contained to the contrary notwithſtanding." Some Goods of *Britiſh* Produce or Manufacture excepted.

40. By the 11 *G.* 1. *c.* 7. After reciting, that it had been provided in the Book of Rates referred to by an Act of the twelfth Year of the Reign of King *Charles* the Second, that if there ſhould be brought into this Realm any Goods liable to the Payment of Cuſtom or Subſidy, which either were omitted in the ſaid Book, or were not then uſed to be brought in, or by reaſon of the great Diverſity of the Value of ſome Goods could not be rated; that in ſuch Caſe every Cuſtomer or Collector for the Time being ſhould levy the Subſidy of Poundage granted by that Act according to the Value and Price of ſuch Goods, to be affirmed upon the Oath of the Merchant, in the Preſence of the Cuſtomer, Collector, Comptroller and Surveyor, or any two of them; and that in the ſubſequent Acts, by which a Subſidy of Poundage or Duties upon particular Goods had been impoſed, the like Proviſion as to all Goods thereto liable and not rated in the ſaid Book of Rates was made; and that it had been found by Experience, that the Value of the ſeveral Sorts of Goods, uſually imported and not rated in the ſaid Book of Rates, which is ſworn to or affirmed by the Importers, according to which the ſaid Subſides and other Duties are * to be paid, have been very unequal, ſome Perſons greatly undervaluing the ſame, to the Detriment of the Revenue and Diſcouragement of the fair Traders, it is enacted, " That the ſeveral Proviſions and Clauſes, The Proviſions, for rating Goods *ad Valorem* according to the Oath of the Importer, repealed.

*Page 538

" contain-

" contained in the ſaid recited Acts and Books of Rates before mentioned, " for aſcertaining the Value of Goods or Merchandizes imported accord- " ing to the Oaths or Affirmations of the Importers, ſo far as the ſame " relate to the particular Goods and Merchandizes mentioned, and ex- " preſſed in a certain Book of Rates herein after mentioned and referred " unto, ſhall be and are hereby repealed and made void."

The old Subſidy, before paid *ad Valorem*, to be aſcertained by the additional Book of Rates.

41. By *par.* 2. it is enacted, " That in Lieu of the ſaid former Rates and " Duties *ad Valorem*, repealed by this Act, there ſhall be payable and paid " for the ſaid old Subſidy the ſeveral Rates and Duties, mentioned and " expreſſed in one Book of Rates, intituled, *An additional Book of Rates* " *of Goods and Merchandizes uſually imported, and not particularly rated* " *in the Book of Rates, referred to in the Act of Tonnage and Poundage* " *made in the twelfth Year of the Reign of King* Charles *the Second, with* " *Rules, Orders and Regulations, ſigned by the Right Honourable* Spencer " Compton *Eſq*; *Speaker of the Honourable Houſe of Commons*, the ſaid " Rates and Duties to be paid, upon Importation of the ſaid Goods and " Merchandizes reſpectively into any Port or Place within this Kingdom, " and ſo in Proportion for any greater or leſſer Quantity; which ſaid laſt " mentioned Book of Rates, compoſed and agreed upon by your Ma- " jeſty's ſaid Commons, and every Article, Rule and Clauſe therein con- " tained, ſhall be and remain during the Continuance of the ſaid Act of " Tonnage and Poundage of full Force, and ſhall be put in Execution " as fully and effectually to all Intents and Purpoſes, as if the ſame were " particularly inſerted in this preſent Act."

The other Subſidies and Duties, before paid *ad Valorem*, to be aſcertained by the additional Book of Rates.

42. By *par.* 3. it is enacted, " That in all Caſes, where any of the Goods " or Merchandizes, mentioned in the ſaid Book of Rates, are by Law " ſubject or liable to any of the Subſidies or Duties, according to the " reſpective Values ſet thereon for the ſaid old Subſidy, or in Proportion " thereto, the ſame ſhall be paid proportionally, according to the parti- " cular Value ſet thereon in the ſaid Book of Rates laſt mentioned, for " the old Subſidy aforeſaid, and not according to the Oath of Affirma- " tion of the Importer; any Thing in the reſpective Acts which granted " the ſaid Duties, or in any other Act, to the contrary notwithſtanding."

The Value of Goods, unrated in either Book of Rates, to be aſcertained by Oath of the Importer.

43. By *par.* 7. after reciting, that it may happen, that ſeveral Goods and Merchandizes may be imported which are omitted to be rated in either of the ſaid Books of Rates, it is enacted, " That in ſuch Caſe, the Value " and Price of ſuch Goods and Merchandizes ſhall be aſcertained by the " Oath or Affirmation of the Merchant, in the Preſence of the Cuſtomer, " Collector, Comptroller and Surveyor, or any two of them, and the old " Subſidy, or other Duties which are payable in Proportion to the ſaid " old Subſidy, ſhall be paid according to ſuch Value and Price."

If Goods paying *ad Valorem* are undervalued, they may be taken for the Uſe of the Crown.

44. By *par.* 8. it is enacted, " That for the better preventing of Frauds " to the Revenue, and that all Merchants may be upon a more equal Foot " in Trade, it ſhall and may be lawful for the Collector and Comptroller " or other proper Officers of the Cuſtoms, to open, view and examine " ſuch Goods and Merchandizes paying Duty *ad Valorem*, and compare " the ſame with the Value and Price thereof ſo ſworn to or affirmed; " and if upon ſuch View and Examination it ſhall appear, that ſuch Goods " and Merchandizes are not valued by ſuch Oath or Affirmation according " to the true Value and Price thereof, according to the true Intent or " Meaning of this or any other Act or Acts of Parliament, that then and " in ſuch Caſe the Importer or Proprietor ſhall, on Demand made in Writ- " ing by the Cuſtomer, or Collector and Comptroller of the Port, where " ſuch Goods and Merchandizes are entered, deliver or cauſe to be deli- *Page 539 "*vered all ſuch Goods and Merchandizes into his Majeſty's Warehouſe " at the Port of Importation, for the Benefit of the Crown; and upon ſuch " Delivery the Cuſtomer or Collector of ſuch Port, with the Privity of the " Comptroller, ſhall out of any Money in his Hands, ariſing by Cuſtoms

" or

" or other Duties belonging to the Crown, pay to ſuch Importer or Pro-
" prietor the Value of ſuch Goods or Merchandizes, ſo ſworn to or af-
" firmed for the ſaid old Subſidy as aforeſaid, together with an Addition
" of the Cuſtoms and other Duties paid for ſuch Goods, and of Ten
" Pounds *per Centum* over and above the Value thereof, taking a Receipt
" for the ſame from ſuch Importer or Proprietor, in full Satisfaction for
" the ſaid Goods as if they had been regularly ſold; and the reſpective
" Commiſſioners of the Cuſtoms ſhall cauſe the ſaid Goods to be fairly
" and publickly ſold for the beſt Advantage, and out of the Produce
" thereof the Money ſo paid or advanced as aforeſaid ſhall be repaid
" to ſuch Collector, to be replaced to ſuch Funds from whence he bor-
" rowed the ſame, and the Overplus if any ſhall be paid into his Majeſty's
" Exchequer towards the Sinking Fund, any Law, Cuſtom or Uſage
" to the contrary, in any wiſe notwithſtanding."

45. By the 21 *G.* 2. *c.* 2. *par.* 1. it is enacted, " That over and above all Subſidies of Poundage, and over and above all additional Duties, Impoſitions and other Duties whatſoever, by any other Act or Acts of Parliament, or otherwiſe howſoever, already due and payable, or which ought to be paid to his Majeſty his Heirs or Succeſſors, for or upon any Goods or Merchandizes which ſhall be imported or brought into the Kingdom of *Great Britain*, one further Subſidy of Poundage, of Twelve Pence in the Pound, ſhall be paid to his Majeſty his Heirs and Succeſſors, upon all Manner of Goods and Merchandizes, to be imported or brought into this Realm or any of his Majeſty's Dominions to the ſame belonging, by the Importer of ſuch Goods or Merchandizes, before the Landing thereof, according to the ſeveral particular Rates and Values of the ſame Goods and Merchandizes, as the ſame are now particularly and reſpectively rated and valued, in the reſpective Books of Rates, referred to by the Acts of the twelfth Year of the Reign of King *Charles* the Second and the eleventh Year of the Reign of his late Majeſty, or by any other Act or Acts of Parliament; or which do now pay any Duty *ad Valorem*." The Subſidy of 1747 on Goods imported.

46. By *par.* 4. it is provided, " That nothing in this Act contained ſhall extend, or be conſtrued to extend, to any Goods or Merchandizes, which were or are now allowed, by the ſaid Act of the Twelfth Year of the Reign of King *Charles* the Second, or any other Act or Acts of Parliament, to be imported Duty free, nor to any prohibited Goods or Merchandizes which may be imported by the united *Eaſt-India* Company." Proviſo as to excepted and prohibited Goods.

47. Divers Kinds of Goods, Wares and Merchandizes, beſides being liable to all the Subſidies and Poundage, are moreover liable to certain Duties, impoſed by particular Acts of Parliament.

48. It has been holden, that Goods thrown on Shore, from a Ship which has been wrecked, are not liable to any Duties; becauſe they are not to be conſidered as brought into the Kingdom by any of the King's natural-born Subjects, or by any other Perſon or Stranger, but by the Wind and Sea. Vaugh. 166, 167, 168. *Shephard* v. *Goſnold*. 12 C. 2. c. 4. ſ. 1.

49. In an Action of Trover, for the Converſion of 14 Shirts, a Night Gown and a Cap, a Caſe was made for the Opinion of the Court. It was ſtated, that the Plaintiff arrived at *Dover* from *France*, and brought the Goods with him as his own wearing Apparel, and not as Merchandize or for Sale; and that the Defendant ſeized them for Non-payment of Duty. Upon the firſt Argument, the Court inclined ſtrongly for the Plaintiff; but a further Argument was ordered. At another Day the Attorney General came into Court, and * ſaid; that, it being ſtated particularly, that the Goods were not imported as Merchandize, it was too much for him to endeavour to ſupport the Seiſure: But that, if it had ſtood only upon the Words that he did not bring them in for Sale, he would have endeavoured to have ſupported it. Str. 943. *Chapman* v. *Lamb*. * Page 540

3. Of

3. Of the Duties to which Aliens are liable.

50. Aliens are ſubject to ſome Duties, which are not paid by natural-born Subjects, or by Perſons naturalized by Act of Parliament.

51. By the 11 *H.* 7. *c.* 14 it is enacted, "That all Merchant Strangers "and others, that be made Denizens by the King's Letters Patent or "otherwiſe, ſhall pay ſuch Cuſtoms and Subſidies for their Goods and "Merchandize inwards and outwards, as they ſhould have paid if ſuch "Letters Patents had never been made."

52. The Practice of impoſing extraordinary Duties upon Aliens is very ancient.

Rot. Chart. 31 E. 1. n. 44. 27 E. 3. c. 26. 2 Inſt. 59.

53. By the *Charter Mercatoria* Aliens were liable to a higher Duty upon Wools, Wool-fells and Leather exported than natural-born Subjects; and they were likewiſe to pay a Duty of Threepence in the Pound upon all other Goods imported except Wine.

12 E. 4. c. 3.

54. In the Reign of *Edward* the Third, the Subſidy of Tonnage was ſix Shillings *per* Ton upon the Wine of Aliens; whereas that of *Engliſh* Merchants was only Half that Sum; and the Subſidy of Poundage was two Shillings upon the Goods of Aliens; whereas that of the *Engliſh* Merchants was only one Shilling.

55. The extraordinary Duties paid by Aliens, being heretofore, to diſtinguiſh them from the larger Duties paid by *Engliſh* Merchants as well as Aliens, called *parvæ Cuſtumæ*, all extraordinary Duties, at this Day paid by Aliens, are accounted for by the Name of petty Cuſtoms.

12 C. 2. c. 4.

56. By the Statute impoſing the old Subſidy of Tonnage, Aliens are to pay for ſome Sorts of Wine one Third, for others one Fourth, and for others one Fifth more Duty than is paid by *Engliſh* Merchants.

9 & 10 W. 3. c. 23. 2 Anne, c. 9. 3 Anne, c. 5.

57. The ſame extraordinary Duties of Tonnage are impoſed upon Aliens, by the Statutes impoſing the further Subſidy, the one third Subſidy, and two thirds Subſidy, as are impoſed by the Act granting the old Subſidy.

58. The Duty of Two Shillings *per* Ton, called Butlerage, granted by *Charta Mercatoria*, is at this Day to be paid by Merchant Strangers, upon all Wine imported by them.

12 C. 2. c. 4.

59. By the Statute, impoſing the old Subſidy of Poundage, it is enacted, "That of every Twenty Shillings Value, of any of the Native Com-"modities of this Realm, or Manufactures wrought of any ſuch Com-"modities, to be carried out of this Realm by any Merchant Alien, "according to the Value thereof in the Book of Rates herein after refer-"red to expreſſed, twelve Pence in the Pound ſhall be paid, over and "above the Subſidy of twelve Pence in the Pound to be paid by *Engliſh* "Merchants."

60. By the Book of Rates, *Art.* 12. it is ordered, "That Merchant Strangers, who according to the Rates and Values in this Book contained "do pay double Subſidy for Lead, Tin and Woollen Cloth ſhall alſo pay "double Cuſtom for Native Manufactures of Wool or Part Wool; and "the ſaid Strangers are to pay upon all other Goods, as well inwards as "outwards, rated to the Subſidy of Poundage, three Pence in the Pound, "or any other Duty payable by *Charta Mercatoria*, beſides the Subſidy."

61. But by the 25 *C.* 2. *c.* 6. *par.* 1. it is enacted, "That ſo much of "ſuch Clauſes of the Statute of the Twelfth Year of our Sovereign "Lord the King, that now is, and of the Twelfth Article of the Book "of Rates therein mentioned, and of all other Clauſes contained in any "other Act or Statute of this Realm whatſoever, as do any ways con-

"cern

" concern any Cuſtom or Subſidy upon any of the Native Commodities of " this Kingdom (except Coals) or Manufactures wrought or made in this " Kindom or Town of *Berwick upon* * *Tweed*, to be exported out of this * Page 541
" Realm, payable by any Merchant Alien made Denizen, or other Stranger " or Alien, over and above the Cuſtom and Subſidy payable by his Ma- " jeſty natural-born Subjects, be hereby repealed."

60. By the 12 *C.* 2. *c.* 18. *par.* 9 it is enacted, " That for preventing Divers " the great Frauds, daily uſed in colouring and concealing Aliens Goods, Goods, if not " all Wines of the Growth of *France* or *Germany*, which ſhall be im- imported in " ported into *England*, *Ireland*, *Wales*, or Town of *Berwick upon Tweed*, *Engliſh* " in any other Ship or Veſſel than which doth truly and without Fraud be- Ships, to pay " long to *England*, *Ireland*, *Wales*, or Town of *Berwick upon Tweed*, and Alien Du- " is navigated with the Mariners thereof as in this Act is before directed, ties. " and all Sorts of Maſts, Timber or Boards, as alſo all foreign Salt, Pitch, " Tar, Roſin, Hemp, Flax, Raiſins, Figs, Prunes, Olive Oils, all Sorts " of Corn or Grain, Sugar, Pot Aſhes, Spirits commonly called Brandy " Wine or *Aqua Vitæ*, Wines of the Growth of *Spain*, the Iſlands of the " *Canaries* or *Portugal*, *Madeira* or the Weſtern Iſlands; and all the " Goods of the Growth, Production or Manufacture of *Muſcovy* or *Ruſſia*, " which ſhall be imported into any of the Places aforeſaid, in any other " than ſuch Shipping and ſo navigated; and all the Currants and *Turkey* " Commodities, which ſhall be imported into any the Places aforeſaid, in " any other than *Engliſh* built Ships and navigated as aforeſaid, ſhall be " deemed Aliens Goods and pay all Strangers Cuſtoms and Duties."

61. By *par.* 10. it is enacted, " That for preventing all Frauds, which No foreign " may be uſed in colouring or buying foreign Ships, no foreign built Ship Ships, unleſs " or Veſſel whatſoever ſhall be deemed or paſs as a Ship belonging to ſold *bona* " *England*, *Ireland*, *Wales* or the Town of *Berwick upon Tweed*, or enjoy *fide*, to be " the Privilege of ſuch Ship or Veſſel, until ſuch Time as he or they, deemed an " claiming the ſaid Ship or Veſſel to be theirs, ſhall make appear to the *Engliſh* " chief Officer or Officers of the Cuſtoms, in the Port next to the Place of Ship. " his or their Abode, that he or they are not Aliens, and ſhall have taken " an Oath, before ſuch chief Officer or Officers, who are hereby autho- " rized to adminiſter the ſame, that ſuch Ship or Veſſel was *bona fide*, and " without Fraud, by him or them bought for a valuable Conſideration, " expreſſing the ſame, as alſo the Time, Place and Perſons from whom " it was bought, and who are his Part Owners, if he have any; all which " Part Owners ſhall be liable to take the ſame Oath, before the chief " Officer or Officers of the Cuſtoms, in the Port next to the Place of his " or their Abode, and that no Foreigner, directly or indirectly, hath any " Part, Intereſt or Share therein; and that upon ſuch Oath he or they " ſhall receive a Certificate, under the Hand and Seal of the ſaid chief " Officer or Officers, whereby ſuch Ship or Veſſel may for the future paſs, " and be deemed, as a Ship belonging to the ſaid Port, and enjoy the " Privileges of ſuch Ship or Veſſel."

62. By the 13 & 14 *C.* 2. *c.* 11. *par.* 6. it is enacted, " That, for the A Liſt to be " better encreaſe of Shipping and Navigation, the Collectors and other made of fo- " Officers of his Majeſty's Cuſtoms, in all the Ports of *England*, ſhall reign Ships " make a true and perfect Liſt, atteſted under their Hands, of all foreign deemed " built Ships belonging to their reſpective Ports, for which Certificates *Engliſh*. " have been made, according to the Directions of an Act paſſed in " the twelfth Year of the Reign of King *Charles* the Second, intituled, " *An Act for the encreaſing and encouraging of Shipping and Navigation*, " and tranſmit the ſame into his Majeſty's Court of Exchequer, there to " remain upon Record: And that no foreign Ship, that is to ſay, not

" built

Page 542 "built in any of his Majeſty's Dominions of *Aſia*, *Africa* or *America*, "other than ſuch as ſhall *bona fide* be bought before the firſt Day of "*October* one thouſand ſix hundred and ſixty-two next enſuing, and be "expreſsly named in the ſaid Liſt, ſhall enjoy the Privilege of a Ship "belonging to *England* or *Ireland*, although owned or manned by *Eng-*"*liſh*, except only ſuch Ships as ſhall be taken at Sea by Letters of Mark "or Repriſal, and Condemnation made in the Court of Admiralty as "lawful Prize; but all ſuch Ships ſhall be deemed as Aliens Ships, and "be liable to all Duties that Aliens Ships are liable to by virtue of the "ſaid Act for the encreaſing and encouraging of Shipping and Naviga-"tion."

(E) Of prohibited Goods.

AS the Offence of Smuggling does in Part conſiſt, in the bringing on Shore, or carrying from the Shore, of any Goods, Wares, or Merchandize, which are by Law prohibited to be brought on Shore or carried from the Shore, it will be proper to give ſome Account of prohibited Goods.

2. The Exportation of ſome Goods, as for Inſtance Wool, is prohibited entirely.

3. The Importation of foreign Embroidery and divers other Goods, is prohibited entirely.

4. The ſuffering of foreign Manufactures to be worn in this Kingdom muſt, by exhauſting the Treaſure thereof, and depriving the Poor of Employment, be very detrimental; but it may be for the Benefit of Trade, to ſuffer ſuch to be imported, provided they be again exported. Upon this Principle, divers of the Manufactures of *Perſia* and the *Eaſt Indies* are allowed to be imported. But it is provided, that they ſhall be depoſited in ſuch Warehouſes as are approved of by the proper Officers of the Cuſtoms; and that no Part of the Goods ſhall be taken thereout, until ſufficient Security be given, that the ſame ſhall be exported to foreign Parts, and not landed again in this Kingdom.

5. For the further Encouragement of Trade and Navigation, the Perſon exporting prohibited Goods is, in ſome Caſes, intitled to a Drawback of the Duties which were paid on the Importation of the Goods.

6. As one of the Requiſites, neceſſary to entitle an Exporter of prohibited Goods to a Drawback, is a Certificate from the proper Officer of the Cuſtoms, that the Duties were paid upon the Importation of the Goods, ſuch Goods are called Certificate Goods.

7. Such great Improvements have been made in Agriculture, that the Corn produced in this Kingdom is uſually more than ſufficient for the Support of the Inhabitants. It follows, that the Exportation of Corn muſt in the general be vaſtly advantageous to the whole Nation, as well as to the Land Owners. To promote this, and that it may be ſent to foreign Markets as cheap as the Corn of other Countries, it has been thought proper to allow a Bounty, upon the Exportation of divers Kinds of Grain, when the Price of the Grain does not exceed a certain Sum.

8. In ſome Caſes, for the Sake of encouraging domeſtick Manufactures, an Allowance or Præmium is granted on the Exportation thereof. This is not only done, when they are made of foreign Materials which have paid Duties on Importation, as in the Caſe of wrought Silks; but likewiſe, when they are made of native Materials, as in the Caſe of Starch and divers other Manufactures.

9. In

*9. In all these Instances, and in every other, wherein a Bounty or Drawback is paid, or any Debenture is made out for the Payment of a Bounty or Drawback, upon the Shipping of any Goods for Exportation, the relanding of the Goods is prohibited, in order to prevent the Loss which the Revenue would thereby sustain, and the Injury which would thereby be done to the fair Trader; and a Bond is usually entered into by the Person who receives such Bounty, Drawback or Debenture, with Condition, that the Goods shall be carried into Parts beyond the Seas, and not landed again in this Kingdom. *Page 543

(F) Of the pecuniary Penalties and Forfeitures incurred by Persons guilty of Smuggling, or of such Practices as have a direct Tendency thereto.

1. AS the Offence of Smuggling is not complete, unless some Goods, Wares or Merchandize, are actually brought on Shore or carried from the Shore contrary to Law, a Person may be guilty of divers Practices, which have a direct Tendency thereto, without being guilty of the Offence.

2. For the Sake of preventing or putting a Stop to such Practices, Penalties and Forfeitures are inflicted by divers Statutes; and indeed it would be to no Purpose, in a Case of this Kind, to provide against the End, without providing at the same Time against the Means of accomplishing it.

3. In treating of the Penalties and Forfeitures, to which Persons guilty of such Practices as have a direct Tendency to this Offence are liable, it is not intended to give an Account of the Penalties and Forfeitures which are inflicted in every particular Case. This would be going into a very large Field; and it will sufficiently answer the present Design, to give a general Account of such Penalties and Forfeitures.

4. The Rule generally adhered to, in the Statutes by which Penalties and Forfeitures are inflicted for Offences against the Laws relating to the Customs, is, that one Moiety of the Money arising from such Penalties and Forfeitures shall be to the Use of his Majesty, his Heirs and Successors, the other Moiety to the Use of such Person or Persons, as shall seize the smuggled or prohibited Goods, or inform, sue or prosecute for the same, by Action, Bill, Plaint, or Information, in any of the Courts of Record at *Westminster*, or in the Court of Exchequer in *Scotland:* But in some few Cases the Application of the Money is otherwise directed.

1. In Ships at Sea or hovering upon the Coast.

5. By the 5 *G.* 1. *cap.* 11. *par.* 8. After reciting, that divers Ships and Vessels of the Burthen of fifty Tons or under, laden with customable and prohibited Goods, pretending to be bound for foreign Parts, do frequently lie hovering on the Coasts of this Kingdom, with Intention to run the same privately on Shore as Opportunity offers, to the great Diminution and Loss of the Revenue and Ruin of fair Traders; and that, by Reason of the said Vessels so hovering, frequent Opportunities are found for

No Ship, of fifty Tons, or under, to hover upon the Coast.

for carrying on the clandeſtine Trade of exporting Wool, and other ſtaple Commodities of this Kingdom prohibited to be exported, it is * enacted, * Page 544
" That where any Ship or Veſſel of the Burthen of fifty Tons or under, " laden with cuſtomable or prohibited Goods, ſhall be found hovering " upon the Coaſts of this Kingdom, within the Limits of any Port, and " not proceeding on her Voyage to foreign Parts, or to ſome other Port of " this Kingdom, Wind and Weather permitting, it ſhall be lawful, for any " Officer of his Majeſty's Cuſtoms to go on Board every ſuch Ship or " Veſſel, and to take an Account of the Lading, and demand and take " Security from the Maſter, or other Perſon having the Charge of ſuch " Ship or Veſſel, by his Bond to be entered into to his Majeſty his Heirs " and Succeſſors, in ſuch Sum as ſhall be Treble the Value of the foreign " Goods then on Board, with Condition that ſuch Ship or Veſſel, as ſoon " as Wind and Weather and the State and Condition of ſuch Ship or " Veſſel doth permit, ſhall proceed regularly on her Voyage, and land ſuch " foreign Goods at ſome foreign Port or Ports; and if ſuch Maſter, or " other Perſon having the Charge of ſuch Ship or Veſſel, ſhall refuſe to " enter into ſuch Bond, or, having entered into it, ſhall not proceed re- " gularly on her Voyage, as ſoon as Wind and Weather and the State and " Condition of ſuch Ship or Veſſel ſhall permit, unleſs ſuffered to make a " longer Stay by the Collector, or other principal Officer of the Port where " ſuch Ship or Veſſel ſhall be, not exceeding twenty Days, then, and in " either of the ſaid Caſes, all the foreign Goods ſo on Board ſhall and may " by any Officer of the Cuſtoms, by the Direction of the Collector or other " principal Officer, be brought on Shore and ſecured; and in caſe the ſaid " Goods are cuſtomable, the Cuſtoms and other Duties ſhall be paid for " the ſame; and if Wool, or any prohibited Goods, or any Goods liable " to Forfeiture, are found on Board ſuch Ship or Veſſel, the ſame are " hereby declared ſubject to Forfeiture, and the Officers of the Cuſtoms " may proſecute the ſame, as alſo the Ship or Veſſel, in caſe ſhe ſhall be " liable to Condemnation."

6. By *par.* 11. So much of this Statute, as relates to the hovering of Ships or Veſſels of fifty Tons or under, was to have Continuance for three Years from the Twenty-fifth Day of *March* one thouſand ſeven hundred and nineteen, and from thence to the End of the then next Seſſion of Parliament, and no longer.

7. But it has been from Time to Time continued, and by the 14 *G.* 3. *c.* 86. is continued to the Twenty-ninth Day of *September* one thouſand ſeven hundered and eighty-one, and from thence to the End of the then next Seſſion of Parliament.

No Ship, of fifty Tons or under, laden with Brandy, to hover within two Leagues of the Shore.

8. By 6 *G.* 1. *c.* 21. *par.* 31. After reciting, that, by an Act of the laſt Seſſion of Parliament, a Remedy was provided againſt Ships or Veſſels of fifty Tons or under, which lie hovering on the Coaſt within the Limits of the Ports of this Kingdom, and whereas ſuch Ships or Veſſels in order to elude that Law, do lie at Anchor or hover on the Coaſt as near the ſaid Limits as may be, it is enacted, " That if any Ship or Veſ- " ſel, of the Burthen of fifty Tons or under, being in Part or fully laden " with Brandy, ſhall be found at Anchor, or hovering, within two " Leagues of the Shore, and not proceeding on her Voyage, Wind and " Weather permitting, it ſhall and may be lawful to and for the Com- " mander of any of his Majeſty's Ships of War, Frigates or armed Sloops, " appointed for the Guard of the Coaſts, or to and for the Commander " of any Yacht, Smack, Sloop or other Boat, in the Service of his Ma- " jeſty's Cuſtoms, or to and for any Officer of his Majeſty's Cuſtoms, " to compel the Maſter, or other Perſon having the Charge of ſuch " Ship or Veſſel, to come into Port; and it is hereby declared, that ſuch

" Maſter,

" Maſter or other Perſon as aforeſaid, as likewiſe ſuch Ship or Veſſel, and " the Brandy wherewith ſuch Ship or Veſſel is laden in Part or in Whole, " ſhall be ſubject to the ſame Rules, Regulations, Penalties and Forfei- " tures, as ſuch Cargoes, Ships or Veſſels, and the Maſters or others tak- " ing Charge thereof, which hover within the Limits of any Port of this " Kingdom, are by the ſaid Act ſubject unto."

9. * By *par.* 33. it is enacted, " That for the preventing of Diſputes, " which may ariſe concerning the Admeaſurement of Ships hovering on " the Coaſt, the following Rule ſhall be obſerved therein, that is to ſay, " take the Length of the Keel within Board ſo much as ſhe treads on " the Ground, and the Breadth within Board by the Midſhip Beam from " Plank to Plank, and Half the Breadth for the Depth, then multiply the " Length by the Breadth, and that Product by the Depth, and divide the " Whole by Ninety-four, and the Quotient ſhall give the true Contents of " the Tonnage; according to which Rule the Tonnage of all ſuch Ships " or Veſſels ſhall be meaſured and aſcertained, any Law, Cuſtom or Uſage " to the contrary in any wiſe notwithſtanding."

*Page 545 The Rule for aſcertaining the Tonnage of a Ship, hovering on the Coaſt.

10. By 9 G. 2. *c.* 35. *par.* 23. After reciting, that foreign Goods are frequently taken out of Ships at Sea, without the Limits of any Port, with Intent to be fraudulently landed in this Kingdom, it is enacted, " That if any foreign Goods ſhall, by any Ship, Boat or Veſſel whatſoever, " be taken in at Sea, or put out of any Ship or Veſſel whatſoever, within " the Diſtance of four Leagus from any of the Coaſts of this Kingdom, " whether the ſame be within or without the Limits of any of the Ports " thereof, without Payment of the Cuſtoms or other Duties payable for " the ſame, unleſs in Caſe of Neceſſity, or for ſome other lawful Rea- " ſon, of which the Maſter or other Perſon having Charge of ſuch Ship, " Veſſel or Boat, ſo taking in the ſame, ſhall give immediate Notice to, and " make Proof before the chief Officer of the Cuſtoms of the firſt Port of " this Kingdom where he ſhall arrive, ſuch Goods ſhall be forfeited; and " the Maſter, or other Perſon having Charge of ſuch Ship, Veſſel or Boat, " ſo taking in the ſame, and all Perſons, who ſhall be aiding, aſſiſting or " otherwiſe concerned in the unſhipping or receiving the ſaid Goods, ſhall " forfeit treble the Value thereof; and the Ships, Boats and Veſſels, into " which the ſaid Goods ſhall be taken ſhall be forfeited, any Ship, Boat " or Veſſel, ſo to be forfeited not exceeding the Burthen of One Hundred " Tons; and the Maſter, Purſer or other Perſon having Charge of ſuch " Ship or Veſſel, out of which ſuch Goods ſhall be taken, unleſs in Caſe " of Neceſſity, or for other lawful Reaſon, of which Notice ſhall be giv- " en and Proof made as aforeſaid, ſhall alſo forfeit treble the Value of " the Goods ſo unſhipped."

No foreign Goods to be taken in or put out of a Ship, within four Leagues of the Coaſts.

11. By the 5 G. 1. *c.* 11. *par.* 3. it is enacted, " That in caſe any foreign " Goods, Wares or Merchandize, ſhall by any Collier, Fiſher Boat, or " other Coaſting Veſſel or Boat, be taken in at Sea, or out of any Ship " or Veſſel whatſoever, in order to be landed or put into any other Ship, " Veſſel or Boat, within the Limits of any Port, without Payment of the " Cuſtoms and other Duties payable for the ſame, ſuch Goods, Wares " and Merchandizes ſhall be forfeited; and the Maſter of ſuch Collier, " Fiſher Boat, or other Coaſting Veſſel or Boat, ſhall forfeit treble the " Value of ſuch Goods, unleſs in Caſe of Neceſſity, of which ſuch Maſ- " ter ſhall immediately give Notice to, and make Proof before the chief " Officers of the Cuſtoms of the firſt Port of this Kingdom where he ſhall " arrive; and the Maſter, Purſer, or other Perſon taking Charge of ſuch " Ship or Veſſel, out of which ſuch Goods ſhall be taken at Sea, unleſs " in Caſe of Neceſſity as aforeſaid, ſhall forfeit treble the Value of ſuch " Goods ſo unſhipped."

No foreign Goods to be taken in at Sea by a Coaſting Veſſel.

12. By

12. By *par.* 11. ſo much of this Statute, as relates to the taking in of Foreign Goods at Sea, was to have Continuance for Three Years from the Twenty-fifth Day of *March* One Thouſand Seven Hundred and Nineteen, and from thence to the End of the then next Seſſion of Parliament, and no longer.

13. But it has been from Time to Time continued, and by the 14 G. 3. *c.* 86. is continued to the Twenty-ninth Day of *September* One Thouſand Seven Hundred and Eighty-one, and from thence to the End of the then next Seſſion of Parliament.

*Page 546 2. In the Shipping or Unſhipping of Goods at any Port, Member or Wharf, not lawfully appointed for ſuch Purpoſes.

Goods to be ſhipped and unſhipped only in the great Ports.

14. Heretofore Goods could only be ſhipped and unſhipped in the great Ports, for by 4 *H.* 4. *c.* 20. it is enacted, "That all Manner of Merchandize entering into the Realm of *England*, or going out of the ſame, ſhall "be charged and diſcharged in the great Ports of the Sea, and not in "Creeks or ſmall Arrivals, upon Pain to forfeit all the Merchandize ſo "charged or diſcharged to our Lord the King; except Veſſels arriving in "ſuch little Creeks and Arrivals, by Coercion of Tempeſt of the Sea."

15. The great Ports of *England*, which are at other Times called the ancient or Head Ports, are *London*, *Ipſwich*, *Yarmouth*, *Lynn*, *Boſton*, *Hull*, *Newcaſtle*, *Berwick*, *Carliſle*, *Cheſter*, *Milford*, *Cardiff*, *Glouceſter*, *Briſtol*, *Bridgwater*, *Plymouth*, *Exeter*, *Poole*, *Southampton*, *Chichester* and *Sandwich*.

Other Ports, Members and Wharfs may be appointed in *England*.

16. But by the 13 & 14 *Car.* 2. *c.* 11. *par.* 14. after reciting that whereas, by an Act of Parliament of the firſt Year of Queen *Elizabeth*, it is ordained that no Goods ſhall be ſhipped on board or diſcharged from any Ship or Veſſel, but from or upon ſome ſuch open Place, Key or Wharf, except the Port of *Hull*, as her Highneſs her Heirs and Succeſſors ſhould therefore appoint, by Virtue of her Highneſs's Commiſſion, within the Port of *London*, and in all Ports, Creeks, Havens and Roads; and whereas, notwithſtanding the ſaid Act, there are ſome Ports, Creeks and Places, where Cuſtomers, Collectors, Comptrollers and Searchers, and their Servants, had then Time out of Mind been reſident, to which no ſuch Commiſſions were ſent, nor any Place, Key or Wharf appointed as by the ſaid Act is directed; and whereas alſo ſince that Time, by reaſon of the Alteration of Rivers, Streams, Channels and Sands, ſome Places then appointed are become unfit, and others more convenient for the diſcharging and ſhipping of Goods, Wares and Merchandize; it is enacted, "That the King's Majeſty may from Time to Time, by his Highneſs's "Commiſſion or Commiſſions out of his Court of Exchequer, appoint "all ſuch further Places, Ports, Members and Creeks, except the "Town of *Hull*, as ſhall be lawful for the landing and diſcharging, lading "or ſhipping, of any Goods, within the Kingdom of *England*, Dominion "of *Wales* or Town of *Berwick upon Tweed*, and to what ancient and "head Ports reſpectively ſuch Places, Members and Creeks, ſhall appertain; and where any ſuch Member, Place or Creek ſhall ſo as aforeſaid be appointed, the Cuſtomer, Collector, Comptroller and Searcher, "of the head Port ſhall, by themſelves or their ſufficient Deputy or "Deputies, Servant or Servants, reſide and inhabit for the entering, "clearing and paſſing Shipping, and diſcharging of Ships, Goods and "Merchandize: And, by Virtue of the aforeſaid Commiſſion or Commiſſions, may likewiſe ſet down and appoint the Extents and Limits of "every Port, Haven or Creek, within his Majeſty's Kingdom of *England*, Dominion of *Wales* and Town of *Berwick*, whereby the Extents, "Limits and Privileges of every Port, Haven or Creek may be aſcertained

"tained

" tained and known; and it ſhall not be lawful for any Perſon whatſo-
" ever to lade or put, or to cauſe to be laden or put from any Key,
" Wharf or other Place on the Land, into any Ship, Veſſel, Lighter, Boat
" or Bottom, any Goods, Wares or Merchandize whatſoever, Fiſh taken
" by his Majeſty's Subjects, Sea Coal, Stone and Beſtials, only excepted,
" to be tranſported into any Place of the Parts beyond the Seas, or carried
" by Land into the Realm of *Scotland*; or to diſcharge or lay on Land, or
" to cauſe to be diſcharged or laid on Land, out of any Boat, Lighter,
" Ship, Veſſel or Bottom, being not in Leak or Wreck, * any Goods, *Page 547
" Wares or Merchandize whatſoever, Fiſh taken by his Majeſty's Subjects,
" Beſtials and Salt, only excepted, to be brought from any of the Parts be-
" yond the Sea, or by Land from the Realm of *Scotland*, but only upon
" ſuch open Place, Key or Wharf, as his Majeſty ſhall from Time to
" Time, by Virtue of ſuch Commiſſion or Commiſſions as aforeſaid, ap-
" point in the Port of *London* and the Members and Liberties thereof, or
" in any other Port, Place, Member or Creek, within the Kingdom of
" *England*, Dominion of *Wales*, and Town and Port of *Berwick*, with-
" out ſpecial Suffrance and Leave firſt had from the Commiſſioners and Offi-
" cers of his Majeſty's Cuſtoms, upon the Penalty of the Forfeiture of all
" ſuch Goods, Wares and Merchandize."

17. By 6 *Ann. c.* 28. *par.* 18. it is enacted, " That for the better and New Ports, Members and Wharfs may be appointed in *Scotland*.
" more effectual aſcertaining the Ports, Members, Creeks and Havens, in
" *Scotland*, where Goods have been or may be exported and imported, and
" the ſeveral Keys, Wharfs and other Places, where the ſame may be put
" on board any Veſſel for Tranſportation, or be unladen upon Importation,
" the Queen's Majeſty her Heirs and Succeſſors ſhall and may from Time
" to Time, by Commiſſion or Commiſſions out of the Court of Exchequer
" in *Scotland*, appoint all ſuch further Places, Ports, Members and Creeks,
" in *Scotland*, as ſhall be lawful for the landing and diſcharging, lading or
" ſhipping, of any Goods, Wares or Merchandizes, in *Scotland*, and to
" what ancient and head Ports reſpectively ſuch Places, Members and
" Creeks, ſhall reſpectively appertain; after which Appointment ſo made;
" the Ports, Members and Creeks, ſo appointed ſhall be ſubject to and
" under ſuch Regulations, as the like Ports, Members and Creeks, appoint-
" ed in *England* for Exportation or Importation there, are or ought to be
" by the Laws of *England*."

3. In Ships in Port inward bound.

18. By the 13 & 14 *C.* 2. *c.* 11. *par.* 2. it is enacted, " That no Ship or An Entry to be made of the Cargoe of a Ship upon her Arrival.
" Veſſel, arriving from the Parts beyond the Seas, ſhall be above three
" Days in coming from *Graveſend* to the Place of her Diſcharge in the Ri-
" ver of *Thames*, without touching or ſtaying at any Wharf, Key or Place,
" adjoining to either Shore between *Graveſend* and *Cheſters* Key, unleſs
" apparently hindered by contrary Winds, Draught of Water or other
" juſt Impediment, to be allowed by ſuch Perſon or Perſons, as are or
" ſhall be appointed for managing the Cuſtoms, the Collectors inwards,
" or other principal Officers of the Cuſtoms; and then or before, the
" Maſter, or Purſer, of ſuch Ship or Veſſel ſhall make a juſt and true En-
" try upon Oath, of the Burthen, Contents and Lading, of every ſuch
" Ship or Veſſel, with the particular Marks, Numbers, Qualities and
" Contents, of every Parcel of Goods therein laden to the beſt of his
" Knowledge; alſo where, and in what Port, ſhe took in her Lading, of
" what Country built, how manned, who was Maſter during the Voyage,
" and who are Owners thereof; and in all Outports or Members, to come
" directly up to the Place of Unlading, as the Condition of the Port

" requires and will admit, and make Entries as aforeſaid, upon the Penalty " of the Forfeiture of One Hundred Pounds."

An Account to be given of the Goods imported in a Ship of War

19. By *par.* 3. it is enacted, " That no Captain, Maſter, Purſer or other " Perſon, taking Charge of a Ship or Veſſel of War, wherein any Goods, " Wares or Merchandizes ſhall be brought from the Parts beyond the " Seas, or out of the Realm of *Scotland*, ſhall put on board any Lighter, " Boat or Bottom, or lay on Land, or ſuffer to be put into any Lighter, " Boat or Bottom, or to be laid on Land, out of any Ship or Veſſel as " aforeſaid, any Goods, Wares or Merchandizes whatſoever, before ſuch " Captain, Maſter, Purſer, or other Perſon taking Charge of the Ship or " Merchants Goods for that Voyage as aforeſaid, ſhall have ſignified in

*Page 548

" * Writing under his Hand, unto the Perſon or Perſons, which are or ſhall " be appointed for managing the Cuſtoms, the Cuſtomer, or Collector and " Comptroller inwards of the Port where he arriveth, the Names of every " Merchant or Lader of any Goods on board the ſaid Ship or Veſſel, to- " gether with the Number and Marks, and the Quantity and Quality of " every Parcel of Goods to the beſt of his Knowledge, and ſhall have " anſwered upon his corporal Oath to ſuch Queſtions concerning ſuch " Goods, as ſhall be publickly adminiſtered to him in the open Cuſtom- " houſe, by ſuch Perſon or Perſons, which are or ſhall be appointed for " the managing of the Cuſtoms, Cuſtomer or Collector and Comptroller, " or their Deputies, and ſhall be liable to all Searches and other Rules, " which Merchant Ships are ſubject unto by the Uſage of his Majeſty's " Cuſtom-houſe, Victualling Bills and entering excepted, upon Pain to " forfeit One Hundred Pounds."

An Officer of one of his Majeſty's Ships, taking Goods on boad to be caſhiered.

20. The Proviſions made by this Clauſe are now at End; it having been enacted by the 22 *G.* 2. *c.* 33. *par.* 2. *Art.* 18. " That if any Captain, " Commander or other Officer, of any of his Majeſty's Ships or Veſſel ſhall " receive on board, or permit to be received on board, ſuch Ship or Veſ- " ſel any Goods or Merchandize other than for the ſole Uſe of the Ship or " Veſſel, except Gold, Silver or Jewels, and except the Goods and Mer- " chandizes belonging to any Merchant, or other Ship or Veſſel, which " may be ſhipwrecked, or in imminent Danger of being ſhipwrecked, " either on the high Seas, or in any Creek, Port or Harbour, in order to " the preſerving them for their proper Owners, and except ſuch Goods or " Merchandizes, as he ſhall at any Time be ordered to take and receive on " board, by Order of the Lord High Admiral of *Great Britain*, or the " Commiſſioners for executing the Office of Lord High Admiral, for the " Time being, every Perſon ſo offending, being convicted thereof by the " Sentence of a Court Martial, ſhall be caſhiered, and be for ever after- " wards rendered incapable, to ſerve in any Place or Office in the Naval " Service of his Majeſty, his Heirs and Succeſſors."

Further Penalty on an Officer of one of his Majeſty's Ships taking Goods on board.

21. And by *par.* 24. after reciting, that by an Act for the more effectual ſuppreſſing of Piracy it is amongſt other Things enacted, that the Captain, Commander or other Officer, of the ſaid Ship or Veſſel of War, and all and every the Owners and Proprietors of ſuch Goods and Merchandizes, put on Board ſuch Ship or Veſſel of War as aforeſaid, ſhall loſe, forfeit and pay, the Value of all and every ſuch Goods and Merchandizes ſo put on board as aforeſaid, it is enacted, " That if any Captain, Commander or " other Officer, of any of his Majeſty's Ships or Veſſels ſhall receive on " board, or permit or ſuffer to be received on board, ſuch Ship or Veſſel " any Goods or Merchandizes, contrary to the true Intent and Meaning " of the eighteenth Article in this Act before mentioned, and hereby " enacted, every ſuch Captain, Commander, or other Officer, ſhall for " every ſuch Offence, over and above any Puniſhment inflicted by this " Act, forfeit and pay the Value of all and every ſuch Goods and Mer-

" chandizes,

" chandizes, ſo received, or permitted or ſuffered to be received, on board " as aforeſaid, or the Sum of Five Hundred Pounds of lawful Money of " *Great Britain*, at the Election of the Informer or Perſon who ſhall ſue " for the ſame, ſo that no more than one of theſe Penalties or Forfeitures " ſhall be ſued for or recovered, by Virtue of this and the ſaid in Part re- " cited Act, or either of them, againſt the ſame Perſon, for one and the " ſame Offence."

No Goods to be imported in a Veſſel appointed to carry Letters.

21. By 13 & 14 *C.* 2. *c.* 11. *par.* 22. it is enacted, " That no Ship, " Veſſel or Boat, appointed and employed ordinarily for the Carriage of " Letters and Pacquets, ſhall, unleſs it be in ſuch Caſes as ſhall be allowed " by the Perſon or Perſons, which are or ſhall be appointed to manage " his Majeſty's Cuſtoms, Cuſtomer, or Collector and Comptroller, import " any Goods and Merchandizes from the Parts beyond the Seas, upon the " Penalty of the Forfeiture of One Hundred Pounds, to be paid by the " Maſter of the ſaid Veſſel or Boat with the Loſs of his Place; and " * all Goods and Merchandizes, that ſhall be found on board any ſuch *Page 549 " Ship, Veſſel or other Boat, ſhall be forfeited."

Officers may go on Board any Ship inward bound, and remain there till ſhe is cleared. Package of Goods not to be altered.

22. By *par.* 4. it is enacted, " That the Perſon or Perſons, which are " or ſhall be appointed for managing the Cuſtoms, and the Officers of the " Cuſtoms and their Deputies, are hereby authorized and enabled to go " and enter on board any Ship or Veſſel, as well Ships of War as Mer- " chant Ships, inwards bound, and from thence to bring on Shore into his " Majeſty's Storehouſe all ſmall Parcels of fine Goods or other Goods, " which ſhall be found in Cabbins, Cheſts, Trunks or other ſmall Pack- " age, or in any private or ſecret Place, in or out of the Hold of the Ship " or Veſſel, which may occaſion a juſt Suſpicion that they were intended " to be fraudulently carried away, and all other Sorts of Goods whatſoever, " for which the Duties of Tonnage or Poundage were not paid, or com- " pounded for, within twenty Days after the firſt Entry of the Ship, to be " put and remain in the Storehouſe aforeſaid, until his Majeſty's Duties " thereupon be juſtly ſatisfied, unleſs the Perſon or Perſons, which are or " ſhall be appointed for managing the Cuſtoms, and Officers of the Cuſ- " toms, ſhall ſee juſt Cauſe to allow a longer Time; and that the ſaid " Perſon or Perſons, which are or ſhall be appointed for the managing " of the Cuſtoms, and the Officers of the Cuſtoms and their Deputies, " may freely ſtay and remain on board, until all the Goods are delivered " and diſcharged out of the ſaid Ship or Veſſel; and if any Maſter, " Purſer, Boatſwain, or other taking Charge of any Ship or Veſſel, or any " other Perſon whatſoever ſhall ſuffer any Truſs, Bale, Pack, Fardel, " Caſk or other Package, to be opened on board the ſaid Ship or Veſſel " and the Goods therein to be embezzled, carried away or put into any " other Form or Package, after the Ship comes into the Port of her Diſ- " charge, in every ſuch Caſe the ſaid Maſter, Purſer, Boatſwain, or " other Perſon, ſhall forfeit the Sum of One Hundred Pounds."

4 W. & M. c. 5. ſ. 4. 9 & 10 W. 3. c. 23. ſ. 7. 8 G. c. 15. ſ. 12. 21 G. 2. c. 2. ſ. 3. and divers other Acts.

23. This Act could only extend to the Duties of Tonnage and Poundage impoſed by 12 *C.* 2. *c.* 4. and ſuch other Duties as were payable at the Time it was made; but it may once for all be obſerved, that in every ſubſequent Act of Parliament, made for impoſing a further Duty of Tonnage or Poundage in general, or a further Duty upon any particular Sort of Merchandize, it is conſtantly provided, that all the Clauſes, Powers, Directions, Penalties, Forfeitures, Matters and Things whatſoever, contained in any Law or Statute then in Force, for the raiſing, levying, ſecuring, collecting, anſwering and paying, the former Duties, ſhall be applied, practiſed and put in Execution, for raiſing, levying, ſecuring, collecting, anſwering and paying the Duty by ſuch Act granted, as fully and effectually, and to all Intents and Purpoſes, as if all and every

the ſaid Clauſes, Powers, Directions, Penalties and Forfeitures, were particularly repeated, and again enacted in the Body of ſuch Act.

No Goods to be unſhipped, till the the Duties are paid.

24. By the 12 *C.* 2. *c.* 4. *par.* 2. it is enacted, "That if any Goods or Merchandize ſhall be brought from the Parts beyond the Seas, into any Port, Place, or Creek, of this Realm or other your Majeſty's Dominions, and be unſhipped to be laid on Land, the Subſidy, Cuſtoms and other Duties, due or to be due for the ſame not being paid, or lawfully tendered to the Collector thereof or his Deputy, nor agreed with for the ſame in the Cuſtom-houſe, according to the true Intent and Meaning of this Act, all the ſaid Goods and Merchandizes whatſoever ſhall be forfeited."

No Goods to be unſhipped, without a Warrant and the Preſence of an Officer.

25. By 13 & 14 *C.* 2. *c.* 11. *par.* 7. it is enacted, "That if any Goods or Merchandize ſhall be laden, or taken, from and out of any Ship or Veſſel, coming in and arriving from foreign Parts, into any Bark, Hoy, Lighter, Barge, Boat or Wherry, without a Warrant, and the Preſence of one or more Officers of the Cuſtoms, ſuch Bark, Hoy, Lighter, Barge, Boat or Wherry, ſhall be forfeited, and the Maſter, Purſer, Boatſwain, or other Mariner of any Ship inward bound, knowing and conſenting thereunto, ſhall forfeit the Value of the Goods ſo unſhipped"

*Page 550

The Goods and the treble Value thereof forfeited, for unſhipping uncuſtomed or prohibited Goods.

* 26. By the 8 *Anne*, *c.* 7. *par.* 17. it is enacted, "That if any Sort of Goods whatſoever, liable to the Payment of Duties, ſhall be unſhipped, with Intention to be laid on Land, the Cuſtoms and other Duties not being firſt paid or ſecured, or if any prohibited Goods whatſoever ſhall be imported into any Part of *Great Britain*, then not only the ſaid uncuſtomed and prohibited Goods ſhall be forfeited, but alſo the Perſons, who ſhall be aſſiſting or otherwiſe concerned in the unſhipping the ſaid uncuſtomed or prohibited Goods, ſhall forfeit treble the Value thereof, together with the Veſſels and Boats made uſe of for landing the aforeſaid Goods."

No Goods to be landed but in the Preſence of an Officer, and at the Hours appointed.

27. By the 13 & 14 *C.* 2. *c.* 11. *par.* 7. it is enacted, "That if any Wharfinger or Keeper of any Wharf, Crane or Key, or their Servants, or any of them, ſhall take up or land, or knowingly ſuffer to be taken up or landed, at any of their ſaid Wharfs, Cranes or Keys, any Goods, Wares or Merchandizes, prohibited, or whereof any Cuſtom, Subſidy or other Duties, are due and payable, without the Preſence of ſome of the Officers of the Cuſtoms thereunto appointed, or at the Hours and Times not appointed by Law, except in the Port of *Hull*, as in the Statute of the firſt Year of Queen *Elizabeth* Chapter the Eleventh is excepted, all and every ſuch Wharfinger and Keeper of ſuch Wharf, Crane or Key, ſhall forfeit the Sum of One Hundred Pounds."

At what Hours of the Day Goods may be landed.

28. By 1 *Eliz.* *c.* 11. *par.* 2. it is enacted, "That it ſhall not be lawful, for any Perſon or Perſons whatſoever to take up, diſcharge and lay on Land, or cauſe or procure to be taken up or diſcharged out of any Lighter, Ship, Crayer, Veſſel or Bottom, not being in a Leak or Wreck, and laid upon Land, any Goods, Wares or Merchandizes whatſoever, Fiſh taken by any of your Highneſs's Subjects and Salt only excepted, to be brought from any the Parts beyond the Seas or the Realm of *Scotland*, but only in the Day Light, that is to ſay, from the firſt of *March* until the laſt of *September*, betwixt Sun-riſing and Sun-ſetting, and from the laſt of *September* until the firſt Day of *March*, betwixt the Hours of Seven in the Morning and Four in the Afternoon, upon Pain of Forfeiture of all ſuch Goods, Wares and Merchandizes."

All Goods to be meaſured,

29. By the 13 & 14 *C.* 2. *c.* 11. *par.* 21. it is enacted, "That all foreign Goods or Merchandizes, which by the Perſon or Perſons, which

"are

" are or ſhall be appointed for managing the Cuſtoms, and the Cuſtomer, " Collector and Comptroller, ſhall be permitted to be landed and taken " up by Bills at Sight, or Bills at View or Sufferance, ſhall be landed at " the moſt convenient Keys or Wharfs, where the ſaid Perſon or Perſons, " Cuſtomer, or Collector and Comptroller, ſhall appoint, and not elſe- " where; and there or in his Majeſty's Storehouſe, at the Election of the " ſaid Perſon or Perſons and Officers, ſhall be meaſured, weighed and " numbered, by and in the Preſence of the Officers to be thereunto par- " ticularly appointed; which ſaid Officers, ſo appointed ſhall perfect the " Entry, and thereunto ſubſcribe their Names, and the next Day follow- " lowing ſhall give Account, and make Report, of every reſpective En- " try, ſo perfected, to the Perſon or Perſons or Officers aforeſaid, without " reaſonable Cauſe to be allowed by the ſaid Perſon or Perſons, or Of- " ficers, or in Default thereof ſhall forfeit the Sum of One Hundred " Pounds."

weighed and numbered, as ſoon as landed.

30. By *par.* 5. it is enacted, " That if, after the clearing of any Ship or " Veſſel by the Perſon or Perſons, which are or ſhall be appointed for ma " naging the Cuſtoms or any their Deputies, and diſcharging the Watch- " men or Tideſmen from attending thereon, there ſhall be found on board " ſuch Ship or Veſſel any Goods, Wares or Merchandizes, which have " been concealed from the Knowledge of the ſaid Perſon or Perſons, which " are or ſhall be appointed for the managing of the Cuſtoms, and for " which the Cuſtom, Subſidy and other Duties, due upon the Importation " thereof, have not been paid, then the Maſter, Purſer, * or other Per- " ſon taking Charge of ſuch Ship or Veſſel, ſhall forfeit the Sum of One " Hundred Pounds."

The Penalty, where Goods concealed are found after a Ship is cleared.

*Page 551

31. By the 5 *G.* 1. *c.* 11. *par.* 4. after reciting, that in Ships from foreign Parts Goods are often found, at clearing ſuch Ships, concealed in falſe Bulk-heads, between the Linings and falſe Knees, or in concealed Lockers, in order to their being landed without Payment of Duties, ſo that it is almoſt impoſſible for the Officers of the Cuſtoms to diſcover them, without having ſome previous Information, it is enacted, " That all Goods not " reported, and found after clearing the Ship by the proper Officer or " Officers of the Cuſtoms, ſhall be liable to Forfeiture."

Goods not reported found after clearing forfeited.

32. By *par.* 11. ſo much of this Statute, as relates to Goods not reported and found after clearing the Ship, was to have Continuance for three Years from the Twenty-fifth Day of *March* One Thouſand Seven Hundred and Nineteen, and from thence to the End of the then next Seſſion of Parliament.

33. But it has been from Time to Time continued, and by the 14 *G.* 3. *c.* 86. is continued to the Twenty-ninth Day of *September* One Thouſand Seven Hundred and Eighty-one, and from thence to the End of the then next Seſſion of Parliament.

34. By the 9 *G.* 2. *c.* 35. *par.* 27. after reciting, that in Ships from foreign Parts Goods are often concealed in falſe Bulk-heads, between the Linings and falſe Knees, or in concealed Lockers, or in the Ballaſt, or in falſe Package and other Places, which the Officers cannot eaſily find out or diſcover, in order to their being landed without Payment of Duties, and ſuch Goods are not liable by Law to Forfeiture, unleſs the ſame be found after clearing the Ship by the proper Officer or Officers of the Cuſtoms, it is enacted, " That all Goods, which ſhall be found concealed " as aforeſaid, or concealed in any other Place, on Board any Ship or " Veſſel, at any Time after the Maſter thereof ſhall have made his Report " at the Cuſtom-houſe, and which ſhall not be comprized or mentioned " in the ſaid Report, ſhall and may be ſeized and proſecuted by any " Officer or Officers of the Cuſtoms; and the Maſter, Purſer or other " Perſon having the Charge or Command of ſuch Ship or Veſſel, in caſe " it

Goods found concealed after the Maſter's Report forfeited, and the Maſter to forfeit the treble Value thereof.

the ſaid Clauſes, Powers, Directions, Penalties and Forfeitures, were particularly repeated, and again enacted in the Body of ſuch Act.

No Goods to be unſhipped, till the the Duties are paid.

24. By the 12 *C.* 2. *c.* 4. *par.* 2. it is enacted, "That if any Goods or Merchandize ſhall be brought from the Parts beyond the Seas, into any Port, Place, or Creek, of this Realm or other your Majeſty's Dominions, and be unſhipped to be laid on Land, the Subſidy, Cuſtoms and other Duties, due or to be due for the ſame not being paid, or lawfully tendered to the Collector thereof or his Deputy, nor agreed with for the ſame in the Cuſtom-houſe, according to the true Intent and Meaning of this Act, all the ſaid Goods and Merchandizes whatſoever ſhall be forfeited."

No Goods to be unſhipped, without a Warrant and the Preſence of an Officer.

25. By 13 & 14 *C.* 2. *c.* 11. *par.* 7. it is enacted, "That if any Goods or Merchandize ſhall be laden, or taken, from and out of any Ship or Veſſel, coming in and arriving from foreign Parts, into any Bark, Hoy, Lighter, Barge, Boat or Wherry, without a Warrant, and the Preſence of one or more Officers of the Cuſtoms, ſuch Bark, Hoy, Lighter, Barge, Boat or Wherry, ſhall be forfeited, and the Maſter, Purſer, Boatſwain, or other Mariner of any Ship inward bound, knowing and conſenting thereunto, ſhall forfeit the Value of the Goods ſo unſhipped"

*Page 550

The Goods and the treble Value thereof forfeited, for unſhipping uncuſtomed or prohibited Goods.

* 26. By the 8 *Anne*, *c.* 7. *par.* 17. it is enacted, "That if any Sort of Goods whatſoever, liable to the Payment of Duties, ſhall be unſhipped, with Intention to be laid on Land, the Cuſtoms and other Duties not being firſt paid or ſecured, or if any prohibited Goods whatſoever ſhall be imported into any Part of *Great Britain*, then not only the ſaid uncuſtomed and prohibited Goods ſhall be forfeited, but alſo the Perſons, who ſhall be aſſiſting or otherwiſe concerned in the unſhipping the ſaid uncuſtomed or prohibited Goods, ſhall forfeit treble the Value thereof, together with the Veſſels and Boats made uſe of for landing the aforeſaid Goods."

No Goods to be landed but in the Preſence of an Officer, and at the Hours appointed.

27. By the 13 & 14 *C.* 2. *c.* 11. *par.* 7. it is enacted, "That if any Wharfinger or Keeper of any Wharf, Crane or Key, or their Servants, or any of them, ſhall take up or land, or knowingly ſuffer to be taken up or landed, at any of their ſaid Wharfs, Cranes or Keys, any Goods, Wares or Merchandizes, prohibited, or whereof any Cuſtom, Subſidy or other Duties, are due and payable, without the Preſence of ſome of the Officers of the Cuſtoms thereunto appointed, or at the Hours and Times not appointed by Law, except in the Port of *Hull*, as in the Statute of the firſt Year of Queen *Elizabeth* Chapter the Eleventh is excepted, all and every ſuch Wharfinger and Keeper of ſuch Wharf, Crane or Key, ſhall forfeit the Sum of One Hundred Pounds."

At what Hours of the Day Goods may be landed.

28. By 1 *Eliz.* *c.* 11. *par.* 2. it is enacted, "That it ſhall not be lawful, for any Perſon or Perſons whatſoever to take up, diſcharge and lay on Land, or cauſe or procure to be taken up or diſcharged out of any Lighter, Ship, Crayer, Veſſel or Bottom, not being in a Leak or Wreck, and laid upon Land, any Goods, Wares or Merchandizes whatſoever, Fiſh taken by any of your Highneſs's Subjects and Salt only excepted, to be brought from any the Parts beyond the Seas or the Realm of *Scotland*, but only in the Day Light, that is to ſay, from the firſt of *March* until the laſt of *September*, betwixt Sun-riſing and Sun-ſetting, and from the laſt of *September* until the firſt Day of *March*, betwixt the Hours of Seven in the Morning and Four in the Afternoon, upon Pain of Forfeiture of all ſuch Goods, Wares and Merchandizes."

All Goods to be meaſured,

29. By the 13 & 14 *C.* 2. *c.* 11. *par.* 21. it is enacted, "That all foreign Goods or Merchandizes, which by the Perſon or Perſons, which

"are

" are or ſhall be appointed for managing the Cuſtoms, and the Cuſtomer, " Collector and Comptroller, ſhall be permitted to be landed and taken " up by Bills at Sight, or Bills at View or Sufferance, ſhall be landed at " the moſt convenient Keys or Wharfs, where the ſaid Perſon or Perſons, " Cuſtomer, or Collector and Comptroller, ſhall appoint, and not elſe- " where; and there or in his Majeſty's Storehouſe, at the Election of the " ſaid Perſon or Perſons and Officers, ſhall be meaſured, weighed and " numbered, by and in the Preſence of the Officers to be thereunto par- " ticularly appointed; which ſaid Officers, ſo appointed ſhall perfect the " Entry, and thereunto ſubſcribe their Names, and the next Day follow- " lowing ſhall give Account, and make Report, of every reſpective En- " try, ſo perfected, to the Perſon or Perſons or Officers aforeſaid, without " reaſonable Cauſe to be allowed by the ſaid Perſon or Perſons, or Of- " ficers, or in Default thereof ſhall forfeit the Sum of One Hundred " Pounds."

weighed and numbered, as ſoon as landed.

30. By *par.* 5. it is enacted, " That if, after the clearing of any Ship or " Veſſel by the Perſon or Perſons, which are or ſhall be appointed for ma " naging the Cuſtoms or any their Deputies, and diſcharging the Watch- " men or Tideſmen from attending thereon, there ſhall be found on board " ſuch Ship or Veſſel any Goods, Wares or Merchandizes, which have " been concealed from the Knowledge of the ſaid Perſon or Perſons, which " are or ſhall be appointed for the managing of the Cuſtoms, and for " which the Cuſtom, Subſidy and other Duties, due upon the Importation " thereof, have not been paid, then the Maſter, Purſer, * or other Per- " ſon taking Charge of ſuch Ship or Veſſel, ſhall forfeit the Sum of One " Hundred Pounds."

The Penalty, where Goods concealed are found after a Ship is cleared.

*Page 551

31. By the 5 *G.* 1. *c.* 11. *par.* 4. after reciting, that in Ships from foreign Parts Goods are often found, at clearing ſuch Ships, concealed in falſe Bulk-heads, between the Linings and falſe Knees, or in concealed Lockers, in order to their being landed without Payment of Duties, ſo that it is almoſt impoſſible for the Officers of the Cuſtoms to diſcover them, without having ſome previous Information, it is enacted, " That all Goods not " reported, and found after clearing the Ship by the proper Officer or " Officers of the Cuſtoms, ſhall be liable to Forfeiture."

Goods not reported found after clearing forfeited.

32. By *par.* 11. ſo much of this Statute, as relates to Goods not reported and found after clearing the Ship, was to have Continuance for three Years from the Twenty-fifth Day of *March* One Thouſand Seven Hundred and Nineteen, and from thence to the End of the then next Seſſion of Parliament.

33. But it has been from Time to Time continued, and by the 14 *G.* 3. *c.* 86. is continued to the Twenty-ninth Day of *September* One Thouſand Seven Hundred and Eighty-one, and from thence to the End of the then next Seſſion of Parliament.

34. By the 9 *G.* 2. *c.* 35. *par.* 27. after reciting, that in Ships from foreign Parts Goods are often concealed in falſe Bulk-heads, between the Linings and falſe Knees, or in concealed Lockers, or in the Ballaſt, or in falſe Package and other Places, which the Officers cannot eaſily find out or diſcover, in order to their being landed without Payment of Duties, and ſuch Goods are not liable by Law to Forfeiture, unleſs the ſame be found after clearing the Ship by the proper Officer or Officers of the Cuſtoms, it is enacted, " That all Goods, which ſhall be found concealed " as aforeſaid, or concealed in any other Place, on Board any Ship or " Veſſel, at any Time after the Maſter thereof ſhall have made his Report " at the Cuſtom-houſe, and which ſhall not be comprized or mentioned " in the ſaid Report, ſhall and may be ſeized and proſecuted by any " Officer or Officers of the Cuſtoms; and the Maſter, Purſer or other " Perſon having the Charge or Command of ſuch Ship or Veſſel, in caſe " it

Goods found concealed after the Maſter's Report forfeited, and the Maſter to forfeit the treble Value thereof.

" it can be made appear, that he was any ways conſenting or privy to " ſuch Fraud or Concealment, ſhall forfeit treble the Value of the Goods " ſo found.

4. In Ships in Port outward Bound.

No *Engliſh* Goods to be ſhipped, till the Ship is entered, and an Entry to be made of all Goods put on Board a Ship outward bound.

35. By the 13 & 14 *C.* 2. *c.* 11. *par.* 3. it is enacted, " That no Captain, Maſter, Purſer, or any other Perſon taking Charge of any Ship or " Veſſel, bound for the Parts beyond the Seas or into the Kingdom of *Scotland*, whether the ſame Ship or Veſſel ſhall have Commiſſion from, or " belong unto, the King's Majeſty that now is, his Heirs or Succeſſors, or " ſhall belong to, or have Commiſſion from, any foreign Prince or State, " or otherwiſe, ſhall take in, or ſuffer to be taken into, or laden aboard " ſuch Ship or Veſſel any *Engliſh* Goods, Wares or Merchandize, to be " exported into the Parts beyond the Sea, or into the Kingdom of *Scotland*, " until ſuch Captain, Maſter, Purſer, or other Perſon, ſhall have entered " ſuch Ship or Veſſel in the Book of the Commiſſioners, Cuſtomer, or Collector and Comptroller outwards of ſuch Port, where he ſhall load or " take in Goods, together with the Name of ſuch Captain or Maſter, the " Burthen of ſuch Ship or Veſſel, the Number of Guns and Ammunition " ſhe carries, and to what Port or Place ſhe intends to paſs or ſail; and, " before he or they ſhall depart, with his or their Ship or Veſſel, out of " ſuch Port or Place, ſhall bring and deliver, unto the Perſon or Perſons, " which are or ſhall be appointed for managing the * Cuſtoms, the Cuſtomer, or Collector and Comptroller of ſuch Port or Place, a Content in " Writing, under his or their Hands, of the Names of every Merchant and " other Perſon or Perſons, that ſhall have laden, or put on board, any " ſuch Ship or Veſſel any Goods or Merchandize, together with the Marks " and Numbers of ſuch Goods and Merchandize, and ſhall likewiſe publickly in the open Cuſtom-houſe, upon his corporal Oath to the beſt of " his Knowledge, have anſwered to ſuch Queſtion or Queſtions, as ſhall " be demanded of him by the ſaid Perſon or Perſons, which are or ſhall be " appointed for managing the Cuſtoms, the Cuſtomer, or Collector and " Comptroller or their Deputies, concerning ſuch Goods and Merchandize as ſhall be aboard ſuch Ship or Veſſel, upon Pain of Forfeiture of " One Hundred Pounds."

*Page 552

Ante 548.

36. The Proviſions in this Clauſe, as to Officers of Ships or Veſſels belonging to his Majeſty, are now at an End; for as has been already ſhewn, all ſuch Officers are abſolutely prohibited from taking any Goods or Merchandize, except Gold, Silver and Jewels, on Board for Exportation.

No Goods to be exported in a Veſſel appointed to carry Letters and Pacquets.

37. By the 13 & 14 *C.* 2. *c.* 11. *par.* 22. it is enacted, " That no Ship, " Veſſel or Boat, appointed and ordinarily employed for the Carriage of " Letters and Pacquets, ſhall, unleſs it be in ſuch Caſes as ſhall be allowed by the Perſon or Perſons, which are or ſhall be appointed for the " managing of the Cuſtoms, the Cuſtomer, or Collector and Comptroller, " export any Goods or Merchandize into the Parts beyond the Seas, upon " the Penalty of the Forfeiture of One Hundred Pounds, to be paid by " the Maſter of the ſaid Veſſel or Boat with the Loſs of his Place; and all " Goods and Merchandize, that ſhall be found on Board any ſuch Ship, " Veſſel or Boat, ſhall be forfeited."

Officers may ſearch Ships outward bound.

38. By *par.* 4. " The Perſon or Perſons, which are or ſhall be appointed for the managing the Cuſtoms, and the Officers of his Majeſty's Cuſtoms and their Deputies, are authorized and enabled, to go and enter " on Board any Ship or Veſſel outwards bound, as well Ships of War as " Mer-

" Merchant Ships, and from thence to bring on Shore all Goods prohibit-
" ed or uncuſtomed, except Jewels."

39. By the 1 *Eliz. c.* 11. *par.* 2. it is enacted, " That it ſhall not be " lawful for any Perſon or Perſons whatſoever, to lade or put, or cauſe to " be laden or put, off from any Wharf, Key or other Place on the Land, " into any Ship, Veſſel, Crayer, Lighter or Bottom, any Goods, Wares or " Merchandizes whatſoever, Fiſh taken by your Highneſs's Subjects only " excepted, to be tranſported into any Place of the Parts beyond the Seas, " or into the Realm of *Scotland*, but only in the Day Light, that is to ſay, " from the firſt of *March* until the laſt of *September*, between Sun-riſing " and Sun-ſetting, and from the laſt of *September* until the firſt of *March*, " between the Hours of ſeven in the Morning and four in the After- " noon, upon Pain of Forfeiture of all ſuch Goods, Wares and Merchan- " dizes." At what Hours of the Day Goods may be put on board a Ship.

40. By the 13 & 14 *C.* 2. *c.* 11. *par.* 7. it is enacted, " That if any " Wharfinger or Keeper of any Wharf, Crane or Key, or their Servants, " or any of them, ſhall ſhip off or ſuffer to be Water-born, at or from any " of their Wharfs, Cranes or Keys, any Goods, Wares or Merchandizes " prohibited, or whereof any Cuſtom, Subſidy or other Duties are due " and payable, without the Preſence of ſome of the Officers of the Cuſ- " toms thereunto appointed, or at Hours and Times not appointed by " Law, except in the Port of *Hull* as in the Statute of the firſt Year of " Queen *Elizabeth* Chapter the Eleventh is excepted, all and every ſuch " Wharfinger and Keeper ſhall forfeit the Sum of One Hundred Pounds." No Goods to be carried from a Wharf, but in the Preſence of an Officer, and at the Hours appointed.

* 41. By the ſame *Par.* it is enacted, " That if any Goods or Merchan- " dize ſhall be laden or taken from the Shore, into any Bark, Hoy, Lighter, " Barge, Wherry or Boat, to be carried on board any Ship or Veſſel, out- " ward bound for the Parts beyond the Seas, without a Warrant and the " Preſence of one or more Officers of the Cuſtoms, ſuch Bark, Hoy, " Lighter, Barge, Wherry or Boat, ſhall be forfeited." * Page 553 No Goods to be ſhipped, without a Warrant and the Preſence of an Officer.

42. By the 12 *C.* 2. *c.* 4. *par.* 3. it is enacted, " That if any Goods or " Merchandize ſhall be ſhipped, or put into any Boat or Veſſel, to the In- " tent to be carried into the Parts beyond the Seas, the Subſidy, Cuſtom " and other Duties, due or to be due for the ſame, not paid or lawfully " tendered to the Collector thereof or his Deputy, nor agreed with for the " ſame in the Cuſtom-houſe, according to the true Intent and Meaning " of this Act, all the ſaid Goods and Merchandizes ſhall be forfeited." No Goods to be ſhipped till the Duties are paid.

43. By the 12 *G.* 1. *c.* 28. *par.* 18. After reciting, that great Quantities of Goods and Merchandizes, on which conſiderable Duties are due and payable to his Majeſty, and divers Sorts of Goods prohibited to be export- ed, are by evil diſpoſed Perſons frequently ſhipped for Parts beyond the Seas, without the Preſence of the proper Officer of the Cuſtoms, to the great Prejudice of the Revenue and all fair Traders, it is enacted, " That " if any ſuch Goods or Merchandizes ſhall be ſhipped for Parts beyond the " Seas, without a Warrant, or without the Preſence of an Officer of the " Cuſtoms appointed for that Purpoſe, all ſuch Goods and Merchandizes " or the Value thereof ſhall be forfeited." Goods ſhipped without the Preſence of an Officer to be forfeited.

44. By the 13 & 14 *C.* 2. *c.* 11. *par.* 9. It is enacted, " That if any " Goods, Wares or Merchandize, for which the Duties of Subſidy or " Cuſtom are due and payable, ſhall be ſecretly conveyed on Board any " Ship or Veſſel, before the Cuſtom and Subſidy thereof be duly anſwered " and paid, and ſhall eſcape the Diſcovery thereof by the Officers of the " Cuſtoms or others, and be carried into Parts beyond the Seas, in ſuch " Caſe the Owners or Proprietors of ſuch Goods, Wares or Merchandizes, " or other Perſon or Perſons, who ſhall have ſo ſhipped, or cauſed the The double Value of Goods ſecretly exported to be forfeited.

" ſame

" ſame to be ſo ſhipped and tranſported, ſhall forfeit the double Value of " the Goods, computed according to the Book of Rates, except for Coal, " which, ſo ſecretly exported as aforeſaid, ſhall pay double the Cuſtom " and Duty due and payable for the ſame."

5. In coaſting Veſſels.

45. Coaſting Veſſels, beſides being ſubject to ſuch general Rules and Regulations as other Ships inward and outward bound are, are likewiſe ſubject to ſome particular ones.

No Goods to be ſhipped, to be carried coaſtwiſe, without a Sufferance.

46. By the 13 & 14 *C.* 2. *c.* 11. *par.* 7. It is enacted, " That if any " Goods, Wares or Merchandizes, ſhall be ſhipped or put on Board, to be " carried forth to the open Sea, from any Port, Creek or Member in the " Kingdom of *England*, Dominion of *Wales* or Town of *Berwick*, to " be landed at any other Place of this Realm, without a Sufferance or " Warrant firſt had and obtained, from the Perſon or Perſons which are or " ſhall be appointed for the managing the Cuſtoms and Officers of the " Cuſtoms, all ſuch Wares and Merchandizes ſhall be forfeited."

Goods entered to be carried coaſtwiſe, to be carried to the Place for which they are entered.

47. By the ſame *par.* It is enacted, " That the Maſter of every Ship or " Veſſel, who ſhall lade or take in any Goods, Wares or Merchandizes, " in any Port, Member or Creek, within the Kingdom of *England*, Do- " minion of *Wales* or Town of *Berwick*, to be landed or diſcharged in " ſome other Port, Member or Creek of this Realm, ſhall, before the Ship " or Veſſel be removed or carried out of the Port where he ſhall take in " his Lading, take out a Cocquet or Cocquets, and become bound to the " King's Majeſty, with good Security in the Value of the * Goods, Wares " and Merchandizes aforeſaid, for Delivery and Diſcharge thereof in the " Place or Port for which the ſame ſhall be entered, or in ſome other Port " or Place within this Realm, and, the Dangers and Accidents of the Seas " excepted, to return a Certificate within ſix Months after the Date of ſuch " Cocquet or Cocquets, under the Hands and Seals of his Majeſty's Of- " ficers, ſigned alſo by the Perſon or ſome one of the Perſons, which are " or ſhall be appointed for managing the Cuſtoms, or their Deputy or " Deputies, in every the reſpective Ports, Members or Creeks where the " ſame ſhall be landed and diſcharged, to his Majeſty's Officers of the " Cuſtoms, to whom ſuch Security hath been given as aforeſaid, that ſuch " Goods, Wares and Merchandizes were there landed and diſcharged ac- " cordingly, upon the Penalty of the Forfeiture of the Bond and Security " aforeſaid."

*Page 554

Penalty of making a falſe Certificate.

48. By *par.* 8. It is enacted, " That if any Officer of any Port, Member " or Creek, ſhall grant or make any falſe Certificate of any Goods or " Merchandizes, which ſhould have been landed out of any Ship or Veſſel, " ſuch Officer ſhall forfeit the Sum of fifty Pounds, and ſhall moreover " loſe his Employment, and be incapable of ſerving his Majeſty in any " Place or Truſt concerning his Cuſtoms."

Penalty of falſifying a Cocquet or Certificate.

49. By the ſame *par.* it is enacted, " That if any Perſon ſhall counterfeit, " raiſe or falſify, any Cocquet, Certificate or Return, Tranſire, Let-paſs, " or any other Cuſtomhouſe Warrant, he ſhall forfeit One Hundred " Pounds; and the Cocquet, Certificate or Return, ſhall be invalid and of " none Effect."

Foreign Goods not to be taken on Board a coaſting Ship, except in the Port wherein they are certified.

50. By the 9 *G.* 1. *c.* 21. *par.* 8 After reciting, that Frauds are many Times committed, under the Pretence of carrying foreign Goods or Merchandizes coaſtwiſe, by Maſters of coaſting Veſſels, who take in ſuch Goods at ſome Place other than the Port from whence they are certified, to the Prejudice of the Revenue and the Encouragement of the foul Trader, it is enacted, " That if any foreign Goods or Merchandizes ſhall

" be

" be taken on Board any coasting Vessel, in Parts beyond the Sea, or out " of any Ship at Sea, or in any Port or Place of this Kingdom, other than " the Port or Place from whence such Goods shall be certified, the said " Goods and double the Value thereof shall be forfeited, and the Master " of the said Vessel shall forfeit the Value of the said Goods."

51. By the 9 *G.* 2. *c.* 35. *par.* 29. It is enacted, " That it shall and " may be lawful to and for any Officer or Officers of the Customs, pro- " ducing his or their Warrant or Deputation, or Warrants, or Deputations, " if required, to go on Board and enter into any coasting Ship or Vessel, " which shall be within the Limits of any of the Ports of this Kingdom, " and to rummage and search the Cabbin, and all other Parts of all such " coasting Ships or Vessels, for prohibited and uncustomed Goods, and " such Officer and Officers is and are hereby authorized and impowered, " to stay and remain on Board all such Ships and Vessels, during the whole " Time that the same shall continue within the Limits of any such Port " as aforesaid; and if any Person or Persons shall obstruct, oppose, mo- " lest, lett or hinder, any Officer or Officers of the Customs, in going and " remaining on Board any such coasting Ship or Vessel, or in entering and " searching the Cabbin or any other Part thereof, every such Person or " Persons shall for every such Offence forfeit the Sum of One Hundred " Pounds." Officers may search a coasting Vessel within the Limits of a Port.

52. By the 8 *G.* 1. *c.* 18. *par.* 18. After reciting, that foreign Goods are frequently taken in at Sea by Masters of coasting Vessels, who privately land the same, to the Prejudice of the Revenue and the Encouragement of the foul Trader, it is enacted, " That if any Goods, brought or coming " into any Port within the Kingdom of *Great Britain*, from any other " Port wit'.n the said Kingdom, by Coast Cocquet, Transire, Let-pass " or Certificate, shall be unshipped, to be landed or put on Shore, before " such Cocquet, Transire, Let-pass or Certificate, shall be delivered to the " Customer, or Collector and Comptroller, of the * Port or Place of her " Arrival, and Warrant of Sufferance made and given from such Cus- " tomer, or Collector and Comptroller, for the landing and discharging " thereof, the Master, Purser, Boatswain, or other Mariner taking Charge " of such Ship or Vessel, out of which the Goods shall be landed or put " on Shore, knowing and consenting thereunto, shall forfeit the Value of " the Goods so unshipped; and if any Goods of foreign Growth, Pro- " duction or Manufacture, coming coastwise as aforesaid, shall be landed " without the Presence of an Officer of the Customs, such foreign Goods " or the Value thereof shall be forfeited, any Law, Custom or Usage to " the contrary, notwithstanding." Goods not to be landed from a coasting Vessel, but in the Presence of an Officer.

* Page 555

53. By *par.* 27. This Statute was to have Continuance for two Years, from the Twenty-fifth Day of *March* one thousand seven hundred and twenty-two, and from thence to the End of the then next Session of Parliament.

54. But it has been continued from Time to Time, and by the 14 *G.* 3. *c.* 86. is continued, except the Clauses therein contained, obliging all Ships and Vessels to perform Quarentine, to the Twenty-ninth Day of *September* one thousand seven hundred and eighty one, and from thence to the End of the next Session of Parliament.

6. In the Case of Certificate and prohibited Goods.

55. By the 12 *G.* 1. *c.* 28. *par.* 17. It is enacted, " That for the bet- " ter preventing Frauds, in the entering for Exportation of any Goods, " whereon there is a Drawback, Bounty, or Præmium, or of Goods pro- " hibited to be worn or used here, to the Prejudice of the Revenue, it " shall Goods intitled to a Drawback or Bounty, and prohibited Goods, may be examined, to see if rightly entered.

" ſhall and may be lawful, to and for any Searcher or other proper Of-
" ficer of the Cuſtoms, after the Entry of any of the ſaid Goods, and be-
" fore and after the ſhipping thereof, to open and ſtrictly examine any
" Bale, Cheſt, Truſs or other Package, to ſee that the Goods are right
" entered; and if on ſuch Examination the ſame ſhall be found rightly
" entered, the Searcher or other Officer ſhall at his own Charge cauſe the
" ſame to be repacked, which Charge ſhall be allowed to ſuch Officer by
" the Commiſſioners of the Cuſtoms, if they think it reaſonable: But in
" caſe the Officer ſhall, on Examination, find ſuch Goods to be leſs in
" Quantity or Value, than is expreſſed in the Exporter's Indorſement upon
" his Entry, or any that ſhall be entered under a wrong Denomination,
" whereby his Majeſty would have been defrauded, all ſuch Goods may
" be ſeized, and ſhall be forfeited, and the Owner or Merchant ſhall loſe
" the Benefit of receiving the Drawback or Bounty for ſuch Goods, and
" the Value thereof."

Certificate Goods relanded, and the double Value of the Drawback thereof, to be forfeited.

56. By the 8 *Anne*, *c.* 13. *par.* 16. After reciting, that it hath been found by Experience, that great Quantities of foreign Goods, after they have been ſhipped for Exportation, have been privately relanded; and that the Remedies already provided by Law have not been ſufficient, to obviate a Practice ſo very prejudicial to the Revenue and all fair Traders, it is enacted, " That if any foreign Goods, contained or ſpecified in any Certi-
" ficate, whereupon any Drawback is to be made, or whereupon any De-
" benture is to be made forth for any ſuch Drawback, ſhall not be really
" and *bona fide* ſhipped and exported, the Danger of the Seas and Enemies
" excepted, or ſhall be landed again in any Part of *Great Britain*, unleſs
" in Caſe of Diſtreſs to ſave the Goods from periſhing, which ſhall be
" preſently made known to the Perſon or Perſons which are or ſhall be ap-
" appointed to manage the Cuſtoms, or principal Officers of the Port, then
" not only ſuch Certificate Goods ſhall be forfeited, but alſo the Perſon or
" Perſons, being the Exporters or any others, who ſhall bring back, or
" cauſe or procure ſuch Certificate Goods, or any Part of them, to be re-
" landed in any Part of *Great Britain*, or be aſſiſting or otherwiſe con-
" cerned in unſhipping the ſame, or by whoſe Privity, Knowledge or Di-
*Page 556 " rection, the ſaid Goods or any Part thereof ſhall be * ſo relanded, ſhall
" forfeit double the Amount of the ſaid Drawback for ſuch Goods, toge-
" ther with the Veſſels or Boats made uſe of in the landing or conveying
" the ſame."

Further Penalty on relanding prohibited or Certificate Goods.

57. By the 5 *G.* 1. *c.* 11. *par.* 6. After reciting, that the Remedies provided by Law, to prevent the relanding of Goods prohibited to be worn in this Kingdom, and of foreign Goods ſhipped out for Parts beyond the
" Seas, have been inſufficient to put a Stop thereto, it is enacted, " That
" if any ſuch Goods ſhall be unſhipped or put on Shore, unleſs in Caſe
" of Diſtreſs to ſave the Ship from periſhing, or in the Preſence of an
" Officer of the Cuſtoms, the ſaid Goods ſhall be forfeited; and if the
" Maſter, Purſer, or other Perſon taking Care of any Ship wherein the
" ſaid Goods ſhall be laden, ſhall ſuffer or permit any of the ſaid Goods
" to be landed or unſhipped, unleſs as aforeſaid, the ſaid Maſter, Purſer
" or other Perſon ſhall forfeit the Value of the Goods ſo unſhipped or
" landed."

Package of Certificate or prohibited Goods not to be opened in Port.

58. By *par.* 7. After reciting, that the Perſons concerned in carrying on ſuch fraudulent Practices, do frequently cauſe the Package of ſuch Goods to be opened on Board the Ship, during the Time ſhe continues in Port, whereby they have a better Opportunity to reland the ſaid Goods, it is enacted, " That if the Package of any ſuch Goods ſhall, with the Pri-
" vity or Conſent of the Maſter, Purſer, or other Perſon taking Care
" of ſuch Ship or Veſſel, be opened on Board any Ship or Veſſel, or put
" into any other Form or Package, during the Time the ſaid Ship or

" Veſſel

" Veſſel remains in Port, without Leave of one or more of the principal " Officers of the Port, the ſaid Maſter, Purſer or other Perſon, ſhall forfeit " one hundred Pounds."

59. By *par.* 11. Theſe two Clauſes of this Statute are only to have Continuance for three Years, from the twenty-fifth Day of *March* one thouſand ſeven hundred and nineteen, and from thence to the End of the then next Seſſion of Parliament.

60. But they have been continued from Time to Time, and by the 14 *G.* 3. *c.* 86. are continued to the twenty-ninth Day of *September* one thouſand ſeven hundred and eighty-one, and from thence to the End of the then next Seſſion of Parliament.

61. It may in the general be obſerved, that in the Caſe of Manufactures prohibited to be worn, and in every Caſe, where a Drawback, Bounty or Præmium, is allowed on the Exportation of any Goods or Manufactures, a Bond is directed to be taken, with Condition for the Exporting of ſuch Goods or Manufactures, and that the ſame ſhall not be relanded in any Part of *Great Britain*. Where this is the Caſe, beſides all other Penalties and Forfeitures, the Penalty of ſuch Bond is forfeited, if any Part of ſuch Goods or Manufactures be relanded.

7. In divers other Caſes.

62. By the 13 & 14 *C.* 2. *c.* 11. *par.* 19. it is enacted, " That if any of " the Officers or Perſons, appointed to manage the Cuſtoms, Searchers, " Waiters, or other Perſon or Perſons whatſoever, deputed and appointed " by or under them or any of them, or any other Authority whatſoever, " and employed in or about the Affairs of the Cuſtoms and Subſidies, ſhall " directly or indirectly take or receive any Bribe, Recompence or Reward in " any Kind whatſoever, to connive at any falſe Entry of any Goods or Mer- " chandize, whereby the King's Majeſty, his Heirs or Succeſſors, ſhall be " defrauded or hindered in or of his Cuſtoms or Subſidies, or other Sums " of Money, or Goods, prohibited to be exported or imported, be ſuffered " to paſs by Way of Importation or Exportation, the Perſon or Perſons ſo " offending ſhall forfeit the Sum of one hundred Pounds, and be for ever " afterwards incapable of any Office or Employment under the King's Ma- " jeſty, his Heirs and Succeſſors, or any Authority derived from them; as " alſo the Merchant, Mariner, or other Perſon or Perſons, who ſhall give or " * pay any ſuch Bribe, Recompence or Reward, ſhall forfeit the Sum of * Page 557 " fifty Pounds."

Penalty of giving or taking a Bribe, for Connivance at a falſe Entry.

63. By the 9 *G.* 2. *c.* 35. *par.* 24. it is enacted, " That if any Perſon or " Perſons ſhall offer any Bribe, Recompence or Reward, to any Officer or " Officers of the Cuſtoms, to connive at or permit any cuſtomable or pro- " hibited Goods to be run on Shore, or to connive at any falſe or ſhort " Entry of any ſuch Goods, or to do any other Act whereby his Majeſty " might be defrauded in his Revenue, every ſuch Perſon and Perſons ſhall " for every ſuch Offence, whether the ſame Offer ſhall be accepted or not, " forfeit the Sum of fifty Pounds."

Penalty of offering a Bribe to an Officer of the Cuſtoms.

64. By the 8 *G.* 1. *c.* 18. *par.* 3. After reciting that many Frauds are committed to the Prejudice of the Revenue, in the clandeſtine Running of Goods imported, and in the relanding of Certificate Goods as well as in exporting Wool and the Coin of this Kingdom, by Watermen and others in Boats, Wherries, Pinnaces, Barges and Gallies, which are ſometimes rowed with ſix, eight or twelve Oars, built on Purpoſe for the Smuggling Trade, and in caſe of their being purſued by the Officers do make their Eſcape, which may alſo be a Means of bringing in the Infection, it is enacted,

A Boat not to be rowed with more than four Oars.

enacted, "That if any Boat, Wherry, Pinnace, Barge or Gally, rowing, or "made or built to row with more than four Oars, ſhall be found upon the "Water, or in any Bargehouſe, Workhouſe, Shed or other Place, within "any of the Counties of *Middleſex*, *Surrey*, *Kent* or *Eſſex*, or in the River "*Thames* either above or below *London Bridge*, or within the Limits of the "Ports of *London*, *Sandwich* or *Ipſwich*, or the Members or Creeks to them "or either of them reſpectively belonging, ſuch Boat, Wherry, Pinnace, "Barge or Galley, with all her Tackle and Furniture or the Value thereof "ſhall be forfeited, and ſhall and may be ſeiſed by any Officer or Officers "of the Cuſtoms; and the Owner or Owners thereof or any Perſon uſing "or rowing in any ſuch Boat, Wherry, Pinnace, Barge or Galley, ſhall "alſo forfeit the Sum of forty Pounds."

Some Boats of more than four Oars excepted.

65. But by *par.* 4. it is provided, "That this Act ſhall not extend or "be conſtrued to extend, to any Barge or Galley belonging to or to be-"long to his Majeſty or the Royal Family, or any of them, or to any "Long-Boat, Yawl, or Pinnace, belonging to and uſed in the Service of "any Merchant Ship or Veſſel, or to ſuch Boat, Wherry, Pinnace, Barge "or Galley, as ſhall be licenſed by the Lord High Admiral or Commiſſi-"oners for executing the Office of Lord High Admiral, or the major "Part of the ſame Commiſſioners for the Time being."

Penalty upon the Inſurer for the Delivery of foreign Goods, without paying the Cuſtoms, or of prohibited Goods.

66. By the 4 *W.* & *M. c.* 15. *ſ.* 14. After reciting, that it is found by Experience, that great Quantities of Goods are daily imported from foreign Parts in a fraudulent and clandeſtine Manner, without paying the Cuſtoms and Duties due and payable to their Majeſties, and the ſame hath of late been much increaſed and promoted by ill Men, who, notwithſtanding the Laws already made, do undertake, as Inſurers or otherwiſe, to deliver ſuch Goods ſo clandeſtinely imported, at their Charge and Hazard, into the Houſes, Warehouſes and Poſſeſſions of the Owners thereof, it is enacted, "That all and every Perſon or Perſons, who, by way of Inſu-"rance or otherwiſe, ſhall undertake or agree to deliver any Goods or "Merchandizes, to be imported from Parts beyond the Seas, at any Port "or Place within this Kingdom of *England*, Dominion of *Wales* or Town "of *Berwick*, without paying the Cuſtoms due and payable for the ſame "at ſuch Importation, or any prohibited Goods whatſoever, or, in Pur-"ſuance of ſuch Agreement, ſhall deliver, or cauſe or procure to be de-"livered any prohibited Goods, or ſhall deliver, or cauſe or procure to "be delivered any Goods or Merchandizes whatſoever, without paying "ſuch Cuſtoms and Duties as aforeſaid, knowing thereof, and all and "every other Aiders, Abettors and Aſſiſtants, ſhall for every ſuch Offence "forfeit the Sum of five hundred Pounds, over * and above all other "Forfeitures to which they are already liable by any Act in Force."

*Page 558

Penalty upon the Perſon ſo inſured.

67. And by *par.* 15. it is enacted, "That all and every Perſon or Per-"ſon, who ſhall agree to pay any Sum or Sums of Money, for the inſuring "or conveying any Goods or Merchandizes that ſhall be ſo imported, "without paying the Cuſtoms and Duties due and payable at the Impor-"tation thereof, or of any prohibited Goods whatſoever, or ſhall receive "or take ſuch prohibited Goods into his or their Houſe or Warehouſe, or "other Place on Land, or ſuch other Goods, before ſuch Cuſtoms or "Duties are paid, knowing thereof, ſhall for every ſuch Offence forfeit "the like Sum of five hundred Pounds."

The Perſon carrying Goods prohibited or clandeſtinely imported to forfeit treble the Value.

68. By the 9 *G.* 2. *c.* 35. *par.* 21. it is enacted, "That all Watermen, "Carmen, Porters or other Perſons, employed in carrying any Goods, "Wares or Merchandizes prohibited, run or clandeſtinely imported, "upon whom or in whoſe Cuſtody the ſame ſhall be found or ſeized, "knowing the ſame Goods to be prohibited, or to have been clandeſ-"tinely run or imported without Payment of the Cuſtoms, and who

"ſhall

" ſhall be thereof lawfully convicted, upon his, her or their Appearance or " Default, upon the Oath or Oaths of one or more credible Witneſs or " Witneſſes, or by the Confeſſion of the Party, before one or more Juſtice " or Juſtices of the Peace of the County, Diviſion or Liberty, where ſuch " Offence ſhall be committed or the Offender found, which Oath ſuch " Juſtice or Juſtices are hereby required to adminiſter, ſhall forfeit treble " the Value of all ſuch Goods."

Penalty upon the Perſon receiving or buying run Goods.

69. By the 8 *G.* 1. *c.* 18. *par.* 10. it is enacted, " That if any Perſon or " Perſons ſhall receive or buy any Goods, Wares or Merchandizes, clan- " deſtinely run or imported, before the ſame ſhall have been legally con- " demned, knowing the ſame to be ſo clandeſtinely run or imported, and " ſhall be thereof lawfully convicted upon his, her or their Appearance or " Default, upon the Oath or Oaths of one or more credible Witneſs or " Witneſſes, or by the Confeſſion of the Party, before one or more Juſtice " or Juſtices of the Peace of the County, Diviſion or Liberty, where ſuch " Offence ſhall be committed or the Offender found, which Oath ſuch " Juſtice or Juſtices of the Peace are hereby required to adminiſter, the " Perſon ſo convicted ſhall forfeit the Sum of twenty Pounds."

70. By *par.* 27. This Clauſe was to have Continuance for the Space of two Years, from the twenty-fifth Day of *March* one thouſand ſeven hundred and twenty-two, and from thence to the End of the then next Seſſion of Parliament.

71. But it has been from Time to Time continued, and by the 14 *G.* 3. *c.* 86. is continued till the twenty-ninth Day of *September* one thouſand ſeven hundred and eighty-one, and from thence to the End of the then next Seſſion of Parliament.

The Concealer of run or prohibited Goods, to forfeit the Goods, and treble the Value thereof.

72. By 11 *G.* 1. *c.* 30. *par.* 16. it is enacted, " That if any Perſon or " Perſons ſhall knowingly harbour, keep or conceal, or ſhall knowingly " permit or ſuffer to be harboured, kept or concealed, any prohibited " Goods, or any run Goods, Wares or Merchandizes whatſoever, which " are liable to any Duty or Duties of the Cuſtoms, the Party or Parties " offending therein, whether he, ſhe or they have or have not, or do or " do not claim or pretend to have, any Property or Intereſt in ſuch Goods, " Wares or Merchandize, ſo harboured, kept or concealed, ſhall for every " ſuch Offence forfeit ſuch Goods, Wares and Merchandizes, and treble " the Value thereof."

Penalty upon the Perſon ſelling prohibited Goods or run Goods.

73. By *par.* 18 & 19. it is enacted, " That if any Perſon or Perſons ſhall " offer or expoſe to Sale any prohibited Goods, Wares or Merchandizes " whatſoever, or any which actually have been, or ſhall by the Party or " Parties offering or expoſing the ſame to Sale be pretended to have been " run, all ſuch Goods, Wares and Merchandizes, together * with the " Package including and containing the ſame, ſhall be forfeited, and ſhall " or may be ſeized by the Party or Parties, to whom the ſame ſhall be ſo " offered or expoſed to Sale; and the Perſon or Perſons, ſo offering or " expoſing ſuch prohibited or run Goods, Wares and Merchandizes to " Sale, ſhall forfeit the treble Value thereof."

*Page 559

Penalty upon the Perſon buying prohibited or run Goods.

74. By *par.* 20 & 21. it is enacted, " That all prohibited or run Goods, " Wares or Merchandizes whatſoever, ſo or as ſuch bought by any Per- " ſon or Perſons whatſoever, together with the Package containing the " ſame ſhall be forfeited, and ſhall or may be ſeized and taken from the " Buyer or Buyers thereof by the Seller or Sellers thereof; and the Per- " ſon or Perſons, who ſhall buy any ſuch prohibited or run Goods, Wares " or Merchandizes, or which by the Seller at the Time of ſelling thereof " ſhall be pretended to be either prohibited or run, ſhall forfeit treble the " Value thereof."

75. By

But these Penalties are not to be incurred both by the Buyer and Seller.

75. But by *par.* 21. it is declared, "That it is not meant or intended "by this Act, that as well the Party or Parties buying, as alſo the Party "or Parties ſelling or offering or expoſing to Sale ſuch Goods, Wares or "Merchandizes as aforeſaid, ſhall, in any Caſe or Caſes, both and each of "them reſpectively forfeit, or be proſecuted, for the treble Value of one "and the ſame identical Parcel or Parcels of ſuch Goods, Wares or Mer-"chandizes; but that the Party or Parties, whether Buyer, or Seller of or "offering or expoſing to Sale ſuch Goods, Wares or Merchandizes, who "with Effect ſhall firſt proſecute the other of the ſaid Parties for the treble "Value of ſuch Goods, Wares and Merchandizes, ſhall in every ſuch "Caſe or Caſes be, and is hereby declared, diſcharged and acquitted of "and from the like Forfeiture, or being proſecuted for or on Account of "the treble Value of ſuch Goods, Wares and Merchandizes, for and on "Account whereof the other Party or Parties ſhall be proſecuted with "Effect."

Penalty upon the Perſon receiving prohibited or run Goods.

76. By the 8 *Anne*, *c.* 7. *par.* 17. it is enacted, "That, beſides the For-"feiture of ſuch Goods, all Perſons, to whoſe Hands any prohibited or un-"cuſtomed Goods ſhall knowingly come after the unſhipping thereof, ſhall "forfeit treble the Value thereof, together with all Horſes and other Cattle "and Carriages, made uſe of in the Removing, Carriage or Conveyance of "any of the aforeſaid Goods."

Penalty upon the Perſon receiving Certificate Goods.

77. By the 8 *Anne*, *c.* 13. *par.* 16. it is enacted, "That, beſides the For-"feiture of ſuch Certificate Goods, every Perſon or Perſons, to whoſe "Hands any Certificate Goods, ſhall come knowingly after the unſhipping "thereof, ſhall forfeit double the Amount of the Drawback for ſuch Goods, "together with all the Horſes or other Cattle and Carriages made uſe of "in Removing, Carriage or Conveyance of the ſame."

Penalty upon an Alehouſe-keeper harbouring a Smuggler.

78. By the 9 *G.* 2. *c.* 35. *par.* 30. it is enacted, "That if any Perſon "or Perſons, who keep or ſhall keep any Tavern, Ale-houſe, Victualling-"houſe or other Houſe, where Ale, Wine, Brandy, or other ſtrong "Liquors ſhall be ſold by Retail, ſhall knowingly receive, harbour or en-"tertain any Perſon or Perſons, againſt whom any *Capias* or other Proceſs "of Arreſt ſhall have iſſued, for having beat, abuſed or obſtructed any Offi-"cer or Officers of the Cuſtoms in the Execution of their Office, or for any "Offence or Offences, that are or ſhall be commited againſt any of the Laws "now in being for preventing Frauds in relation to the Revenues of the Cuſ-"toms, or for any Crime or Crimes whatſoever, that ſhall be committed or "done in prejudice of the ſaid Revenue, and to which *Capias* or other Pro-"ceſs, the Sheriff, or other Officer having Execution of the ſaid Proceſs, ſhall "have returned, that ſuch Perſon or Perſons cannot be found, and which "Perſon or Perſons ſhall not have appeared to the ſaid Proceſs; or ſhall "knowingly harbour, receive or entertain any Perſon or Perſons, who "having been in Priſon for any of the ſaid Offences ſhall have eſcaped, or "who ſhall have been convicted for the ſame, and ſhall fly from Juſtice, "ſhall forfeit * one hundred Pounds, and be rendered incapable of having "a Licence for keeping any Tavern, Ale-houſe, or Victualling-houſe, or "ſelling Wine, Ale, Brandy or other ſtrong Liquors by Retail for the "future."

*Page 560

79. But by *par.* 31. it is provided, "That no Perſon ſhall ſuffer any "Penalty or Diſability, for ſuch receiving harbouring or entertaining, unleſs "publick Notice ſhall have been given ſix Days before, in two ſucceeding "*Gazettes*, of the abſconding of the Perſon or Perſons, who ſhall be ſo "received, harboured or entertained, and alſo by Writing, to be fixed to the "Door of the Pariſh Church, where ſuch Perſon or Perſons laſt dwelt "before his abſconding."

Penalty upon the Hundred where an

80. By the 19 *G.* 2. *c.* 34. *par.* 6. it is enacted, "That if any Officer or "Officers, of his Majeſty's Revenue, or other Perſon, being employed in

"the

" the ſeizing, or conveying, or ſecuring, any Wool or Goods forfeited on Account of their being prohibited or accuſtomed Goods, or in endeavouring to apprehend any Offender againſt this Act, ſhall be beat, wounded, or maimed or killed by any Offender againſt this Act, or the ſaid Wool or other Goods ſhall be reſcued, by Perſons armed as in this Act is before mentioned, in all ſuch Caſes reſpectively, the Inhabitants of every Rape or Lath, in ſuch Counties as are divided into Rapes and Laths, and in every other County, the Inhabitants of every Hundred, where ſuch Facts ſhall be committed, within that Part of *Great Britain* called *England*, ſhall make full Satisfaction and Amends for all the Damages, which ſuch Officers or Perſons ſhall reſpectively ſuffer by ſuch beating, wounding and maiming reſpectively, and by the Loſs of ſuch Goods ſo ſeized and reſcued; and ſhall alſo pay the Sum of one hundred Pounds, for each Perſon ſo killed, to the Executors or Adminiſtrators of ſuch Officer or Perſon ſo killed as aforeſaid; and that ſuch reſpective Officers and other Perſons, and their ſaid Executors and Adminiſtrators ſhall be and are hereby enabled to ſue for and recover ſuch their Damages, ſo as the Sum to be recovered, for ſuch beating, wounding or maiming ſhall not exceed forty Pounds, nor for the Loſs of the Goods two hundred Pounds, againſt the Inhabitants of the ſaid Rape or Lath, in ſuch Counties as are divided into Rapes or Laths, and in every other County, the Inhabitants of every hundred, who by this Act ſhall be made liable to anſwer all or any Part thereof."

Officer is obſtructed or Goods ſeized are reſcued.

81. But by *par.* 8. it is provided, " That where any Offender ſhall be apprehended, and convicted of ſuch Offence within the Space of ſix Calendar Months after the Offence is committed, no Hundred, Rape or Lath, or any Inhabitant thereof, ſhall be in any wiſe ſubject to make any Satisfaction for ſuch Damages, or to pay the ſaid one hundred Pounds to the Executors or Adminiſtrators of ſuch killed Perſon."

82. By 22 *G.* 2. *c.* 36. After reciting, that great Quantities of foreign Embroidery continued to be brought into, and ſold within this Kingdom, the Importation whereof is contrary to divers Acts of Parliament, it is enacted; " That, from and after the firſt Day of *July* one thouſand ſeven Hundred and Forty-nine, no foreign Embroidery, or Gold or Silver Brocade, ſhall be imported or brought into *Great Britain*, upon Pain of being forfeited and burnt, and upon the further Penalty of one Hundred Pounds, to be paid by the Importer thereof, for each Piece or Parcel ſo imported."

83. In a Caſe reſerved, in an Action for the Penalty of one Hundred Pounds for bringing in foreign Embroidery, it was ſtated; that the Defendant, whilſt he was in *France*, had worn an embroidered Waiſtcoat, which was made in *France*; and that this Waiſtcoat was brought over in his Portmanteau, when he came to *England*. The Queſtion was whether he were liable to the Penalty inflicted by the 22 *G.* 2.? It was holden, that he was not; and by Lord *Mansfield* Ch. J. the Intention of that Statute was to prevent the bringing in of foreign Embroidery for Sale, and not to hinder a Gentleman from bringing in his wearing Apparel. If the Defendant were liable in this Caſe to the Penalty, the Waiſtcoat might have been ſeiſed in his Portmanteau; and if it could have been ſeiſed in his Portmanteau, it might have been taken off his Back; the Conſequence of which would be, that any Perſon, even a Foreigner, coming from a foreign Part, might be ſtripped naked, as ſoon as he ſets his Feet on the *Britiſh* Shore.

M. S. Rep. 83. *Dyſon* qui tam v. *Lord Villiers* *Eaſt.* 13 G. 3. in K. B.

(G) Of the corporal Punishments to which Persons who have been guilty of Smuggling, or of such Practices as have a direct Tendency thereto, are liable.

1. Imprisonment.

If a Person forcibly obstruct an Officer.

1. BY the 13 & 14 *C.* 2. *c.* 11. *par.* 6. it is enacted, "That if any "Officer or Officers of the Customs shall be, by any Person or Persons "armed with Club or any Manner of Weapon, forcibly hindred, affronted, "abused, beaten or wounded, either on Board any Ship or Vessel or upon *Page 561 "* the Land or Water, in the due Execution of their Office, all and every "Person or Persons so resisting, affronting, abusing or wounding the "said Officer or Officers, or their Deputies, or such as shall act in their "Aid or Assistance, shall by the next Justice of Peace, or other Magis"trate, be committed to Prison, there to remain till the next Quarter"Sessions; and the Justices of Peace of the said Quarter-Sessions are "hereby impowered, to punish the Offender by Fine not exceeding One "Hundred Pounds, and the Offender is to remain in Prison, till he be "discharged by Order of the Exchequer both of the Fine and of the "Imprisonment, or discover the Person that set him on Work, to the "End that he may be legally proceeded against."

If an Officer make a false Certificate.

2. By *par.* 8. It is enacted, "That if any Officer of any Port, Member "or Creek, shall grant or make any false Certificate of any Goods or "Merchandizes, which should have been landed out of any Ship or "Vessel, such Officer shall suffer one Year's Imprisonment without Bail "or Mainprize, and be further liable to such corporal Punishment as the "Court of Exchequer shall think fit.

If a Master of a Ship suffer the Package of prohibited, or Certificate Goods, to be opened in Port.

3. By the 5 *G.* 1. *c.* 11. *par.* 7. It is enacted, "That if any Master, "Purser or other Person taking Charge of any Ship or Vessel, shall per"mit or suffer any Goods prohibited to be worn in this Kingdom, or "any foreign Goods shipped for Parts beyond the Seas to be unshipped "or landed, or the Package of any such Goods to be opened or put into "any other Form, during the Time the said Ship or Vessel remain in "Port, without Leave of one or more of the principal Officers of the "Port, such Master, Purser or other Person shall, besides being subject "to the Forfeiture of One Hundred Pounds, suffer six Months Imprison"ment without Bail or Mainprize."

If a Master of a Ship suffer prohibited, or uncustomed Goods, to be shipped or unshipped.

4. By 6. *G.* 1. *c.* 21. *par.* 32. After reciting, that illegal Importations and Exportations cannot be carried on by Ships or Vessels, if the Masters or Commanders thereof do take due Care to prevent the same, it is "enacted, "That if the Master, Purser, or other Person taking Charge "of any Ship or Vessel, shall suffer any uncustomed or prohibited Goods "to be put out of the said Ship or Vessel, into any Hoy, Lighter, Boat "or Bottom, to be laid on Land, or shall suffer any Wool, Wool-fells, "Mortlings, Shortlings, Yarn made of Wool, Wool-flocks, Fullers"Earth, Fulling-Clay or Tobacco-Pipe-Clay, to be put on board such "Ship or Vessel, to be carried to Parts beyond the Seas, he or they so "offending, being convicted thereof, shall, besides the Penalties and For"feitures to which they will be liable by any Law now in being, suffer six "Months Imprisonment without Bail or Mainprize."

If a Person receive run Goods.

5. By the 8 *G.* 1. *c.* 18. *par.* 10. After directing that any Person or Persons, convicted of knowingly receiving or buying any run Goods before the same shall have been lawfully condemned, shall be liable to a Distress

for

for the Penalty of Twenty Pounds given by the 8 *G.* 1. *c.* 18. *par.* 10. it is enacted, "That for Want of ſuch Diſtreſs, every ſuch Offender ſhall "be committed to Priſon, without Bail or Mainprize, for the Space of "three Months."

2. Whipping.

6. By the 9 *G.* 2. *c.* 35. *par.* 18. It is enacted, "That upon Information, "to be given upon Oath before one or more Juſtices of the Peace in any "County, City or Liberty, that any Perſon or Perſons are or ſhall be "lurking, waiting or loitering within five Miles from the Sea Coaſt, or "from any navigable River, and that there is Reaſon to ſuſpect, that "they wait with Intent to be aiding and aſſiſting in the running, landing "or carrying away, any prohibited or uncuſtomed Goods, it ſhall and "may be lawful, for every ſuch Juſtice and Juſtices, to cauſe all ſuch "* Perſons to come and be brought before him and them, and to grant "his or their Warrant or Warrants for the apprehending ſuch Offender, "and bringing him or them before any of the ſaid Juſtices of the Peace, "and if ſuch Perſons ſhall not give a ſatisfactory Account of themſelves, "and their Callings and Employments, or otherwiſe make it appear to "the Satisfaction of ſuch Juſtice or Juſtices, that they are not to be "employed or concerned in, or to be aiding or aſſiſting in, the carrying "on any fraudulent or clandeſtine Trade, or unlawful Buſineſs or Occu-"pation, and are not at ſuch Place as aforeſaid, with Intent to carry on "the ſaid clandeſtine Practices, then every ſuch Perſon, who ſhall not "give ſuch Account and Satisfaction to ſuch Juſtice or Juſtices, ſhall "be committed to the Houſe of Correction, there to be whipt and kept "to hard Labour, for any Time which ſuch Juſtice or Juſtices ſhall in "his or their Diſcretion think meet, not exceeding one Month."

If a Perſon lurk upon any Coaſt or navigable River.

*Page 562

7. But by *par.* 19. It is provided, "That if any Perſon or Perſons, ſo "brought before ſuch Juſtice or Juſtices, ſhall deſire Time for the mak-"ing it appear, that he or they is or are not concerned in any of the "ſaid fraudulent or clandeſtine Practices, ſuch Perſon or Perſons ſhall "not be puniſhed by Whipping or other Correction; but that then, and "in every ſuch Caſe, it ſhall and may be lawful, for every ſuch Juſtice "and Juſtices to commit ſuch Perſon and Perſons to the common Gaol, "there to remain and continue, until he or they ſhall give ſuch Account "of him or themſelves, or make Proof of the Matters aforeſaid to the "Satisfaction of ſuch Juſtice or Juſtices, or until ſuch Perſon or Per-"ſons ſhall give and find good and ſufficient Security, to the Appro-"bation and Satisfaction of the ſaid Juſtice or Juſtices, not to be "guilty of any of the ſaid Offences, or fraudulent, clandeſtine or indirect "Practices."

But ſuch Perſon to have Time, to make his Innocence appear.

8. By *par.* 21. After directing, that all Watermen, Carmen, Porters and other Perſons, convicted of carrying any Goods or Merchandizes, know-ing the ſame to be prohibited or run, ſhall be liable to a Diſtreſs, for the Penalty of treble the Value of ſuch Goods given by the 9 *G.* 2. *c.* 35. *par.* 21. it is enacted, "That for Want of ſuch Diſtreſs, every ſuch Of-"fender ſhall be committed to the Houſe of Correction there to be "whipt and kept to hard Labour, for any Time which the Juſtice or "Juſtices of the Peace committing him or her ſhall in his or their Diſ-"cretion judge meet, not exceeding three Months."

If a Perſon carry prohibited, or run Goods.

3. Tranſportation.

If any Perſons, to the Number of eight, forcibly obſtruct an Officer.

9. By 6 *G.* 1. *c.* 21. *par.* 34. After reciting, that the Puniſhment already inflicted by Law on ſuch as ſhall forcibly obſtruct Officers of the Cuſtoms in the due Performance of their Duty, has proved inſufficient, it is enacted, "That if any Officer or Officers of the Cuſtoms be forcibly "hindred, wounded or beaten, in the due Execution of their Office, by "any Perſons armed with Club or any Manner of Weapon, tumultuouſly "aſſembled in the Day or Night to the Number of eight or more Per-"ſons, all and every Perſon or Perſons ſo hindring, wounding or beating "the ſaid Officer or Officers, or ſuch as ſhall act in their Aid or Aſ-"ſiſtance, being convicted thereof, ſhall, by Order of the Court before "whom ſuch Offender or Offenders ſhall be convicted, be tranſported to "ſome of his Majeſty's Colonies and Plantations in *America*, for ſuch "Term as the Court ſhall think fit, not exceeding ſeven Years, in the "ſame Manner, as by an Act made in the fourth Year of his preſent Ma-"jeſty's Reign intituled, *An Act for the further preventing Robbery, &c.* "the Offenders therein mentioned are to be tranſported to the ſaid Co-"lonies and Plantations."

*Page 563

If any Perſons, more than five in Number, be found paſſing with uncuſtomed Goods.

10. *By the 8 *G.* 1. *c.* 18. *par.* 6. It is enacted, "That all and every Per-"ſon and Perſons, who ſhall be found paſſing knowingly and willingly with "any foreign Goods or Commodities, landed from any Ship or Veſſel, "without the due Entry and Payment of the Duties by Law charged "thereon, in his, her or their Cuſtody, from any of the Coaſts of this "Kingdom, or within the Space of twenty Miles of any of the ſaid "Coaſts, and ſhall be more than five Perſons in Company; or ſhall carry "any offenſive Arms or Weapons; or wear any Vizard, Maſk or other "Diſguiſe, when paſſing with ſuch Goods or Commodities as aforeſaid; "or ſhall forcibly hinder or reſiſt any Officers of the Cuſtoms, in the "ſeizing or ſecuring any Sorts or Kinds of run Goods or Commodities, "ſhall be deemed and taken to be Runners of foreign Goods and Com-"modities, within the Meaning of this preſent Act; and being convicted "of or for any of the ſaid Offences, for which he, ſhe or they, ſo con-"victed, are by this preſent Act declared to be deemed and taken to be "Runners of foreign Goods and Commodities, ſhall be adjudged guilty "of Felony, and ſhall for ſuch his, her or their Offence be tranſported "as a Felon to ſome of his Majeſty's Colonies or Plantations in *Ame-"rica*, there to remain for the Space of ſeven Years, in the ſame Man-"ner, as Felons are appointed to be tranſported by an Act made in the "fourth Year of his Majeſty's Reign, intituled *An Act for the further "preventing Robbery &c.* and by another Act made in the ſixth Year "of his Majeſty's Reign, intituled *An Act for the further preventing "Robbery &c.*

If three or more Perſons be aſſembled with Fire-Arms, for the running of Goods.

11. By the 9 *G.* 2. *c.* 35. *par.* 10. After reciting, that divers diſſolute and diſorderly Perſons frequently appear in great Gangs near the Sea Coaſts, and the Shores of navigable Rivers, and in and about Towns and Villages adjacent thereto, and in divers other Parts of this Kingdom, carrying Fire Arms and other offenſive Weapons, to the great Terror of his Majeſty's Subjects, and the Hindrance of the Civil Officers, and the Officers of the Cuſtoms and Exciſe, in the Execution and Diſcharge of their Duty, and during their Abode there commit great Spoil and Devaſtation on the Eſtates thereabouts, in order to be aiding and aſſiſting in the clandeſtine running, landing or carrying away prohibited and uncuſtomed Goods, and to reſcue the ſame after Seizure from the Officers of the Cuſtoms and Exciſe, and to watch for Opportunities for that Purpoſe; and that ſeveral Officers of the Revenue, and other their Aſſiſtants,

Aſſiſtants, have been wounded, maimed and ſome of them murthered in the Execution of their Office, and great Quantities of run Goods have been reſcued after Seizure, and Sheriffs, and other Chief Officers have been forcibly hindred from the Execution of Proceſs, it is enacted, "That, "upon Information to be given on Oath, before any one or more of his "Majeſty's Juſtices of the Peace in any County, City or Liberty, that any "Perſons to the Number of three or more are or have, after the 24th Day "of *June* in the Year of our Lord One thouſand ſeven hundred and thirty-"ſix, been aſſembled for any of the Purpoſes aforeſaid, and are or have "been armed with Fire-Arms or other offenſive Weapons, ſuch Juſtice or "Juſtices of the Peace ſhall and may grant his or their Warrant to the "Conſtables, Headboroughs and other Peace Officers, or any of them, "requiring ſuch Officer and Officers reſpectively, to take to his and their "Aſſiſtance as many of his Majeſty's Subjects, as may be thought neceſſary, "for the apprehending all and every Perſon and Perſons againſt whom ſuch "Information ſhall be given as aforeſaid, and ſuch Juſtice or Juſtices ſhall "and may, if upon due Examination he ſhall find Cauſe, commit all and "every or any of the ſaid Perſon and Perſons to the next County Goal, "there to remain without Bail or Mainprize, until he ſhe or they ſhall be "diſcharged by due Courſe of Law; and all and every ſuch Perſon and "Perſons, upon due Proof of his, her or their being aſſembled and armed "as aforeſaid, in order to be aiding and aſſiſting in the clandeſtine running, "landing or carrying away prohibited or uncuſtomed Goods, and, upon *Page 564
"Conviction of and for ſuch Offence, ſhall be adjudged guilty of Felony, "and ſhall be tranſported as a Felon, to ſome one of his Majeſty's Colo-"nies or Plantations in *America*, there to remain for ſeven Years."

12. The Defendant having been indicted upon this Statute, it was found by a ſpecial Verdict, that there were above three in Company, and that all the others had Fire-Arms; but that the Defendant had only a common Horſewhip. Upon the firſt Argument the Court inclined ſtrongly, that he was not guilty; for that the Act makes the being armed a material Circumſtance in each Man's Caſe, and an Act ſo penal is to be conſtrued ſtrictly. The Court did not however determine the Caſe upon the firſt Argument; but gave the Attorney General Time to conſider of it. He, after Conference with the Solicitor General, declined to argue it a ſecond Time; and the Priſoner was diſcharged. *Str.* 1166. *The King* and *Fletcher*.

13. By 9 *G.* 2. *c.* 35. *par.* 28. After reciting, that the Puniſhment, to which ſuch Perſons, as ſhall forcibly obſtruct or hinder any Officer of the Cuſtoms, being on board any Ship, Boat or Veſſel within the Limits of any Port of this Kingdom, are liable by Law, hath proved inſufficient, it is enacted, "That if any Officer or Officers of the Cuſtoms, being on "board any Ship, Boat or Veſſel within the Limits of any of the Ports of "this Kingdom, ſhall be forcibly hindred, oppoſed, obſtructed, wounded "or beaten, in the due Execution of his or their Office, or Duty, by any "Perſon or Perſons whatſoever, either in the Day or Night, all and every "Perſon and Perſons, ſo forcibly hindering, oppoſing, obſtructing, wound-"ing or beating the ſaid Officer or Officers in the Execution of his or their "Office, and all ſuch as ſhall act in their Aid or Aſſiſtance, being convicted "thereof, ſhall, by order of the Court before whom ſuch Offender "or Offenders ſhall be convicted, be tranſported to ſome one of "his Majeſty's Colonies or Plantations in *America* for ſuch Term as ſuch "Court ſhall think fit, not exceeding ſeven Years." If a Perſon forcibly obſtruct an Officer on board a Ship.

14. By the 19 *G.* 2. *c.* 34. *par.* 3. It is enacted, "That all and every "Perſon and Perſons, who ſhall, after the Time appointed for the Sur-render If a Perſon harbour a Smuggler

who has not furrendered.

" render of any Perſons or Perſons, charged upon Oath with any of the " Offences before mentioned in this Act, ſhall be expired, harbour, receive, " conceal, aid, abet or ſuccour ſuch Perſon or Perſons, knowing him to " have been ſo charged, and to have been required to ſurrender him or " themſelves by ſuch Order or Orders as are thereby directed to to be made, " and not to have ſurrendered him or themſelves purſuant to ſuch Order " or Orders, being proſecuted for the ſame within one Year after the " Offence committed, and lawfully convicted thereof, ſhall be guilty of " Felony, and ſhall be tranſported as a Felon or Felons to ſome one of " his Majeſty's Colonies or Plantations in *America*, there to remain for the " Space of ſeven Years."

4. Death.

15. By the 9 *G.* 2. *c.* 35. All Perſons are indemnified and diſcharged from all Penalties, Forfeitures, Indictments, Outlawries, Convictions and Judgments, except in a few Caſes therein mentioned, incurred, had or given, or that may ariſe or accrue, for or by Reaſon or Means of Offences againſt the Cuſtoms, committed before the Twenty-ſeventh Day of *April* in the Year of our Lord One thouſand ſeven hundred and thirty-ſix.

If a Perſon liable to be tranſported, be, after taking the Benefit of an Indemnity, guilty of the ſame Offence.

16. But by *par.* 7. It is provided, " That if any Perſon or Perſons, who " hath been guilty of any Offence or Offences, for which ſuch Perſon or " Perſons is or are by any Law or Statute now in Being liable to be tranſ- " ported as a Felon or Felons, ſhall for any of the ſaid Offences take or " receive the Benefit of this preſent Act, and ſhall afterwards be guilty of, " or commit any of the ſaid Offences, for which he ſhe or they is or are now " liable to be tranſported as aforeſaid, then all and every ſuch Perſon " and Perſons, being duly convicted of or for any of the ſaid Offences " hereafter to be committed as aforeſaid, and upon due Proof made, that " ſuch Perſon or Perſons had committed any of the ſaid Offences before the " making of this Act, and had taken or received the Benefit thereof for his " her or their Diſcharge, ſhall be adjudged guilty of Felony and ſhall ſuffer " Death, as in Caſes of Felony without Benefit of Clergy."

*Page 565

16. By the 18 *G.* 2. *c.* 28. All Perſons are indemnified, as to all Offences againſt the Cuſtoms, except as therein is excepted, committed before the firſt Day of *May* in the Year of our Lord One thouſand ſeven hundred and forty-five; and there is in this Statute Proviſion, that all, who being liable to be tranſported ſhould take the Benefit of this Act, and be again guilty of the ſame Offence, ſhall ſuffer Death as in Caſes of Felony without Benefit of Clergy.

If any Perſons, to the Number of three, aſſemble with Fire Arms, in Defiance of the Laws of the Cuſtoms.

17. By the 19 *G.* 2. *c.* 34. *par.* 1. After reciting, that divers diſſolute Perſons have aſſociated themſelves, and entered into Confederacies to ſupport one another, and have appeared in great Gangs in divers Parts of the Kingdom, carrying Fire-Arms or other offenſive Weapons, and when ſo aſſembled have been aiding and aſſiſting, in running, landing or carrying away prohibited or uncuſtomed Goods, or Goods liable to Duties of Exciſe; or in the illegal relanding of Goods or Merchandizes, which have been ſhipped or exported upon Debenture or Certificate; or in reſcuing the ſame after Seizure; or in obſtructing the Officers of the Revenue in the Execution of their Office, to the great Diſcouragement of the fair Trader and the Loſs of the publick Revenue; and that ſeveral Officers of the Revenue and their Aſſiſtants have been wounded, maimed and ſome of them killed, when in the Execution of their Office or otherwiſe, by the ſaid diſſolute Perſons ſo aſſociated and aſſembled as aforeſaid, to the great Terror of his Majeſty's peaceable Subjects, in Defiance of the Laws,

Laws, and to the utter Subverſion of all civil Authority and Power whatſoever, it is enacted, "That if any Perſons, to the Number of three or "more, ſhall from and after the twenty-fourth Day of *July* in the Year of "our Lord One thouſand ſeven hundred and forty-ſix be aſſembled, in "order to be aiding and aſſiſting in the illegal Exportation of Wool, or "other Goods prohibited to be exported; or in the carrying of Wool, "or other ſuch Goods, in order to ſuch Exportation; or in the running, "landing or carrying away prohibited or uncuſtomed Goods, or Goods "liable to pay any Duties which have not been paid or ſecured; or in "the illegal relanding of any Goods whatſoever, which have been ſhipped "or exported upon Debenture or Certificate; or in reſcuing or "taking away the ſame, after Seizure, from any Officer or Officers of the "Cuſtoms or Exciſe or other his Majeſty's Revenue, or other Perſon or "Perſons employed by him or them, or aſſiſting him or them, or from the "Place where they ſhall be lodged by him or them; or in reſcuing any "Perſon, who ſhall be apprehended, for any of the Offences made Felony "by this or any other Act relating to the Revenues of the Cuſtoms or "Exciſe; or in preventing the apprehending of any Perſon who ſhall be "guilty of any ſuch Offence; and in caſe any Perſons to the Number of "three or more, ſo armed as aforeſaid, ſhall, after the ſaid twenty-fourth "Day of *July*, be ſo aiding or aſſiſting; or if any Perſon ſhall, after the "ſaid twenty-fourth Day of *July*, have his Face blacked, or wear any "Vizard, Maſk or other Diſguiſe, when paſſing with ſuch Goods; or ſhall "forcibly hinder, obſtruct, aſſault, oppoſe or reſiſt any of the Officers of "the Cuſtoms or Exciſe, or any other his Majeſty's Revenue, in the ſeizing and ſecuring any ſuch Goods; or if any Perſon or Perſons, after the "ſaid twenty-fourth Day of *July*, ſhall maim or dangerouſly wound any "Officer of the Cuſtoms or Exciſe, or any other his Majeſty's Revenue, in "his attempting to go on board any Ship or Veſſel, within the Limits of "any of the Ports of this Kingdom; or ſhall ſhoot at maim or dangerouſly wound him when on Board ſuch Ship, * or Veſſel, and in the due *Page 566
"Execution of his Office or Duty, then every Perſon ſo offending, being "thereof lawfully convicted, ſhall be adjudged guilty of Felony, and ſhall "ſuffer Death, as in Caſes of Felony without Benefit of Clergy."

18. By *par.* 2. For the more eaſy and ſpeedy bringing the Offenders againſt this Statute to Juſtice, it is enacted, "That if any Perſon or Perſons ſhall "be charged with being guilty of any of the Offences aforeſaid, before any "one or more of his Majeſty's Juſtices of Peace, or before one of the "Juſtices of his Majeſty's Court of King's Bench, if the Offence be committed in *England*, or before the Lord Juſtice General, or one of the "Lords of Juſticiary, or any one or more of his Majeſty's Juſtices of "Peace in *Scotland*, if the Offence be committed in *Scotland*, by Information of one or more credible Perſon or Perſons upon Oath, by him "or them to be ſubſcribed, ſuch Juſtice of the Peace, or Juſtice of the "King's Bench, or Lord Juſtice General, or Lord Juſtice Clerk, or "Lord of Juſticiary reſpectively, before whom ſuch Information ſhall "be made as aforeſaid, ſhall forthwith certify under his Hand and Seal, "and return ſuch Information to one of the principal Secretaries of "State of his Majeſty, his Heirs or Succeſſors, who is hereby required to "lay the ſame, as ſoon as conveniently can be, before his Majeſty, his "Heirs or Succeſſors, in his or their Privy Council; whereupon it ſhall "and may be lawful, for his Majeſty, his Heirs or Succeſſors, to make his "or their Order in his or their ſaid Privy Council, thereby requiring and "commanding ſuch Offender or Offenders to ſurrender him or themſelves, within the Space of forty Days after the Publication thereof in "the *London Gazette*, to the Lord Chief Juſtice, or any other of his

If any Perſon, charged with ſuch Offence, do not ſurrender himſelf.

"Majeſty's

" Majeſty's Juſtices of the Court of King's Bench, or to any one of his " Majeſty's Juſtices of the Peace, if the Offence be committed in *England*; " or to any of the Lords of Juſticiary, or to any of his Majeſty's Juſtices " of the Peace in *Scotland*, if the Offence be committed in *Scotland*: " who is hereby required, upon ſuch Offender or Offenders ſurrendering " him or themſelves, to commit him or them without Bail or Mainprize to " the County Goal, or to the Gaol or Priſon of the Place where he or " they ſhall ſo ſurrender, to the End that he or they may be forth-coming, " to anſwer the Offence or Offences wherewith he or they ſhall ſtand " charged according to due Courſe of Law; which Order the Clerks of " his Majeſty's Privy Council ſhall cauſe to be forthwith printed and pub- " liſhed, in the two ſucceſſive *London Gazettes*, and to be forthwith tranſ- " mitted to the Sheriff of the County where the Offence ſhall be commit- " ted, who ſhall, within fourteen Days after the Receipt thereof, cauſe " the ſame to be proclaimed, between the Hours of ten in the Morning " and two in the Afternoon, in the Market Places, upon the reſpective " Market Days, of two Market Towns in the ſame County, near to the " Place where ſuch Offence ſhall have been committed; and a true Copy " of ſuch Order ſhall be affixed upon ſome publick Place in ſuch Market " Towns; and in caſe ſuch Offender or Offenders ſhall not ſurrender him " or themſelves, purſuant to ſuch Order of his Majeſty, his Heirs or Suc- " ceſſors, to be made in Council as aforeſaid, he or they ſo neglecting or " refuſing to ſurrender him or themſelves as aforeſaid, or eſcaping after " ſuch Surrender, ſhall, from the Day appointed for his or their Surrender " as aforeſaid, be adjudged, deemed and taken to be convicted and attaint- " ed of Felony, and ſhall ſuffer Pains of Death, as in Caſes of a Perſon " convicted and attainted by Verdict and Judgment of Felony, without " Benefit of Clergy; and it ſhall be lawful to and for the Court of King's " Bench, or the Juſtices of Oyer and Terminer or general Goal Delivery, " for the County or Place where ſuch Perſon ſhall be, to award Execution " againſt ſuch Offender and Offenders, in ſuch Manner, as if he or they " had been convicted and attainted in the ſaid Court of King's Bench, or " before ſuch Juſtices of Oyer and Terminer or general Gaol Delivery re- " ſpectively."

*Page 567 * 19. By *par.* 17. This Statute was to have Continuance for the Space of ſeven Years, and from thence to the End of the next Seſſion of Parliament.

20. But ſo much thereof, as relates to the further Puniſhment of Perſons going armed or diſguiſed in Defiance of the Laws of the Cuſtoms and Exciſe, has been from Time to Time continued, and is by the 4 *G.* 3. *c.* 12. further continued to the twenty-ninth Day of *September* one thouſand ſeven hundred and ſeventy-one, and from thence to the End of the then next Seſſion of Parliament.

MS. Rep. *Rex* v. *Harvey*, Eaſter 20 G. 2. in *K. B.*

21. *Harvey*, who had been committed for not ſurrendering himſelf purſuant to the Directions of this Statute, being brought into the Court of *King's Bench* by a *Habeas Corpus*, it was agreed by the Court, that a Suggeſtion containing all the Facts ſhould be entered upon the Roll: And by *Lee* Ch. J. it is neceſſary that all the Facts ſhould in this Caſe appear to the Court upon Record; it not being like the Caſe of an Attainder by Act of Parliament, in which the Facts are ſettled, the Perſon named, and the only Queſtion is, whether the Priſoner be the identical Perſon attainted? In a Suggeſtion entered by the Attorney General, it was among other Facts to bring the Priſoner within this Statute averred, that he had been guilty of an Offence, provided againſt by this Statute, at *Benacre* in the County of *Suffolk*; and that the Sheriff did, within fourteen Days after the Receipt of the Order of Council, cauſe the ſame to be proclaimed, between the Hours of ten in the Morning and two in the

After-

Afternoon, in the reſpective Market Places, upon the reſpective Market Days, of two Market Towns, but neither of them was named in the Suggeſtion, in the County of *Suffolk*, the ſaid two Market Towns being near to the Place where the Offence was committed. *Ford*, of Counſel for the Priſoner, objected to the two Market Towns not being named in the Suggeſtion; but it being ruled, that, if the Priſoner had any Objection to the Suggeſtion, he muſt demur to it, he gave up this Objection, and prayed Time to plead till next Term. As to this the Opinion of the Court was, that the Priſoner ought to plead *Inſtanter*, as is done in Indictments; and by *Foſter*, J. if this Court ſhould give a Term to plead in, it will be expected that Juſtices of Gaol Delivery, to whom the ſame Power is given by this Statute as is given to this Court, ſhould give Time to plead till the next Aſſize. Hereupon the Priſoner denied all the Facts he was charged with; and the Attorney General affirmed them, joined Iſſue, and prayed that a *Venire* might be awarded. *Ford* deſired to have a Copy of the Suggeſtion; but the Court, who told him he might hear it read again, refuſed to grant this. A *Venire* was awarded, and it was agreed by the Court, that the Proceedings ſhould be in the ſame Manner as before Juſtice of Gaol Delivery. In the next Term the Priſoner was brought to the Bar; and a Jury was ſworn well and truly to try the ſeveral Iſſues joined between our Sovereign Lord the King and *John Harvey*, and a true Verdict to give according to the Evidence. After divers of the Facts had been proved, the Underſheriff of *Suffolk* proved the proclaiming of the Order of Council at *Ipſwich*, a Market Town where the Priſoner was accuſtomed to come frequently; but he ſaid, that there were eight other Market Towns nearer to *Benacre* than *Ipſwich*. It was likewiſe proved, that the Order was proclaimed at *Leoſtoff*, a Market Town within five Miles of *Benacre*, and at *Hadley*, another Market Town in which the Priſoner lived. To this Evidence *Ford* demurred; and for Cauſe ſaid, that this was not a Proclamation within the Meaning of the Statute, which directs, that the Proclamation ſhall be made in two Market Towns near the Place where the Offence was committed, whereas *Hadley* is forty-two Miles diſtant from thence, and *Ipſwich* thirty-three; and it appears from the * Evidence of the Underſheriff, that there are ſeveral Market Towns much nearer to *Benacre*. The Counſel for the Crown anſwered, that the Word *near* is in this, as in many other Acts of Parliament, merely directory; that the Intention of the Statute is nothing more, than that the Proclamation ſhould, at the Diſcretion of the Sheriff, be made where the Party is moſt likely to hear of it; and that this Intention has in the preſent Caſe been fully anſwered. If the Legiſlature had intended a Place than which none is nearer, they would not have made Uſe of the Word *near*, but of the Word *next*; which might for ſeveral Reaſons have been inconvenient, and ſeems to have been avoided with Deſign. He inſiſted further, that this is a Matter of Fact, of which the Jury are the proper Judges. *Ford* in Reply ſaid, that although the Word *near* was not intended to mean the ſame Thing as the Word *next*, it by no Means follows, that Market Towns at the Diſtance of forty Miles can be ſaid to be near; and eſpecially, if as in this Caſe there are eight Market Towns nearer; and that this is not a Matter proper to be left to the Jury. *Lee* Ch. J. If this Man had been guilty of an Offence againſt this Statute he was not under a Neceſſity of ſurrendering himſelf upon theſe Proclamations. *Wright*, J. All the Directions in this Statute are very expreſs, and nothing is left to Diſcretion. It would be of very dangerous Conſequence, to leave Matters of this Sort to the Diſcretion of a Sheriff, and then to enquire whether he has acted properly. *Denniſon*, J. No Rule of Law is more certain, than that in Capital Caſes the Words of an Act of Parliament

* Page 568

muſt

muſt be ſtrictly complied with. In the Caſe of the *King* v. *Fletcher*, a Smuggler, before Smuggling was made a Capital Offence, it was holden, that a Statute which creates a new Felony, muſt always be conſtrued literally and ſtrictly. I agree, that this Statute does not intend to fix the making of the Proclamations at the very next Market Towns; but it plainly intends, that they ſhould be made near the Place where the Offence was committed, and not at the Diſtance of thirty or forty Miles. *Foſter*, J. The Underſheriff ſeems to have acted uprightly, and with a good Intention: But the Statute has not in Fact been complied with; for, although the Word *near* does not import the ſame rigid Exactneſs as the Word *next*, it certainly excludes the Diſtance of thirty or forty Miles, when there are ſo many Market Towns much nearer. The Jury were directed by the Court to find all the Iſſues for the Crown, except that in which it is averred, that the Proclamations were made in two Market Towns near the Place where the Offence was committed, and to find that Iſſue for the Defendant.

---

*Page569

* SODOMY.

1. SODOMY, ſo called from the Prevalence of this Crime in the City of *Sodom*, is an unnatural Copulation between two human Creatures, or between a human and a brute Creature.

2. The Word *Buggery*, by which Name this Offence is likewiſe known, is derived from the *Italian* Word *Bugeriare*, which ſignifies *to pierce a Hole through*.

3. If any Crime deſerve to be puniſhed in a more exemplary Manner this does. Other Crimes are prejudicial to Society; but this ſtrikes at the Being thereof: It being ſeldom known that a Perſon, who has been guilty of abuſing his generative Faculties ſo unnaturally, has afterwards a proper Regard for Women.

4. From that Indifference to Women, ſo remarkable in Men of this depraved Appetite, it may fairly be concluded, that they are curſed with Inſenſibility to the moſt extatick Pleaſure, which human Nature is in the preſent State capable of enjoying.

5. It ſeems a very juſt Puniſhment, that ſuch Wretches ſhould be deprived of all Taſte for an Enjoyment, upon which they did not ſet a proper Value; and the Continuation of an impious Diſpoſition, which might have been tranſmitted to their Children, if they had had any, may be thereby prevented.

Puff. Law of Nature and Nations, b. 2. c. 3. ſ. 3.

6. By the Levitical Law not only the Man or Woman guilty of Beſtiality was to ſuffer Death; but the Beaſt was likewiſe to be put to Death. This is ſaid to have been ordained, not becauſe the Beaſt had offended: But for the following Reaſons, that the like foul Paſſion might not be excited in another Perſon, by the Sight of the Beaſt; that the Beaſt might not, by remaining alive, keep up the Remembrance of the Wretch who had ſuffered; and that the Beaſt might not, as ſometimes happens,

bring

bring forth a Monſter, the Sight of which would be offenſive and hateful to all good Men. A fourth Reaſon is added in a Note upon the Paſſage; namely, that the divine Author of the Levitical Law, to make Mankind ſenſible how deteſtable this Crime is in his Eyes, would have every Creature put to Death which had contributed to the Commiſſion thereof.

7. It is laid down by *Coke* Ch. J. that the leaſt Degree of Penetration maketh a carnal Knowledge. 3 Inſt. 59.

8. It is ſaid that, as every Indictment for Sodomy muſt contain the Words, *Rem Veneream habuit et carnaliter cognovit*, ſome Kind of Penetration, and alſo of Emiſſion, muſt be proved; and that Emiſſion is *prima facie* Evidence of Penetration. 1 Hawk. Pl. C. 6.

9. It muſt be allowed, that Penetration may be without Emiſſion; and it is eaſy to conceive, that it would in ſome Caſes be difficult to prove Emiſſion where it has in Fact been. It ſeems then a little ſtrange, to make the Proof of Emiſſion neceſſary to the Proof of Sodomy.

10. It is indeed ſaid in one of the Books cited by Mr. Serjeant *Hawkins*, that Emiſſion is an Evidence of Buggery: But it is not ſaid, that the Proof of Emiſſion is neceſſary upon an Indictment for Buggery. 3 Inſt. 59.

11. *Hale* Ch. J. goes further; his Opinion being, that Proof of Emiſſion is not neceſſary upon an Indictment for Buggery. 1 H. H. P. C. 628.

* 12. The Patient in this Offence, as well as the Agent, is guilty of Felony; unleſs he be under fourteen Years of Age. *Page 570 3 Inſt. 59. 1 H. H. P. C. 670.

13. Although this Offence can be committed by only two Perſons; yet if any other Perſon be preſent, abetting and aiding, he is a Principal. 3 Inſt. 59. 1 H. H. P. C. 670.

14. It appears from divers Authors, that in antient Times the Puniſhment of this Offence was Death; but they differ as to the Mode of inflicting it.

15. According to *Britton*, a Sodomite was to be burnt. Britt. lib. 6. c. 9.

16. In *Fleta*, it is ſaid, *pecorantes et ſodomitæ in terra vivi confodiantur.* Flet. lib. 6. c. 35.

17. With the latter agrees the *Mirror*; and it is added, *iſſint que Memoire ſeont reſtraine, pur le grand abomination del fait.* Mirr. c. 4. ſ. 14.

18. About the Time of *Richard* the Firſt, the Practice was to hang a Man, and drown a Woman, guilty of this Offence. 3 Inſt. 58.

19. The Practice of puniſhing this Offence with Death had, for ſome Time before the making of the Statute of the 25 *H.* 8. *c.* 6. been diſcontinued.

20. By this Statute, after reciting, that there is not yet a ſufficient Puniſhment appointed, for the deteſtable and abominable Vice of Buggery with Mankind or Beaſt, it is enacted, "That the ſame Offence be "from henceforth adjudged Felony; and that the Offender, being thereof "convicted, ſhall ſuffer ſuch Pains of Death, as Felons are accuſtomed "to do according to the Order of the Common Law of this Realm; and "that no Perſon, offending in any ſuch Offence, ſhall be admitted to "his Clergy."

21. This Statute was repealed by the 1 *Mar. c.* 1. But it was revived, and made perpetual, by the 5 *Eliz. c.* 17.

22. A Man was found guilty, of having committed Buggery upon a Girl eleven Years of Age, and had received Sentence of Death: But the Judge, before whom he was tried, reprieved him, in order to obtain the Opinion of the Judges, whether this was a Caſe within the Statute. It is ſaid, that no Opinion was given; becauſe the Judges were not unanimous: But *Forteſcue Aland* J. who reports the Caſe, affirms, that Forteſc. 91. *Rex* v. *Wiſeman.*

that a great Majority of them were of Opinion, that this is a Buggery by the Law of *England*. He adds, that the Earl of *Macclesfield*, then Chancellor, to whom he wrote upon the Occaſion, was clearly of Opinion, that this Caſe is not only within the Reaſon, but alſo within the Words, of the Statute; and that he was ſurprized, there ſhould have been any Difference of Opinion among the Judges. The Reporter does moreover cite ſeveral Authorities to ſhew, that under the Word Mankind, which is the Word uſed in the Statute, all Females as well as Males of the human Species are comprehended.

---

*Page 571

* SOLDIERS.

A SOLDIER, ſo called from the *German* Word *Sold* or *Sould*, which ſignifies a Stipend, is a Man hired for Pay to ſerve in War.

1 Inſt. 71. The ancient Method of raiſing Soldiers was in this Manner. A Knight or an Eſquire, who had Revenues, Farmers and Tenants, did covenant with the King, by Indenture inrolled in the Exchequer, to ſerve him in War for a certain Term, with a certain Number of Men, whoſe Names were ſet down in a Liſt.

18 H. 6. c. 18, 19. 7 H. 7. c. 1. 3 H. 8 c. 5. 2 & 3 E. 6. c. 2. 4 & 5 P. & M. c. 3. There are divers Regulations concerning Soldiers in ſome ancient Statutes; but as theſe were adapted to the ancient Method of raiſing Soldiers, which has for many Years been diſcontinued, it is not neceſſary, to give an Account of ſuch Regulations.

The Regulations as to Soldiers, at this Time obſerved, depend upon ſome modern Acts of Parliament, and principally, upon one which is paſſed annually, intituled *An Act for puniſhing Mutiny and Deſertion, and for the better Payment of the Army and their Quarters.*

Such of theſe Regulations, as are of more general Uſe to be known, ſhall be treated of in the following Order,

(A) Of inliſting Soldiers.
(B) In what Caſes Soldiers are free from Arreſt.
(C) Of quartering Soldiers.
(D) Of Carriages for the Uſe of his Majeſty's Forces.
(E) Of the Penalties incurred by encouraging Deſertion or harbouring a Deſerter, and of the Reward for apprehending a Deſerter.
(F) Of the military Puniſhments to which Soldiers are liable.

(G) Of

(G) Of the Civil Punishments to which Soldiers are liable.

(H) Of the Liberty given to Soldiers of exercising Trades.

(I) Of divers Things, which did not fall under any of the foregoing Heads.

---

* (A) Of inlisting Soldiers.

*Page 572

1. BY the 17 *G.* 3. *c.* 3. *par.* 71. it is enacted, "That when and as often as any Person or Persons shall be inlisted as a Soldier or Soldiers in his Majesty's Land Service, he and they shall within four Days, but not sooner than twenty-four Hours, after such inlisting respectively, be carried before the next Justice of the Peace of any County, Riding, City or Place, or chief Magistrate of any City or Town Corporate, not being an Officer of the Army, and before such Justice or chief Magistrate he or they shall be at Liberty to declare his or their Dissent to such Inlisting; and upon such Declaration and returning the inlisting Money, and also each Person so dissenting paying the Sum of twenty Shillings for the Charges expended or laid out upon him, such Person or Persons so inlisted shall be forthwith discharged and set at Liberty in the Presence of such Justice or chief Magistrate; but if such Person or Persons shall refuse, or neglect, within the Space of twenty-four Hours to return and pay such Money as aforesaid, he or they shall be deemed and taken to be inlisted, as if he or they had given his or their Assent thereto before such Justice or chief Magistrate; or if such Person or Persons shall declare his or their having voluntarily inlisted himself or themselves, then such Justice or chief Magistrate shall and he is hereby required forthwith to certify under his Hand, that such Person or Persons is or are duly inlisted, setting forth the Place of the Birth, Age and Calling of him or them respectively, if known, and that the second and sixth Sections of the Articles of War against Mutiny and Desertion were read to him or them, and that he or they had taken the Oath mentioned in the said Articles of War; and if any such Person or Persons, so to be certified as duly inlisted, shall refuse to take the said Oath of Fidelity before the said Justice or chief Magistrate, it shall and may be lawful for such Officer, from whom he has received such Money as aforesaid, to detain and confine such Person or Persons until he or they shall take the Oath before required; and every military Officer that shall act contrary hereto, or offend herein, shall incur the like Penalty and Forfeiture, as is by this Act to be inflicted upon any Officer for making a false and untrue Muster."

A Person inlisted may dissent within twenty-four Hours.

2. The second Section of the Articles of War, which is to be read to an inlisted Man, contains the following Articles.

3. *Art.* 1. "Whatsoever Officer or Soldier shall presume to use traiterous or disrespectful Words against the sacred Person of his Majesty, his Royal Highness the Prince of *Wales*, or any of the Royal Family; if a commissioned Officer he shall be cashiered; if a Non-commissioned Officer or Soldier he shall suffer such Punishment as shall be inflicted upon him by the Sentence of a Court-martial."

4. *Art.* 2. Any Officer or Soldier, who shall behave himself with Contempt or Disrespect towards the General or other Commander in Chief of our Forces, or shall speak Words tending to his Hurt or Dishonour, shall be punished according to the Nature of his Offence by the Judgment of a Court-martial."

5. *Art.*

5. *Art.* 3. "Any Officer or Soldier, who ſhall begin, excite, cauſe or join "in any Mutiny or Deſertion in the Troop, Company or Regiment to "which he belongs, or in any other Troop or Company in our Service, or "on any Party, Poſt, Detachment or Guard, on any Pretence whatſoever, "ſhall ſuffer Death or ſuch other Puniſhment as by a Court-martial ſhall "be inflicted."

6. *Art.* 4. "Any Officer, Non-commiſſioned Officer or Soldier, who "being preſent at any Mutiny or Sedition does not uſe his utmoſt En-
*Page 573 "deavours to ſuppreſs the ſame, or coming to the Knowledge of any "Mutiny or intended Mutiny does not without Delay give Information "thereof to his commanding Officer, ſhall be puniſhed by a Court-martial "with Death or otherwiſe according to the Nature of his Offence."

7. *Art.* 5. "Any Officer or Soldier, who ſhall ſtrike his ſuperior Officer, "or offer to draw or ſhall lift up any Weapon, or offer any Violence "againſt him being in the Execution of his Office, on any Pretence what-"ſoever, or ſhall diſobey any lawful Command of his ſuperior Officer, "ſhall ſuffer Death, or ſuch other Puniſhment as ſhall according to the "Nature of his Offence be inflicted upon him by the Sentence of a Court-"Martial."

8. The ſixth Section of the Articles of War, which is likewiſe to be read to an inliſted Man, contains the following Articles.

9. *Art.* 1. "All Officers and Soldiers, who having received Pay or hav-"ing been duly inliſted in our Service ſhall be convicted of having deſerted "the ſame, ſhall ſuffer Death or ſuch other Puniſhment as by a Court-"martial ſhall be inflicted."

10. *Art.* 2. "Any Non-commiſſioned Officer or Soldier, who ſhall with-"out Leave from his commanding Officer abſent himſelf from his Troop "or Company, or from any Detachment with which he ſhall be com-"manded, ſhall, upon being convicted thereof, be puniſhed according to "the Nature of his Offence at the Diſcretion of a Court-martial."

11. *Art.* 3. "No Non-commiſſioned Officer or Soldier ſhall inliſt him-"ſelf in any other Regiment, Troop or Company, without a regular Diſ-"charge from the Regiment, Troop or Company in which he laſt ſerved, "on the Penalty of being reputed a Deſerter and ſuffering accordingly: "And in Caſe any Officer ſhall knowingly receive and entertain ſuch Non-"commiſſioned Officer or Soldier, or ſhall not after his being diſcovered to "be a Deſerter immediately confine him, and give Notice thereof to the "Corps in which he laſt ſerved, he the ſaid Officer ſo offending ſhall by a "Court-martial be caſhiered."

12. *Art.* 4. "Whatſoever Officer or Soldier ſhall be convicted of having "adviſed or perſuaded any other Officer or Soldier to deſert our Service, "ſhall ſuffer ſuch Puniſhment as ſhall be inflicted upon him by the Sen-"tence of a Court-martial."

13. The Oath which is to be adminiſtred to an inliſted Man is in theſe Words; "I ſwear to be true to our Sovereign King *George*, and to ſerve "him honeſtly and faithfully, in Defence of his Perſon, Crown and Dig-"nity againſt all his Enemies and Oppoſers whatſoever: And to obſerve and "obey his Majeſty's Orders, and the Orders of the Generals and Officers "ſet over me by his Majeſty."

A Perſon abſconding after taking inliſting Money to be deemed inliſted.

14. By the 17 *Geo.* 3. *c.* 3. *par.* 72. it is enacted, "That if any Perſon "or Perſons ſhall receive the inliſting Money from any Officer, knowing it "to be ſuch, and ſhall abſcond or refuſe to go before ſuch Juſtice or chief "Magiſtrate, in order to declare his Aſſent or Diſſent as aforeſaid, ſuch "Perſon or Perſons ſhall be deemed and taken to be enliſted to all Intents "and Purpoſes whatſoever; and ſhall and may be proceeded againſt, as "if he or they had taken the Oath, directed by the ſaid Articles of War "to be taken before ſuch Juſtice or chief Magiſtrate."

15. *Parker*

15. *Parker* an Apprentice, who had inliſted without the Conſent of his Maſter, being brought up by a *Habeas Corpus* to the Court of King's Bench he was diſcharged. MS. Rep. *Rex* and *Parker*, *Eaſter* 31 G. 2.

16. By the 17 *G.* 3. *c.* 4. intituled, *An Act for the Regulation of his Majeſty's Marine Forces while on Shore*, the ſame Proviſions are made as to the inliſting of Men to ſerve as Marines, as in the Paragraph juſt cited are made for the inliſting of Men to ſerve as Soldiers; and it may once for all be obſerved, that the ſame Regulations, as to their being free from Arreſts, their Quarters, their being ſubject to military Puniſhments, and many other Things, are made by this Statute for Marines, as are made by the Mutiny Act for Soldiers. The ſame Regulations made for enliſting Marines as for enliſting Soldiers.

17. By the 16 *G.* 3. *c.* 3. *par.* 1. after reciting, that whereas by an Act made in the ſecond Year of the Reign of his preſent Majeſty, intituled an Act to explain and amend, and reduce into one Act of Parliament the ſeveral Laws now in being, relating to the raiſing and training the Militia within that Part of *Great Britain* called *England*, it is amongſt other Things enacted, that in caſe of an actual Invaſion, or upon imminent Danger thereof, or in caſe of Rebellion, it may and ſhall be lawful for his Majeſty, his Heirs and Succeſſors, the Occaſion being firſt communicated to Parliament, if the Parliament ſhall be then ſitting, or declared in Counſel and notified by Proclamation, if no Parliament ſhall be then ſitting or in being, to order and direct his or their Lieutenants and Deputy Lieutenant therein mentioned, with all convenient Speed to draw out and embody all the Regiments and Battalions of Militia of their reſpective Counties, Ridings, or Places, or ſo many of them as his Majeſty, his Heirs and Succeſſors, ſhall judge neceſſary, in ſuch Manner as ſhall be beſt adapted to the Circumſtances of the Danger; and to direct them to be employed in ſuch Manner as is therein more particularly mentioned: And whereas it might be of great public Utility, that the Militia of this Kingdom ſhould be drawn out, embodied and employed as aforeſaid, upon Occaſion of the preſent Rebellion in *America*, or any Rebellion that may hereafter ariſe in any of the Dominions of the Crown of *Great Britain*, that his Majeſty may be more able to employ his other Forces for the ſuppreſſing of ſuch Rebellion, and at the ſame Time to provide for the Defence of theſe Kingdoms, it is enacted; "That in all Caſes of Rebellion within this Realm "of *Great Britain*, or any of the Territories or Dominions thereunto be- "belonging, the Occaſion being firſt communicated, declared and notified "as in the ſaid Act is provided, it ſhall and may be lawful for his Majeſty "his Heirs and Succeſſors, to order and direct all Regiments and Batta- "lions of Militia, of the reſpective Counties or Places in this Kingdom, "or ſo many of them as his Majeſty, his Heirs and Succeſſors ſhall judge "neceſſary to be drawn out, embodied, led, and employed in any Parts of "theſe Kingdoms, in ſuch Manner and upon the like Terms and Conditi- "ons, and Regulations, to all Purpoſes and Effects whatſoever, as in the "ſaid Act are provided in the Caſes therein mentioned." All the Regulations of the Mutiny Act are to be extended to the Militia, when embodied.

(B) In what Caſes Soldiers are free from Arreſt.

1. BY the 17 *G.* 3. *c.* 3. *par.* 71. In order to prevent, as far as may be, any unjuſt or fraudulent Arreſts that may be made upon Soldiers, whereby his Majeſty and the Publick may be deprived of their Service, it A Soldier not to be arreſted, unleſs for a

Crime or a Debt of ten Pounds.

it is enacted, "That no Perſon whatſoever, who is or ſhall be liſted, or "ſhall liſt or enter himſelf as a Volunteer in his Majeſty's Service, as a "Soldier, either in the Kingdom of *Great Britain* or *Ireland*, or in "*Jerſey*, *Guernſey*, *Alderney*, *Sark*, or *Man*, or the Iſlands thereto be- "longing, or in any of his Majeſty's Plantations, during the Continuance "of this Act, ſhall be liable to be taken out of his Majeſty's Service by "any Proceſs or Execution whatſoever, other than for ſome criminal "Matter, unleſs for a real Debt or other juſt Cauſe of Action, and unleſs "before the taking out of ſuch Proceſs or Execution, not being for a "criminal Matter, the Plaintiff or Plaintiffs therein, or ſome other Per- "ſon or Perſons on his or their Behalf, ſhall make Affidavit before one or "more Judge or Judges of the Court of Record, or other Court, out of "which ſuch Proceſs or Execution ſhall iſſue, or before ſome Perſon au- "thorized to take Affidavits in ſuch Court, that to his or their Knowledge "the original Sum, juſtly due and owing to the Plaintiff or Plaintiffs from "the Defendant or Defendants in the Action, or Cauſe of Action on "which Proceſs ſhall iſſue, or that the original Debt for which ſuch "Execution ſhall be iſſued out, amounts to the Value of ten Pounds at "leaſt, over and above all Coſts of Suit in the ſame Action, or in any "other Action on which the ſame ſhall be grounded; a Memorandum of "which Oath ſhall be marked on the Back of ſuch Proceſs or Writ, for "which Memorandum or Oath no Fee ſhall be taken; and if any Perſon "ſhall nevertheleſs be arreſted contrary to the Intent of this Act, it ſhall "and may be lawful for one or more Judge or Judges of ſuch Court, "upon Complaint thereof made by the Party himſelf, or by any his ſupe- "rior Officer, to examine into the ſame by Oath of the Parties or other- "wiſe, and by Warrant under his or their Hands and Seals to diſcharge "ſuch Soldier ſo arreſted contrary to the Intent of this Act, without paying "any Fee or Fees, upon due Proof made before him or them, that ſuch "Soldier ſo arreſted was legally liſted as a Soldier in his Majeſty's Service, "and arreſted contrary to the Intent of this Act, and alſo to award to "the Party ſo complaining ſuch Coſts as ſuch Judge or Judges ſhall think "reaſonable: For the Recovery whereof he ſhall have the like Remedy, "that the Perſon who takes out the ſaid Execution might have had for his "Coſts, or the Plaintiff in the like Action might have had for the Re- "covery of his Coſts, in caſe Judgment had been given for him with "Coſts againſt the Defendant in the ſaid Action."

But Execution may be had againſt the Goods of a Soldier.

2. But by *par.* 67. To the End that honeſt Creditors, who aim only at the Recovery of juſt Debts, due to them from Perſons entered into and liſted in his Majeſty's Service, may not be hindered from ſuing for the ſame, but on the contrary may be aſſiſted and forwarded in their Suits; and inſtead of an Arreſt, which may at once hurt the Service and occaſion a great Expence and Delay to themſelves, may be enabled to proceed in a more ſpeedy and cheap Method, it is enacted, "That it ſhall and may "be * lawful to or for any Plaintiff or Plaintiffs, upon Notice firſt given "in Writing of the Cauſe of Action to ſuch Perſon or Perſons ſo entered, "or left at his or their laſt Place of Reſidence before ſuch liſting, to file a "common Appearance, in any Action to be brought for or upon Account "of any Debt whatſoever, ſo as to entitle ſuch Plaintiff to proceed therein "to Judgment or Outlawry, and to have an Execution thereupon, other "than againſt the Body or Bodies of him or them ſo liſted as aforeſaid, this "Act or any Thing herein or any former Law or Statute to the contrary "notwithſtanding."

*Page 575

An impreſſed Soldier not to be arreſted but for a criminal Matter.

3. The Exemption from being arreſted, except for a criminal Matter or a Debt of ten Pounds, extended formerly only to Volunteers. But by the 30 *G.* 2. *c.* 8. *par.* 20. it is enacted, "That the Commiſſioners, pre- "ſent

"ſent at a Meeting for liſting Soldiers as in this Act is before directed, "ſhall cauſe the ſecond and ſixth Sections of the Articles of War againſt "Mutiny and Deſertion to be read to the Men impreſſed by virtue of this "Act, and from and after the reading the ſaid Articles of War, every Man "ſo impreſſed ſhall be deemed a liſted Soldier to all Intents and Purpoſes, "and ſhall not be liable to be taken out of his Majeſty's Service by any "Proceſs, other than for ſome criminal Matter."

4. To a *Latitat* iſſued to arreſt a Man the Sheriff returned, that he was liſted according to the Act of the 4 & 5 *Anne, c.* 10. *et ea Occaſione capere non poſſum.* It was inſiſted, that the Sheriff ought to have arreſted the Defendant, and that he might afterwards have been diſcharged by a Judge on common Bail if he were regularly liſted, but that the Sheriff was not to take upon himſelf to determine as to the Regularity of the enliſting. The Court upon Conſideration held the Return to be good, and that, as the Statute operated as a *Superſedeas* to any Proceſs to be iſſued againſt a Perſon inliſted, the Sheriff if he ſhould arreſt ſuch Perſon would be liable to an Action of falſe Impriſonment. It appears from the Clauſe, by which the Plaintiff is enabled to file common Bail and to proceed a Judgment againſt the Defendant, that it is not the Intention of the Statute, that a Soldier ſhould be liable to be arreſted and be afterwards diſcharged on common Bail. If this Man were not regularly liſted, the Plaintiff has his Remedy by Action againſt the Sheriff for a falſe Return. Ld. Raym. 1246. *Sheriff of Middleſex's* Caſe.

5. A Soldier being in Cuſtody upon a Writ *De Excommunicato Capiendo*, for Non-payment of Coſts in a Suit for Tithes in a Court Chriſtian, he was ordered by the Court of King's Bench to be diſcharged, as being within the Reaſon of the Mutiny Act. 11 Mod. 191. Anon.

6. As the Words heretofore in the Mutiny Act were, *that any Perſon, who voluntarily liſts himſelf, ſhall not be taken out of his Majeſty's Service by any Proceſs whatſoever*, it was holden by the Court of King's Bench that only meſne Proceſs was intended, and that a Soldier might be taken in Execution. It appears however from what fell from *Holt*, Ch. J. that the Court of Common Pleas had at that Time been of a contrary Opinion. 11 Mod. 234. *Maſcall* v. *Davys*, Trin. 8 Anne. *ibid.* 252.

7. To remove all Doubt as to this, the Words now conſtantly inſerted in the Mutiny Act are, *that no Perſon, liſted as a Volunteer in his Majeſty's Service as a Soldier, ſhall be liable to be taken out of his Majeſty's Service by any Proceſs or Execution whatſoever, other than for ſome criminal Matter, unleſs for a real Debt, &c.*

8. The Conſtruction of a Mutiny Act has been, that if more than ten Pound had been recovered by a Judgment for Damages and Coſts, in an Action for a Debt under ten Pound, and a ſecond Action be brought upon the Judgment, a Soldier ſhall not be diſcharged upon common Bail; the Court being of Opinion, that, as the Debt which they were to conſider was the Sum recovered by the Judgment, the Defendant ought to be holden to ſpecial Bail. 1 Barn 311. *Nichols* v. *Wilder.*

9. But it is provided by the preſent Mutiny Act, and by all the Mutiny Acts for ſome Years paſt it hath been provided, *that the original * Debt, for which Execution may be iſſued, muſt amount to ten Pounds at leaſt, over and above all Coſts of Suit in the ſame Action, or in any other Action on which the ſame ſhall be grounded.* *Page 576

10. A Trooper, who liſted on the ſixteenth Day of *May* was arreſted upon the nineteenth. Upon a Motion to diſcharge him upon filing common Bail it was ſaid for the Plaintiff, that, as the Affidavit only went to his having been learning to ride, this was not doing Duty as the Act requires, but was only to qualify himſelf for the doing it: But by the Court: It is doing Duty, he receives his Pay and muſt be diſcharged on common Bail. Str. 2. *Bagley* v. *Jenners*, 10 Mod. 346.

11. Upon

Str. 7. *Johnſon* v. *Lowth*, 10 Mod. 346.

11. Upon a Motion to diſcharge a Gunner in the Train of Artillery upon filing common Bail it was inſiſted for the Plaintiff, that a Gunner receives one Shilling *per* Day for his Pay, that he is appointed by Warrant, and that he is in the Nature of a Commiſſion Officer. It was anſwered, that a Gunner is liſted as a common Soldier is, and that he is liable to all the Penalties in the Mutiny Act to which a common Soldier is liable. He was diſcharged upon common Bail; and by the Court: We are informed that a Gunner is within the Deſcription of a common Soldier, the extraordinary Pay being only in Conſideration of the Skill requiſite in his Place.

Sayer 107. *Methuen* v. *Martin*. Mich. 27 G. 2.

12. Upon a Rule to ſhew Cauſe, why a Sum of Money paid by the Defendant ſhou'd not be repaid, it appeared, that the Defendant was a private Man in one of the Troops of Life-Guards; and that, being arreſted for a Debt under ten Pounds, he paid the Debt in order to obtain his Liberty, one Queſtion was, whether the Defendant be ſuch Soldier, as is by the 26 *G.* 2. *c.* 5. exempted from being liable to an Arreſt for a Debt under ten Pounds? *Wright* J. *Deniſon* J. *Lee* C. J. being abſent, were of Opinion that he is. And by *Wright* J. it is declared by that Statute "That no "Perſon, who ſhall be liſted, or ſhall liſt himſelf as a Volunteer in his "Majeſty's Service, as a Soldier, ſhall be liable to be taken out of his Ma"jeſty's Service by any Proceſs, other than for ſome criminal Matter, unleſs "for a real Debt of ten Pounds." *Foſter* J. inclined to be of Opinion, that as a Perſon, inſtead of receiving Money, pays a conſiderable Sum upon being admitted as a private Man into a Troop of Life-Guards, ſuch Perſon is not a Soldier within the Meaning of that Statute. At another Day, a Certificate being produced from the Commiſſary General's Office, that the Defendant did liſt himſelf as a Volunteer; and it appearing, that the Articles of War were read over to him; and that the Oath, directed to be adminiſtered to a liſted Soldier by a Juſtice of the Peace, was taken by him. *Foſter* J. concurred in Opinion with the other Juſtices. Another Queſtion was, whether, although the Defendant would, whilſt under the Arreſt, have been entitled to the Diſcharge of his Perſon, he be now entitled, to have the Money paid to obtain his Liberty repaid? It was holden that he is; and by the Court: It is equally reaſonable, that the Money paid by the Defendant to obtain his Liberty ſhould be repaid, as that his Perſon, in caſe the Application had been on that Account, ſhould have been diſcharged.

1 Barn. 311. *Bowler* v. *Owen*.

13. An Out-penſioner of *Chelſea* College having been arreſted, a Queſtion aroſe, whether he were intitled to his Diſcharge as being a Soldier in his Majeſty's Service? It was holden that he was not; becauſe he is not under military Diſcipline, and only ſubject to the Controul of the Commiſſioners of the College.

(C) Of quartering Soldiers.

Soldiers may be quartered in Inns, Alehouſes, &c. but not in private Houſes.

1. BY the 17 *G.* 3. *c.* 3. *par.* 25. After reciting, that whereas by *the Petition of Right*, in the third Year of King *Charles* the Firſt, it is enacted and declared, that the People of the Land are not by the Laws to be burthened with the ſojourning of Soldiers againſt their Wills; and by a Clauſe in an Act of Parliament, made in the one and thirtieth Year of the Reign of King *Charles* the Second, it is declared and enacted, that no Officer Civil or Military, or other Perſon whatſoever, ſhould from thenceforth preſume to place, quarter or billet, any Soldier or Soldiers upon any Subject

Subject or inhabitant of this Realm of any Degree, Quality or Profeſſion whatſoever, without his Conſent; and that it ſhall and may be lawful for any * Subject, Sojourner, or Inhabitant, to refuſe to quarter any Soldier or Soldiers, notwithſtanding any Demand or Warrant, or Billeting whatſoever: But foraſmuch as at this Time, and during the Continuance of this Act, there is and may be Occaſion, for the marching and quartering of Regiments, Troops and Companies, in ſeveral Parts of this Kingdom, it is enacted, "That for and during the Continuance of this Act, and no longer, "it ſhall and may be lawful to and for the Conſtables, Tythingmen, Headboroughs and other chief Officers and Magiſtrates of Cities, Towns and "Villages, and other Places within *England*, *Wales* and the Town of *Berwick upon Tweed*, and in their Default or Abſence, for any one Juſtice "of the Peace, inhabiting in or near any ſuch City, Town, Village or "Place, and for no others; and ſuch Conſtables, and other chief Magiſtrates as aforeſaid are hereby required, to quarter and billet the Officers "and Soldiers in his Majeſty's Service in Inns, Livery-ſtables, Ale-houſes, "Victualling houſes, and the Houſes of Sellers of Wine by Retail to be "drunk in their own Houſes or Places thereunto belonging, other than and "except Perſons who keep Taverns only, being Freemen of the Company "of Vintners of the City of *London*, notwithſtanding ſuch Perſons who "keep Taverns only have taken out Victualling Licenſes; and all Houſes "of Perſons ſelling Brandy, Strong Waters, Cyder or Metheglin, by Retail to be drank in their Houſes, other than and except the Houſes of "Diſtillers, who keep Houſes or Places of diſtilling Brandy or Strong Waters, and the Houſe of any Shopkeeper, whoſe principal Dealings ſhall "be more in other Goods and Merchandizes than in Brandy or Strong Waters, ſo as ſuch Diſtillers or Shopkeepers do not permit, or ſuffer, tippling in his or their Houſes, and in no other and in no private Houſe "whatſoever; nor ſhall any more Billets at any Time be ordered, than "there are effective Soldiers preſent to be quartered."

*Page 577

A Magiſtrate or Conſtable quartering a Soldier in a private Houſe liable to an Action.

2. By the ſame *Par.* it is provided, "That if any Conſtable, Tythingman or ſuch like Officer, or Magiſtrate as aforeſaid, ſhall preſume to "quarter or billet any Officer or Soldier in any private Houſe, without the "Conſent of the Owner or Occupier, in ſuch Caſe ſuch Owner or Occupier ſhall have his or their Remedy at Law againſt ſuch Magiſtrate or "Officer, for the Damage that ſuch Owner or Occupier ſhall ſuſtain thereby."

Salk. 387. *Parkhurſt* v. *Foſter*, Carth. 417. Ld. Raym. 479.

3. In an Action of Treſpaſs againſt a Conſtable for quartering a Dragoon upon the Plaintiff, it was found by a ſpecial Verdict, that the Plaintiff kept a Houſe at *Epſom*, and let Lodgings to ſuch as came there for the Benefit of the Air and Waters, that he dreſſed Meat for his Lodgers at four Pence *per* Joint, and ſold them Small Beer at two Pence *per* Mugg, and that he likewiſe found them Stable Room, Hay and other Things for Horſes, at certain Rates, and the Queſtion was, whether he were liable to have a Soldier quartered upon him? it was holden that he was not; and by *Holt* Ch. J. this Caſe is ſo plain, that there is no Occaſion for giving Reaſons.

Penalty on a Military Officer quartering Soldiers contrary to this Act.

4. By the 17 *G.* 3. *c.* 3. *par.* 25. it is provided, "That if any military "Officer ſhall take upon him to quarter Soldiers, otherwiſe than is limited and allowed by this Act, or ſhall uſe or offer any Menace or "Compulſion to any Mayors, Conſtables, or other civil Officers before-"mentioned, tending to deter and diſcourage any of them from performing any Part of their Duty hereby required or appointed, ſuch "military Officer ſhall for every ſuch Offence, being thereof convicted "before any two or more of the next Juſtices of the Peace of the County, "by the Oath of two credible Witneſſes, be deemed and taken to be

" *ipso facto* caſhiered, and ſhall be utterly diſabled to have or hold any " military Employment within this Kingdom, or in his Majeſty's Service; " provided the ſaid Conviction be affirmed at the next Quarter-Seſſions of " the Peace of the ſaid County, and a Certificate thereof be tranſmitted to " the Judge Advocate, who is hereby obliged to certify the ſame to the " next Court-martial."

Soldiers Wives, Children or Servants not to be quartered without Conſent.

5. By *par.* 48. it is enacted, " That if any Officer military or civil, by " this Act authorized to quarter Soldiers in any Houſes hereby appointed " for that Purpoſe, ſhall at any Time during the Continuance of this Act " quarter the Wives, Children, or Men or Maid Servants of any Officer or " Soldier, in any ſuch Houſes againſt the Conſent of the * Owners, the " Party offending, if an Officer of the Army, ſhall upon Complaint and " Proof thereof made to the Commander in Chief of the Army, or Judge " Advocate, be *ipſo facto* caſhiered; and if a Conſtable, Tythingman or " other civil Officer, he ſhall forfeit to the Party aggrieved twenty Shillings, " upon Complaint and Proof made thereof to the next Juſtice of Peace, to " be levied by Warrant of ſuch Juſtice by Diſtreſs and Sale of his Goods."

*Page 578

Perſons aggrieved by the quartering of Soldiers to be relieved.

6. By *par.* 25. it is provided, " That in caſe any Perſon ſhall find himſelf " aggrieved, in that ſuch Conſtable, Tythingman or Headborough, chief " Officer or Magiſtrate, ſuch chief Officer or Magiſtrate not being a Juſtice " of the Peace, has quartered or billeted in his Houſe a greater Number " of Soldiers, than he ought to bear in Proportion to his Neighbours, and " ſhall complain thereof to one or more Juſtice or Juſtices of the Peace of " the Diviſion, City or Liberty where ſuch Soldiers are quartered; or in " caſe ſuch chief Officer or Magiſtrate ſhall be a Juſtice of the Peace, then " on Complaint made to two or more Juſtices of the Peace of ſuch Divi- " ſion, City or Liberty, ſuch Juſtices reſpectively ſhall have and have here- " by Power to relieve ſuch Perſon, by ordering ſuch and ſo many of the " Soldiers to be removed, and quartered upon ſuch other Perſon or Per- " ſons as they ſhall ſee Cauſe; and ſuch other Perſon or Perſons ſhall be " obliged to receive ſuch Soldiers accordingly."

No Juſtice of the Peace being a military Officer, to quarter a Soldier under his own Command.

7. By *par.* 26. it is enacted, " That no Juſtice or Juſtices of the Peace, " having or executing any military Office or Commiſſion in that Part of " *Great Britain* called *England*, ſhall and may, during the Continuance of " this Act, directly or indirectly be concerned in the quartering or billet- " ing or appointing any Quarters for any Soldier or Soldiers in the Regi- " ment, Troop or Company, under the immediate Command or Commands " of ſuch Juſtice or Juſtices according to the Diſpoſition made for quarter- " ing of any Soldier or Soldiers by Virtue of this Act; but that all War- " rants, Acts, Matters or Things, executed or appointed by ſuch Juſtice or " Juſtices of the Peace, for or concerning the ſame, ſhall be void, any " Thing in this Act to the contrary notwithſtanding."

Penalty on an Officer taking Money to excuſe the quartering of a Soldier.

8. By *par.* 29. it is enacted, " That if any Officer ſhall take or cauſe to " be taken, or knowingly ſuffer to be taken, any Money of any Perſon, " for excuſing the quartering of Officers or Soldiers or any of them in any " Houſe allowed by this Act, every ſuch Officer ſhall be caſhiered, and be " incapable of ſerving in any military Employment whatſoever."

In what Manner Officers may exchange Men or Horſes in their Quarters.

9. By *par.* 31. after reciting, that ſome Doubts have ariſen, whether commanding Officers of any Regiment, Troop or Company, may exchange any Man or Horſe quartered in any Town or Place, with another Man or Horſe quartered in the ſame Place, for the Benefit of the Service, it is enacted, " That ſuch Exchange as above mentioned may be made by " ſuch commanding Officers reſpectively, provided the Number of Men " and Horſes do not exceed the Number at that Time billeted on ſuch " Houſe or Houſes; and the Conſtables, Tythingmen, Headboroughs

" and

" and other chief Officers or Magiſtrates of the Cities, Towns and Vil-
" lages, or other Places, where any Regiment, Troop, or Company ſhall
" be quartered, are hereby required to billet ſuch Men and Horſes hereby
" exchanged accordingly."

Penalty on a Conſtable for not quartering Soldiers or for taking Money to excuſe the quartering of them.

10. By *par* 68. it is enacted, " That if any High Conſtable, Conſtable,
" Beadle or other Officer or Perſon whatſoever, who by Virtue or Colour
" of this Act ſhall quarter or billet, or be employed in quartering or
" billeting any Officers or Soldiers, ſhall neglect or refuſe, for the Space
" of two Hours, to quarter or billet ſuch Officers or Soldiers, when
" thereunto required in ſuch Manner as is by this Act directed, provided
" ſufficient Notice be given before the Arrival of ſuch Troops; or ſhall
" receive, * demand, contract or agree for any Sum or Sums of Money
" or any Reward whatſoever, for or on Account of excuſing, or in order
" to excuſe, any Perſon or Perſons whatſoever from quartering, or receiv-
" ing into his, her or their Houſe or Houſes, any ſuch Officer or Sol-
" dier, and ſhall be thereof convicted before any one or more Juſtice or
" Juſtices of Peace of the County, City or Liberty, within which ſuch
" Offence ſhall be committed, either by his own Confeſſion, or by the
" Oath of one or more credible Witneſs or Witneſſes, which Oath the
" ſaid Juſtice or Juſtices is and are hereby impowered to adminiſter,
" every ſuch High Conſtable, Conſtable, Beadle, or other Officer or Per-
" ſon ſo offending, ſhall forfeit for every ſuch Offence the Sum of five
" Pounds, or any Sum of Money not exceeding five Pounds nor leſs
" than forty Shillings, as the ſaid Juſtice or Juſtices, before whom the
" Matter ſhall be heard, ſhall in his or their Diſcretion think fit, to be le-
" vied by Diſtreſs and Sale of the Goods of the Perſon offending, by War-
" rant under the Hand and Seal, or Hands and Seals, of ſuch Juſtice or
" Juſtices before whom ſuch Offender ſhall be convicted, or one or more
" of them, to be directed to any other Conſtable within the County, City
" or Liberty, or to any of the Overſeers of the Poor of the Pariſh where
" the Offender ſhall dwell; the ſaid Sum of five Pounds, or the ſaid Sum
" not exceeding five Pounds nor leſs than forty Shillings, when levied,
" to be paid to the Overſeers of the Poor of the Pariſh wherein the Of-
" fence ſhall be committed, or to ſome one of them, for the Uſe of
" the Poor of the Pariſh."

* Page 579

A Juſtice of the Peace may require an Account of the Number of Soldiers quartered.

11. By *par.* 69. it is enacted, " That it ſhall and may be lawful to and
" for any one or more Juſtice or Juſtices of the Peace, within their re-
" ſpective Counties, Cities or Liberties, by Warrant or Order under his
" or their Hand and Seal, or Hands and Seals, at any Time or Times
" during the Continuance of this Act, to require and command any High
" Conſtable, Conſtable, Beadle or other Officer, who ſhall quarter or
" billet any Soldiers in Purſuance of this Act, to give an Account in
" Writing, unto the ſaid Juſtice or Juſtices requiring the ſame, of the
" Number of Officers or Soldiers who ſhall be quartered or billeted by
" them, and alſo the Names of the Houſekeepers or Perſons upon whom
" every ſuch Officer or Soldier ſhall be quartered or billeted, together
" with an Account of the Street or Place where every ſuch Houſekeeper
" dwells, and the Signs, if any, belonging to their Houſes; to the End it
" may appear to the ſaid Juſtice or Juſtices where ſuch Officers and Sol-
" diers are quartered and billeted, and that he or they may be thereby
" the better enabled to prevent or puniſh all Abuſes in the quartering or
" billeting of them."

Officers and Soldiers to be furniſhed with Diet and Small Beer in their Quarters.

12. By *par.* 27. it is enacted, " That the Officers and Soldiers, quartered
" and billeted as aforeſaid, ſhall be received and furniſhed with Diet and
" Small Beer by the Owners of the Inns, Livery Stables, Alehouſes,
" Victualling-Houſes, and other Houſes in which they are allowed to be
" quartered and billeted by this Act, paying and allowing for the ſame

" the ſeveral Rates herein after mentioned, to be payable out of the Sub-
" ſiſtence-Money for Diet and Small Beer."

What may be allowed Soldiers in the Room of furniſhing them with Diet.

13. But by *par.* 28. it is provided, " That in caſe any Innholder or
" other Perſon, on whom any Non-commiſſion Officers or private Men
" ſhall be quartered by Virtue of this Act, except on a March or employ-
" ed in recruiting, and likewiſe except the Recruits by them raiſed, for
" the Space of ſeven Days at moſt, for ſuch Non-commiſſion Officers and
" Soldiers, who are recruiting and Recruits by them raiſed, ſhall be de-
" ſirous to furniſh ſuch Non-commiſſion Officers or Soldiers with Can-
" dles, Vinegar and Salt, and with either Small Beer or Cyder, not ex-
" ceeding five Pints for each Man *per Diem gratis*, and allow to ſuch
" Non-commiſſion Officers or Soldiers the Uſe of Fire, and the neceſſary
*Page 580 " * Utenſils for dreſſing and eating their Meat, and ſhall give Notice
" of ſuch his Deſire to the commanding Officer, and ſhall furniſh and
" allow the ſame accordingly; then in ſuch Caſe the Non-commiſſion Offi-
" cers and Soldiers ſo quartered ſhall provide their own Victuals."

Officer receiving the Subſiſtence Money to pay what is due where Soldiers are quartered at certain Rates, and in Default thereof the Paymaſter of the Army to do it.

14. By *par.* 36. to the End that the Quarters of Officers and Soldiers in *Great Britain*, and in *Jerſey*, *Guernſey*, *Alderney*, *Sark* and *Man*, and the Iſlands thereunto belonging, may be duly paid and ſatisfied, and his Majeſty's Duties of Exciſe better anſwered, it is enacted, " That from and
" after the Twenty fourth Day of *March* One thouſand ſeven hundred
" and ſeventy-ſeven every Officer, to whom it belongs to receive, or that
" does actually receive, the Pay, or Subſiſtence Money either for a whole
" Regiment, or particular Troops or Companies, or otherwiſe, ſhall im-
" mediately upon ſuch Receipt of every particular Sum, which ſhall
" from Time to Time be paid, returned or come to his or their Hands on
" Account of Pay or Subſiſtence, give publick Notice thereof to all Per-
" ſons keeping Inns or other Places, where * Officers or Soldiers are quar-
" tered by Virtue of this Act; and ſhall appoint the ſaid Inn-keepers and
*Page 581 " others to repair to their Quarters, at ſuch Times as they ſhall appoint
" for the Diſtribution and Payment of the ſaid Pay or Subſiſtence Money
" to the Officers or Soldiers, which ſhall be within four Days at the fur-
" theſt after the Receipt of the ſame as aforeſaid: And the ſaid Inn-
" keepers and others ſhall then and there acquaint ſuch Officer or Officers
" with the Accounts or Debts, if any ſhall be, between them and the
" Officers and Soldiers ſo quartered in their reſpective Houſes; which Ac-
" counts the ſaid Officer or Officers are hereby required to accept of, and
" immediately pay the ſame, before any Part of the ſaid Pay or Subſiſt-
" ence Money be diſtributed either to the Officers or Soldiers: Provided
" the ſaid Accounts exceed not, for a Commiſſion Officer of Horſe, be-
" ing under the Degree of a Captain, for ſuch Officer's Diet and Small
" Beer *per Diem* two Shillings; nor for one Commiſſion Officer of Dra-
" goons, being under the Degree of a Captain, for ſuch Officer's Diet
" and Small Beer *per Diem* one Shilling; nor for one Commiſſion Officer
" of Foot, being under the Degree of a Captain, for ſuch Officer's Diet
" and Small Beer *per Diem* one Shilling; and if ſuch Officer ſhall have
" a Horſe or Horſes, for each Horſe or Horſes for their Hay and
" Straw *per Diem* ſix Pence; nor for one Light Horſeman's Diet and
" Small Beer *per Diem* ſix Pence, and Hay and Straw for his Horſe *per*
" *Diem* ſix Pence; nor for one Dragoon's Diet and Small Beer *per Diem*
" ſix Pence, and Hay and Straw for his Horſe *per Diem* ſix Pence; nor
" for one Foot Soldier's Diet and Small Beer *per Diem* four Pence: And
" if any Officer or Officers as aforeſaid ſhall not give Notice as aforeſaid,
" and ſhall not immediately upon producing ſuch Account ſtated ſatisfy,
" content and pay the ſame, upon Complaint and Oath made thereof

" by

" by any two Witneſſes, at the next Quarter-Seſſions for the County or " City where ſuch Quarters were, which Oath the Juſtices of the Peace " at ſuch Seſſions are hereby authorized and required to adminiſter, the " Paymaſter or Paymaſters of his Majeſty's Guards, Garriſons and Ma- " rines are hereby required and authorized, upon Certificate of the ſaid " Juſtices before whom ſuch Oath was made of the Sums due upon ſuch " Accounts, and the Perſons to whom the ſame is owing, to pay and ſa- " tisfy the ſaid Sums out of the Arrears due to the ſaid Officer or Officers, " upon Penalty, that ſuch Paymaſter or Paymaſters ſhall forfeit their re- " ſpective Place or Places of Paymaſter or Paymaſters, and be diſcharged " from holding the ſame for the future; and in caſe there ſhall be no " Arrears due to the ſaid Officer or Officers, then the ſaid Paymaſter or " Paymaſters are hereby authorized and required, to deduct the Sums he " or they ſhall pay, purſuant to the Certificate of the ſaid Juſtices, out " of the next Pay or Subſiſtence Money of the Regiment to which ſuch " Officer or Officers ſhall belong; and ſuch Officer or Officers ſhall for " every ſuch Offence, or for neglecting to give Notice of the Receipt of " ſuch Pay or Subſiſtence Money as aforeſaid, be deemed and taken, and " are hereby declared *ipſo facto* caſhiered. And where it ſhall happen, " that the Subſiſtence Money due to any Officer or Soldier ſhall by Occa- " ſion of any Accident not to be paid ſuch Officer or Soldier, or ſuch " Officer or Soldier ſhall neglect to pay the ſame, ſo that Quarters cannot " be or are not paid as this Act directs; and where any Horſe, Foot or " Dragoons ſhall be upon their March, ſo that no Subſiſtence can then be " remitted to them, to make Payment as this Act directs, or they ſhall " neglect to pay the ſame; in every ſuch Caſe it is hereby further enact- " ed, that every ſuch Officer ſhall, before his or their Departure out of " his or their Quarters, where ſuch Regiment, Troop or Company, ſhall " remain for any Time whatſoever, make up the Accounts as this Act di- " rects, with every Perſon with whom ſuch Regiment, Troop or Com- " pany have quartered, and ſign a Certificate thereof, and give the ſaid " Certificate by him ſo ſigned to the Party to whom * ſuch Money is due, *Page 582 " with the Name of ſuch Regiment, Troop or Company, to which he " or they ſhall belong; to the End the ſaid Certificate may be forthwith " tranſmitted to the Paymaſter of his Majeſty's Guards and Garriſons, or " to the Paymaſter of the Marines, who are hereby required immediately " to make Payment thereof to the Perſon or Perſons to whom ſuch Mo- " nies ſhall be due, to the End the ſame may be applied to ſuch Regiment, " Troop or Company reſpectively, under Pain as is in this Act before di- " rected for Non-payment of Quarters."

15. By *par.* 33. it is enacted, " That it ſhall and may be lawful, to " quarter Officers and Soldiers in *Scotland*, in ſuch and the like Places and " Houſes, as they might have been quartered in by the Laws in Force in " *Scotland* at the Time of the Union; and that the Poſſeſſors of ſuch " Houſes ſhall only be liable to furniſh the ſaid Officers and Soldiers quar- " tered there, as by the ſaid Laws in Force at the Time of the Union " was provided; and that no Officer ſhall be obliged to pay for his Lodg- " ing, where he ſhall be regularly billeted, except in the Suburbs of *Edin- " burgh.*" Soldiers to be quartered in *Scotland* as before the Union.

16. By *par.* 68. it is enacted, " That if any Victualler or any other Per- " ſon liable by this Act to have any Officer or Soldier quartered or billeted " on him or her, ſhall refuſe to receive or victual any ſuch Office or Sol " dier quartered or billeted upon him or her as aforeſaid; or ſhall refuſe " to furniſh or allow, according to the Directions of this Act, the ſe- " veral Things herein before reſpectively directed to be furniſhed or al- " lowed to Non-commiſſion Officers or Soldiers ſo quartered or billeted Penalty on a Perſon not receiving an Officer or Soldier quartered upon him.

" on

" on him or her as aforeſaid; or ſhall neglect to refuſe to furniſh good and " ſufficient Hay and Straw for each Horſe quartered or billeted on him or " her as aforeſaid, at the Rate herein before mentioned, and ſhall be " thereof convicted, before one or more Juſtice or Juſtices of the Peace " of the County, City or Liberty, within which ſuch Offence ſhall be com- " mitted, either by his own Confeſſion, or by the Oath of one or more cre- " dible Witneſs or Witneſſes, which Oath the ſaid Juſtice or Juſtices is " and are hereby impowered to adminiſter, every Perſon ſo offending ſhall " forfeit for every ſuch Offence the Sum of five Pounds, or any Sum of " Money not exceeding five Pounds nor leſs than forty Shillings, as the " ſaid Juſtice or Juſtices, before whom the Matter ſhall be heard, ſhall " in his or their Diſcretion think fit, to be levied by Diſtreſs and Sale of " the Goods of the Perſon offending, by Warrant under the Hand and " Seal, or under the Hands and Seals, of ſuch Juſtice or Juſtices before " whom ſuch Offender ſhall be convicted, or one or more of them, to be " directed to any other Conſtable within the County, City or Liberty, or " to any of the Overſeers of the Poor of the Pariſh, where the Offender " ſhall dwell; the ſaid Sum of five Pounds, or the ſaid Sum not exceed- " ing five Pounds nor leſs than forty Shillings, when levied, to be paid to " the Overſeers of the Poor of the Pariſh wherein the Offence ſhall be " committed, or to ſome one of them, for the Uſe of the Poor of the " ſaid Pariſh."

MS. Rep. *Morton* v. *Closbury and another, Bucks, Lent Aſſize* 1757.

17. In an Action of Treſpaſs againſt two Juſtices of the Peace, who had iſſued a Warrant for levying the Penalty upon the Plaintiff for not receiving a Soldier billeted upon him, the Caſe appeared upon the Evidence to be thus. A Shopkeeper, who likewiſe dealt in Spirituous Liquors, in order to intitle himſelf to a Licence for ſelling Spirituous Liquors by Retail, had a Licence as a Victualler. For the Sake of obtaining this laſt Licence, ſome Beer was laid in by him, of which an Account was taken by the Exciſe Officer, as is done of the Stock of a Victualler; but he never ſold any of this, nor acted in any Manner as a Victualler, nor ſuffered Spirituous Liquors to be drank in his Houſe. The Plaintiff was nonſuited, for Want of producing the Warrant of the two Juſtices; but *Foſter*, J. before whom the Cauſe was tried, ſaid, he ſhould upon the Merits have been of Opinion, that the Plaintiff was not liable to have Soldiers quartered upon him.

Soldiers to be removed if quartered in a Place where an Election for a Member of Parliament is to be.

19. By the 8 *G.* 2. *c.* 30. *par.* 1. After reciting, that by the ancient common Law of this Land all Elections ought to be free; and that by an Act paſſed in the Third Year of the Reign of King *Edward* the Firſt, of famous Memory, it is commanded upon great Forfeiture, that no Man by Force of Arms, nor by Malice or Menacing, ſhall diſturb any to make free Election; and that the Freedom of Elections of Members to ſerve in Parliament, is of the utmoſt Conſequence to the Preſervation of the Rights and Liberties of this Kingdom; and that it hath been the Uſage and Practice, to cauſe any Regiment, Troop or Company, or any Number of Soldiers, which hath been quartered in any City, Borough, Town or Place, wherein any Election of Members to ſerve in Parliament hath been appointed to be made, to remove and continue out of the ſame during the Time of ſuch Election, except in ſuch particular Caſes as are herein after ſpecified, to the End that the ſaid Uſage and Practice may be ſettled and eſtabliſhed for the future, it is enacted, " That when and " as often as any Election, of any Peer or Peers to repreſent ths Peers of " *Scotland* in Parliament, or of any Member or Members to ſerve in " Parliament, ſhall be appointed to be made, the Secretary at War for " the Time being, or in caſe there ſhall be no Secretary at War, then " ſuch Perſon, who ſhall officiate in the Place of the Secretary at War, " ſhall and is hereby required, at ſome convenient Time before the Day

" appointed

"appointed for such Election, to issue and send forth proper Orders in "Writing, for the Removal of every such Regiment, Troop or Company, "or other Number of Soldiers, as shall be quartered or billeted in any "such City, Borough, Town or Place, where such Election shall be ap- "pointed to be made, out of every such City, Borough, Town or Place, "one Day at least before the Day appointed for such Election, to the Dis- "tance of two or more Miles from such City, Borough, Town or Place, "and not to make any nearer Approach to such City, Borough, Town or "Place as aforesaid, until one Day at the least after the Poll to be taken "at such Election shall be ended, and the Poll Books closed."

Penalty on the Secretary at War for not removing Soldiers so quartered.

20. By *par.* 2. it is enacted, "That in case the Secretary at War for the "Time being, or such Person who shall officiate in the Place of the Secre- "tary at War, shall neglect or omit to issue or send forth such Orders as "aforesaid, according to the true Intent and Meaning of this Act, and shall "be thereof lawfully convicted, upon any Indictment to be presented at "the next Assizes, or Sessions of Oyer and Terminer, to be held for the "County where such Offence shall be committed, or on an Information to "be exhibited in the Court of King's Bench, within six Months after such "Offence committed, such Secretary at War, or Person who shall officiate "in the Place of the Secretary at War, shall for such Offence be discharged "from their said respective Offices, and shall * from thenceforth be utterly "disabled, and made incapable to hold any Office or Employment civil or "military in his Majesty's Service." *Page 583

The Secretary at War is not to incur this Penalty unless he have Notice of the issuing of the Writ.

20. But by *par.* 5. it is provided, "That the Secretary at War, or such "Person who shall officiate in the Place of the Secretary at War, shall not "be liable to any Forfeiture or Incapacity, for not sending such Order as "aforesaid, upon any Election to be made of a Member to serve in Parlia- "ment on a Vacancy of any Seat there, unless Notice of the making out "any new Writ for such Election shall be given to him by the Clerk of the "Crown in Chancery, or other Officer making out any new Writ for such "Election, which Notice he is hereby directed and required to give with "all convenient Speed after the making out the said Writ."

This Act is not to extend to the Guards of the King or any of the Royal Family, nor to any Garrison.

21. By *par.* 3. it is provided, "That nothing in this Act contained "shall extend, or be construed to extend, to the City and Liberty of *West-* "*minster*, or the Borough of *Southwark*, for or in Respect of the Guards "of his Majesty, his Heirs or Successors, nor to any City, Borough, Town "or Place, where his Majesty, his Heirs or Successors, or any of his "Royal Family, shall happen to be or reside at the Time of any such "Election as aforesaid, for or in Respect of such Number of Troops or "Soldiers only, as shall be attendant as Guards to his Majesty, his Heirs "or Successors, or to such other Person of the Royal Family as is afore- "said; nor to any Castle, Fort or fortified Place, where any Garrison is "usually kept, for or in Respect of such Number of Troops or Soldiers "only, whereof such Garrison is composed."

Nor to any Soldier who has a Right to vote at such Election.

22. By *par.* 4. it is provided, "That nothing in this Act shall extend, "or be construed to extend, to any Officer or Soldier, who shall have a "Right to vote at any such Election as aforesaid, but that every such "Officer and Soldier may freely, and without Interruption, attend and give "his Vote at such Election, any Thing herein before contained to the con- "trary notwithstanding."

(D) Of Carriages for the Use of his Majesty's Forces.

Justices to order Constables to provide Carriages.

1. BY the 17 *G.* 3. *c.* 3. *par.* 42. it is enacted, "That for the better "and more regular Provision of Carriages for his Majesty's Forces, "in their Marches, or for their Arms, Clothes and Accoutrements, in *England*, *Wales* and the Town of *Berwick upon Tweed*, all Justices of the "Peace, within their several Counties, Ridings, Divisions, Shires, Liberties and Precincts, being duly required thereunto by an Order from his "Majesty, or the General of his Forces, or the Master General or Lieutenant General of his Majesty's Ordnance, shall, as often as such Order is "brought and shewn unto one or more of them, by the Quarter Master, "Adjutant or other Officer of the Regiment, Detachment, Troop or "Company so ordered to march, issue out his or their Warrants, to the "Constables or Petty Constables of the Division, Riding, City, Liberty, "Hundred and Precinct, from, through, near or to, which such Regiment, "Detachment, Troop or Company shall be ordered to march, requiring "them to make such Provision for Carriages, with able Men to drive the "same, as is mentioned in the said Warrant, allowing them sufficient Time "to do the same, that the neighbouring Parts may not always bear the "Burthen; and in case sufficient Carriages cannot be provided within any "such Liberty, Division or Precinct, then the next Justice or Justices of "the Peace of the County, Riding or Division shall, upon * such Order *Page 584
"as aforesaid being brought and shewn to one or more of them by any of "the Officers aforesaid, issue his or their Warrants to the Constables or "Petty Constables of such next County, Riding, Liberty, Division or Precinct, for the Purposes aforesaid, to make good such Deficiency: and the "aforesaid Officer or Officers, who by virtue of the aforesaid Warrant "from the Justices of the Peace are to demand the Carriage or Carriages "therein mentioned of the Constable or Petty Constables to whom the "Warrant is directed, is and are hereby required, at the same Time to "pay down in Hand to the said Constable or Petty Constable, for the Use "of the Person who shall provide such Carriages and Men, the Sum of "one Shilling for every Mile any Waggon with five Horses shall travel; "and the Sum of one Shilling for every Mile any Wain with six Oxen, "or four Oxen with two Horses shall travel; and the Sum of nine Pence "for every Mile any Cart with four Horses shall travel; and so in Proportion for less Carriages; for which respective Sums so received, the said "Constable or Petty Constable is hereby required to give a Receipt in Writing to the Person or Persons paying the same: And such Constable or "Petty Constable shall order and appoint such Person or Persons, having "Carriages within their respective Liberties, as they shall think proper, to "provide and furnish such Carriages and Men, according to the Warrant "aforesaid, who are hereby required to provide and furnish the same accordingly."

Carriages to be provided in *Scotland* as before the Union.

2. By *par.* 47. it is enacted, "That the Carriages, for the Services of "the Forces from Time to Time quartered or marching in *Scotland*, shall "be provided in like Manner, and at the Rates, and the Furnisher of such "Carriages shall be paid, as was directed by the Law in Force in *Scotland* "at the Time of the Union.

Penalty on an Officer forcing a Carriage to go more than

3. By *par.* 42. it is enacted, "That if any military Officer or Officers, "for the Use of whose Troop or Company the Carriage was provided, "shall force or constrain any Waggon, Wain, Cart or Carriage, to travel "more than one Day's Journey; or shall not discharge the same in due

"Time

" Time for their Return Home; or ſhall ſuffer any Soldier or Servant, " except ſuch as are ſick, or any Woman to ride in the Waggon, Wain, " Cart or Carriage aforeſaid; or ſhall force any Conſtable or Petty Con- " ſtable by Threatnings or menacing Words, to provide Saddle Horſes for " themſelves or Servants; or ſhall force Horſes from the Owners by them- " ſelves Servants or Soldiers; every ſuch Officer for every ſuch Offence " ſhall forfeit the Sum of five Pounds; Proof thereof being made upon " Oath before two of his Majeſty's Juſtices of the ſame County or Riding, " who are to certify the ſame to the Paymaſter General, or other reſpec- " tive Paymaſter of his Majeſty's Forces, who is hereby required to pay " the aforeſaid Sum of five Pounds, according to the Order and Appoint- " ment, under the Hands and Seals of the aforeſaid Juſtices of the Peace " of the ſame County or Riding."

one Day's Journey, or ſuffering Women and others to ride, or demanding Saddle Horſes to be provided.

4. By *par.* 46. it is enacted, " That no Waggon, Wain, Cart or Carriage, " impreſſed by the Authority of this Act, ſhall be liable or obliged by " virtue of this Act to carry above thirty hundred Weight, any Thing in " this Act contained to the contrary notwithſtanding."

No Carriage is obliged to carry more than thirty hundred Weight.

5. By *par.* 43. it is enacted, " That if any High Conſtable or Petty " Conſtable ſhall wilfully neglect or refuſe to execute ſuch Warrants of " the Juſtices of the Peace, as ſhall be directed unto them for providing " Carriages as aforeſaid; or if any Perſon or Perſons, appointed by ſuch " High Conſtable or Petty Conſtable to provide any Carriage and Man, " ſhall refuſe or neglect to provide the ſame; or any other Perſon or Per- " ſons whatſoever ſhall wilfully do any Act or Thing, whereby the Execu- " tion of the ſaid Warrant ſhall be hindered or fruſtrated; every ſuch Con- " ſtable or other Perſon or Perſons ſo offending ſhall, for every ſuch Of- " fence, forfeit any Sum not exceeding forty Shillings nor leſs than twenty " Shillings, to the Uſe of the Poor of the Pariſh where any ſuch Offence ſhall " be committed: And all and every ſuch Offence and Offences * ſhall and may " be enquired of, heard and fully determined, by two of his Majeſty's " Juſtices of the Peace dwelling in or near the Place where ſuch Offence " ſhall be committed, who have hereby Power to cauſe the ſaid Penalty " to be levied by Diſtreſs and Sale of the Offenders Goods."

Penalty on a Conſtable not appointing, and on a Perſon appointed not providing Carriages, and on a Perſon obſtructing the providing of Carriages.

* Page 585

6. By *par.* 44. after reciting, that whereas the reſpective Sums of Money, by this Act appointed to be paid to the Conſtable by the Officers demanding ſuch Carriages, are not in many Caſes ſufficient to anſwer the Charge and Expence of providing the ſame, inſomuch that the ſaid Conſtable is frequently at great Charges, over and above what is received by him of the ſaid Officers, to the great Burthen of the Townſhip of which he is Conſtable, or elſe the Perſons performing ſuch Carriages are grievouſly oppreſſed: For Remedy thereof, and that the ſaid Overplus Charge may be born by each County or Riding at the general Charge of ſuch County or Riding, it is enacted, " That the Treaſurer or Treaſurers of each reſpec- " tive County or Riding ſhall, without Fee or Reward, pay unto ſuch " Conſtable all and every ſuch reaſonable Sum or Sums of Money, ſo by " him paid or laid out for ſuch Carriages, over and above what was or " ought to have been paid by the Officer requiring ſuch Carriages, out of " the publick Stock of ſuch County or Riding, according to ſuch Rates, " Orders, Rules and Directions, as the ſaid Juſtices of the Peace in their " Quarter Seſſions aſſembled within their reſpective Juriſdictions ſhall from " Time to Time during the Continuance of this Act make, direct and ap- " point, which Orders ſhall be made without Fee or Reward, Regard " being always had to the Seaſon of the Year, and the Length and Con- " dition of the Ways by and through which ſuch Carriages are to travel."

If the Sum, ordered to be paid by the military Officer, be not ſufficient to defray the Expence of Carriages, the Surplus is to be paid out of the County Stock.

7. The

Stra. 42. *Rex* v. *Hunt, and another*, Hil. 3 G. 1.

7. The Court granted a *Mandamus* upon the 1 *G.* 1. *c.* 34. directed to the Juſtices of the Peace, to allow the Defendants, being Conſtables, their extraordinary Charges in providing Carriages on the late Expedition into *Scotland*.

Stra. 93. *Hunt*'s Caſe. Eaſter 4 G. 1.

8. It ſeems, as if the Treaſurer of the County had refuſed to pay this Money to the Conſtables; for more than a Year after another *Mandamus* upon the ſame Statute was granted by the Court, directed to the Juſtices of Peace, for them to compel the Treaſurer of the County, to reimburſe a Conſtable, of the Name of *Hunt*, the extraordinary Charges he had been at in providing Carriages on the late Expedition into *Scotland*.

(E) Of the Penalties incurred by encouraging Deſertion or harbouring a Deſerter, and of the Reward for apprehending a Deſerter.

Penalty on the Perſon perſuading a Soldier to deſert.

1. BY the 1 *G.* 1. *ſt.* 2. *c.* 47. *par.* 1. after reciting, that a pernicious and dangerous Practice has been induſtriouſly carried on in theſe Kingdoms of *Great Britain* and *Ireland*, by Papiſts and other evil diſpoſed Perſons diſaffected to his Majeſty's Title and Government, under falſe and groundleſs Pretences, to delude his good Subjects, who had engaged themſelves as Soldiers in the Service of his Majeſty and their Country, and to prevail with them by corrupt and indirect Means to deſert the ſame, oftentimes in order to procure their Aſſiſtance for a Popiſh Pretender, the avowed Enemy of the Proteſtant Religion and the Laws and Liberties of theſe Kingdoms; for which Purpoſes the ſaid Papiſts, and other evil diſpoſed Perſons, have with great Diligence frequented the publick Houſes and other Places where the ſaid Soldiers uſed to reſort or are quartered, and by Entertainments, ſeditious Speeches and vain Promiſes, have often ſeduced his Majeſty's ſaid Subjects from their Duty and Allegiance, it is enacted, "That if any Perſon or Per-
"ſons whatſoever, other than ſuch as are or ſhall be inliſted as Soldiers,
Page 586 " againſt whom ſufficient Remedy is already provided by Law, ſhall
"by Words or other Means whatſoever, directly or indirectly, perſuade
"or procure any Soldier or Soldiers in the Service of his Majeſty, his
"Heirs or Succeſſors, to deſert or leave ſuch Service, or ſhall go about
"and endeavour in Manner aforeſaid to perſuade, prevail on or procure,
"ſuch Soldier or Soldiers to deſert or leave ſuch Service as aforeſaid,
"every ſuch Perſon or Perſons ſo offending as aforeſaid, and being
"thereof lawfully convicted, ſhall for every ſuch Offence forfeit to
"his Majeſty, his Heirs or Succeſſors, or to any other Perſon or Per-
"ſons who ſhall ſue for the ſame, the Sum of forty Pounds, to be re-
"covered by Bill, Plaint or Information, in any of his Majeſty's Courts
"of Record at *Weſtminſter*; and if it ſhall happen that any ſuch Of-
"fender, ſo convicted as aforeſaid, hath not any Goods or Chattels,
"Lands or Tenements, to the Value of forty Pounds, to pay and ſatisfy
"the ſame, or that from the Circumſtances and Heinouſneſs of the
"Crime it ſhall be thought proper and convenient, the Court, before
"which the ſaid Conviction ſhall be made as aforeſaid, ſhall award the
"ſaid Offender to Priſon, there to remain for any Time not exceeding
"ſix Months without Bail or Mainprize, and alſo to ſtand in the Pillory
"for the Space of one Hour, in ſome Market Town next adjoining to
the

" the Place where the Offence was committed, in open Market there, or " in the Market Town itſelf where the Offence was committed."

2. But by *par.* 2. it is provided, " That no Action ſhall be brought or " Proſecution carried on by Virtue of this Act, unleſs the ſame be com- " menced within ſix Months after the Offence is committed."

3. By the 17 *G.* 3. *c.* 3. *par.* 65. it is enacted, " That for ſuch Offences " as ſhall be committed againſt the laſt cited Act within that Part of *Great* " *Britain* called *England*, the Penalties thereby enacted ſhall be ſued for " and recoverable in any of his Majeſty's Courts of Record at *Weſtminſter*; " and for ſuch Offences as ſhall be committed in that Part of *Great Bri-* " *tain* called *Scotland*, the ſame ſhall be ſued for and recoverable in his " Majeſty's Court of Exchequer in *Scotland*; and for ſuch Offences as " ſhall be committed in *Ireland*, the ſame ſhall be ſued for and recovera- " ble in any of the four Courts in *Dublin*; and for ſuch Offences as ſhall " be committed in the Iſlands of *Guernſey*, *Sark* and *Alderney*, and the " Iſland thereto belonging, the ſame ſhall be ſued for and recoverable in " the Royal Court of *Guernſey*; and for ſuch Offences as ſhall be com- " mitted in the Iſland of *Jerſey*, the ſame ſhall be ſued for and recovera- " ble in the Royal Court of *Jerſey*, and for ſuch Offence, as ſhall be com- " mitted in the Iſland of *Man*, in any of the Courts of Record in the ſaid " Iſland, or in any of his Majeſty's Courts of Record at *Weſtminſter*, any " Thing in the ſaid Act to the contrary notwithſtanding."

In what Courts the Penalty for perſuading a Soldier to deſert may be recovered.

4. By *par.* 52. After reciting, that Soldiers duly inliſted do afterwards deſert, and are often found wandering and otherwiſe illegally abſenting themſelves from his Majeſty's Service, it is enacted, " That it ſhall and " may be lawful for the Conſtable, Headborough or Tythingman of the " Town or Place, where any Perſon who may reaſonably be ſuſpected to " be a Deſerter ſhall be found, to apprehend or cauſe him to be appre- " hended, and to cauſe ſuch Perſon to be brought before any Juſtice of " the Peace living in or near ſuch Town or Place, who hath hereby " Power to examine ſuch ſuſpected Perſon; and if by his Confeſſion, or " the Teſtimony of one or more Witneſs or Witneſſes upon Oath, or by " the Knowledge of ſuch Juſtice of the Peace, it ſhall appear or be found, " that ſuch ſuſpected Perſon is a liſted Soldier, and ought to be with the " Troop or Company to which he belongs, ſuch Juſtice of the Peace ſhall " forthwith cauſe him to be conveyed to the Gaol of the County or Place " where he ſhall be found, or to the Houſe of Correction or other publick " Priſon in ſuch Town or Place where ſuch Deſerter ſhall be apprehended, " or to the *Savoy*, in caſe ſuch Deſerter ſhall be apprehended within the " City of *London* or *Weſtminſter* or Places adjacent, and tranſmit an Ac- " count thereof to the Secretary of War for the Time being, to the End " that ſuch Perſon may be proceeded againſt according to Law; and the " Keeper of the ſaid Gaol, * Houſe of Correction or Priſon ſhall receive " the full Subſiſtence of ſuch Deſerter, during the Time he ſhall continue " in his Cuſtody, for the Maintenance of the ſaid Deſerter, but ſhall not " be intitled to any Fee or Reward, on Account of the Impriſonment of " ſuch Deſerter, any Law, Uſage or Cuſtom to the contrary notwith- " ſtanding."

A Perſon ſuſpected of Deſertion may be committed to Priſon.

* Page 587

5. By *par.* 53. For the Encouragement of any Perſon or Perſons to ſecure and apprehend ſuch Deſerter as aforeſaid, it is enacted, " That ſuch " Juſtice of the Peace ſhall alſo iſſue his Warrant in Writing, to the " Collector or Collectors of the Land Tax Money of the Pariſh or " Townſhip where ſuch Deſerter ſhall be apprehended, for paying out " of the Land Tax Money ariſen, or to ariſe in the Year One thouſand " ſeven hundred and ſeventy-ſeven, into the Hands of ſuch Perſon, who " ſhall apprehend or cauſe to be apprehended any Deſerter from his Ma- " jeſty's Service, the Sum of twenty Shillings for every Deſerter that " ſhall

Reward for apprehending a Deſerter.

" ſhall be ſo apprehended and committed; which Sum of twenty Shillings " ſhall be ſatisfied by ſuch Collector or Collectors, to whom ſuch Warrant " ſhall be directed, and allowed upon his Account."

Penalty on a Perſon harbouring a Deſerter.

6. By *par.* 54. it is provided, " That if any Perſon ſhall harbour, conceal or aſſiſt any Deſerter from his Majeſty's Service, knowing him to be " ſuch, the Perſon ſo offending ſhall forfeit for every ſuch Offence the Sum " of five Pounds; and upon Conviction, by the Oath of one or more credible Witneſs or Witneſſes before any of his Majeſty's Juſtices of the " Peace, the ſaid Penalty of five Pounds ſhall be levied by Warrant under " the Hands of the ſaid Juſtice or Juſtices o the Peace, by Diſtreſs and Sale " of the Goods and Chattels of the Offender; one Moiety of the ſaid Penalty to be paid to the Informer, by whoſe Means ſuch Deſerter ſhall be " apprehended, and the Reſidue of the ſaid Penalty to be paid to the Officer, to whom any ſuch Deſerter or Soldier did belong: And in caſe " any ſuch Offender, who ſhall be convicted as aforeſaid of harbouring " and aſſiſting any ſuch Deſerter, ſhall not have ſufficient Goods and Chattels, whereon Diſtreſs may be made to the Value of the Penalty for ſuch " Offence; or ſhall not pay ſuch Penalty within four Days after ſuch Conviction; then and in ſuch Caſe ſuch Juſtice of the Peace ſhall and may, " by Warrant under his Hand and Seal, either commit ſuch Offender to " the common Gaol, there to remain without Bail or Mainprize for the " Space of three Months, or cauſe ſuch Offender to be publickly whipped, at the Diſcretion of ſuch Juſtice."

No Houſe to be broke open to ſearch for a Deſerter, without a Warrant from a Juſtice of the Peace.

7. But by *par.* 55. it is provided, " That no Commiſſion Officer ſhall " break open any Houſe, to ſearch for Deſerters, without a Warrant from " a Juſtice of the Peace; and that every Commiſſion Officer, who ſhall " without Warrant from one or more of his Majeſty's Juſtices of the " Peace, which ſaid Warrant the ſaid Juſtice or Juſtices of the Peace are " hereby impowered to grant, forcibly enter into or break open the Dwelling Houſe or Outhouſes of any Perſon whatſoever, under Pretence of " ſearching for Deſerters, ſhall upon due Proof thereof forfeit the Sum of " twenty Pounds."

(F) Of the military Puniſhments to which Soldiers are liable.

Offences which may be puniſhed with Death.

1. BY the 17 *G.* 3. *c.* 3. *par.* 1. After reciting, that, whereas the raiſing or keeping a ſtanding Army within this Kingdom in Time of Peace, unleſs it be with Conſent of Parliament, is againſt Law: And whereas it is judged neceſſary by his Majeſty and this preſent Parliament, that a Body of Forces ſhould be continued for the Safety of this Kingdom, the Defence of the Poſſeſſions of the Crown of *Great Britain*, and the *Page 588 * Preſervation of the Balance of Power in *Europe*: And whereas no Man can be forejudged of Life or Limb, or ſubjected in Time of Peace to any Kind of Puniſhment within this Realm, by martial Law, or in any other Manner than by the Judgment of his Peers, and according to the known and eſtabliſhed Laws of this Realm; yet nevertheleſs, it being requiſite for the retaining ſuch Forces in their Duty that an exact Diſcipline be obſerved, and that Soldiers, who ſhall mutiny or ſtir up Sedition, or deſert his Majeſty's Service within this Realm, or the Kingdom of *Ireland*, or in *Jerſey*, *Guernſey*, *Alderney* and *Sark*, or the Iſlands to the ſame belonging, be brought to a more exemplary and ſpeedy Puniſhment

Puniſhment than the uſual Forms of the Law will allow, it is enacted, "That if any Perſon, being muſtered or in Pay as an Officer, or who is "or ſhall be liſted or in Pay as a Soldier, and on the twenty-fourth Day "of *March* One thouſand ſeven hundred and ſeventy-ſeven ſhall remain in "ſuch Service, or ſhall during the Continuance of this Act voluntarily en- "ter himſelf in his Majeſty's Service as a Soldier, ſhall at any Time during "ſuch Continuance of this Act, within the Realm of *Great Britain*, or "the Kingdom of *Ireland*, or in *Jerſey*, *Guernſey*, *Alderney*, *Sark* or *Man*, "or the Iſlands thereunto belonging, or in the Iſland of *Minorca*, or in his "Majeſty's Garriſon of *Gibraltar*, or in any of his Majeſty's Dominions "beyond the Seas reſpectively, begin, excite, cauſe or join in, any Mu- "tiny or Sedition in the Regiment, Troop or Company, to which he doth "belong, or in any other Regiment, Troop or Company, either of his "Majeſty's Land or Marine Forces, in his Majeſty's Service; or ſhall not "uſe his utmoſt Endeavours to ſuppreſs the ſame, or, coming to the "Knowledge of any Mutiny or intended Mutiny, ſhall not without De- "lay give Information thereof to his commanding Officer; or ſhall de- "ſert his Majeſty's Service; or, being a Soldier actually liſted in any Re- "giment, Troop or Company, ſhall liſt himſelf into any other Regiment, "Troop or Company, without a Diſcharge produced in Writing from the "Colonel, or in his Abſence the Field Officer commanding in chief the "Regiment, Troop or Company, in which he laſt ſerved as a liſted Sol- "dier; or ſhall be found ſleeping upon his Poſt, or ſhall leave it before "relieved; or if any Officer or Soldier in his Majeſty's Army ſhall, either "upon Land within or out of *Great Britain*, or upon the Sea, hold Cor- "reſpondence with any Rebel or Enemy of his Majeſty, or give them Ad- "vice or Intelligence, either by Letters, Meſſages, Signs or Tokens, in "any Manner or Way whatſoever; or ſhall treat with ſuch Rebels or Ene- "mies, or enter into any Condition with them without his Majeſty's Li- "cence, or Licence of the General, Lieutenant-General or Chief Com- "mander; or ſhall ſtrike or uſe any Violence againſt his ſuperior Of- "ficer, being in the Execution of his Office; or ſhall diſobey any "lawful Command of his ſuperior Officer; all and every Perſon and "Perſons ſo offending, in any of the Matters before mentioned, ſhall "ſuffer Death, or ſuch other Puniſhment as by a Court-martial ſhall be "inflicted."

Puniſhment of a Papiſt inliſting and not declaring himſelf to be ſo.

2. By the 1 *G.* 1. *ſt.* 2. *c.* 47. *par.* 3. After reciting, that to carry on the Service of the Pretender, and for other wicked Purpoſes, many Papiſts, pretending themſelves to be Proteſtants, and taking the Oath of Abjuration and ſubſcribing the Teſt when thereunto required, being ſo allowed to do by the Pope and their other ſpiritual Superiors, the better to diſguiſe and conceal their Deſigns, do liſt themſelves in his Majeſty's Troops, whereby the greateſt Danger may ariſe to theſe Kingdoms if not timely prevented, it is enacted, "That any Perſon or Perſons having profeſſed the "Popiſh Religion, who ſince the firſt Day of *February* One thouſand ſe- "ven hundred and fifteen have been liſted in his Majeſty's Troops, and "who ſhall not after the firſt Day of *June* One thouſand ſeven hundred "and ſixteen, in *Great Britain* or *Ireland* or in the Iſles of *Guernſey* or "*Jerſey*, produce a Teſtimonial of his having publickly renounced the "ſame, or ſhall * not, at the Time of his liſting, declare to the Officer * Page 589 "or Soldier who liſteth him, that he hath been or at preſent is of the "Popiſh Religion, ſhall be liable to and receive ſuch corporal Puniſhment, "not extending to Loſs of Life, as a Court-martial ſhall inflict for the "ſame, who are hereby impowered ſo to do."

Immorality or Miſbehaviour in Sol-

3. By 17 *G.* 3. *c.* 3. *par.* 3. it is enacted, "That it ſhall and may be "lawful to and for Courts-martial, by their Sentence or Judgment, to "inflict

Soldiers to be punished. "inflict corporal Punishment, not extending to Life or Limb, on any Soldier for Immoralities, Misbehaviour, or Neglect of Duty."

New Articles of War may be made, and Courts-martial appointed by his Majesty.

4. By *par.* 56. it is provided, "That it shall and may be lawful to and for his Majesty, to form, make and establish Articles of War for the better governing of his Majesty's Forces, and for bringing Offenders against the same to Justice; and to erect and constitute Courts-martial, with Power to try, hear and determine any Crimes or Offences by such Articles of War, and inflict Penalties by Sentence or Judgment of the same, as well within the Kingdoms of *Great Britain* and *Ireland*, *Jersey*, *Guernsey*, *Alderney*, *Sark* and *Man*, and the Islands thereto belonging, as in the Island of *Minorca*, his Majesty's Garrison of *Gibraltar*, and in any of his Majesty's Dominions beyond the Seas."

But the Punishment by such new Articles is not to extend to Life or Limb.

5. But by *par.* 57. it is provided, "That no Person or Persons shall be adjudged, to suffer any Punishment extending to Life or Limb by the said Articles of War, within the Kingdoms of *Great Britain* and *Ireland*, *Jersey*, *Guernsey*, *Alderney*, *Sark* and *Man*, and the Islands thereto belonging, except for such Crimes as are expressed to be so punishable by this Act."

Offenders beyond the Seas may be tried in this Realm or in Ireland.

6. By *par.* 58. it is enacted, "That if any Officer or Soldier shall in any of his Majesty's Dominions beyond the Seas, or elsewhere beyond the Seas, commit any of the Offences triable by Courts-martial, by Virtue of this Act, and shall come into this Realm, or *Ireland*, or into *Jersey*, *Guernsey*, *Alderney*, *Sark*, or *Man*, or the Islands thereto belonging, before he be tried by a Court-martial for such Offence, such Officer or Soldier shall be tried for the same, as if the said Offence had been committed within this Realm."

Offences against former Mutiny Acts punishable by this Act.

7. By *par.* 73. in order to prevent all Doubts that may arise, in Relation to punishing Crimes and Offences committed against former Mutiny Acts, it is enacted, "That all Crimes and Offences, which have been committed against any former Mutiny Act, shall and may, during the Continuation of this present Act, be enquired of, heard, tried, and determined, adjudged and punished, before and by the like Courts, Persons, Powers, Authorities, Ways, Means and Methods, as the like Crimes and Offences committed against this present Act may be enquired of, heard, tried, determined, adjudged and punished: And that the Proceedings of a Court-martial, upon any Trial, begun under the Authority of such former Act, shall not be discontinued by the Expiration of the same, but it shall be lawful to proceed to Judgment upon such Trial, and to carry such Judgment into Execution, in like Manner as if the Proceedings had been commenced under the Authority of this Act."

None liable to be tried, &c. for Offences committed three Years before issuing the Warrant for Trial, except for Desertion.

8. But by *par.* 74. it is provided, "That no Person shall be liable to be tried and punished for any Offence against any of the said Acts, which shall appear to have been committed more than three Years before the issuing of the Commission or Warrant for such Trial; except only for the Offence of Desertion.

Impressed Men rendered liable to martial Law.

9. Only Volunteers were formerly liable to be punished by martial Law, but by the 30 *G.* 2. *c.* 8. *par.* 20. it is enacted, "That the Commissioners, present at a Meeting for listing of Soldiers, as in this Act is before directed, shall cause the second and sixth Sections of Articles of War against Mutiny and Desertion, to be read to the Men impressed by Virtue of this Act; and from and after the reading the said Articles of War, every Person so impressed shall be deemed a listed Soldier to all Intents and Purposes, and shall be subject to the Discipline of War,

"and

"and in Case of Desertion, shall be proceeded against as a Deserter by "any Law now in Force, or by any Law to be made for Punishment of "Deserters."

10. By the 17 *G.* 3. *c.* 3. *par.* 11. it is provided, "That no Officer or "Soldier, being acquitted or convicted of any Offence, be liable to be "tried a second Time by the same or any other Court-Martial for the "same Offence, unless in the Case of an Appeal from a Regimental to a "general Court-martial, and that no Sentence given by any Court-"martial, and signed by the President thereof, shall be liable to be "revised more than once." No Person to be tried a second Time for the same Offence.

11. By *par.* 60. it is provided, "That no Person or Persons, being "acquitted or convicted of any capital Crimes, Violences or Offences "by the civil Magistrate, shall be liable to be punished by a Court-"martial for the same otherwise than by cashiering." No Person, acquitted or convicted of a Crime, to be punished by martial Law.

(G) Of the Civil Punishments to which Soldiers are liable.

1. BY the 17 *G.* 3. *c.* 3. *par.* 12. it is provided, "That nothing in this "Act shall extend, or be construed, to exempt any Officer or "Soldier from being proceeded against by the ordinary Course of "Law."

2. And by *par.* 61. it is provided, "That if any Officer, Non-commission "Officer or Soldier shall be accused of any capital Crime, or of any Vio-"lence or Offence against the Person, Estate or Property of any of his "Majesty's Subjects, which is punishable by the known Laws of the "Land, the commanding Officer or Officers of every Regiment, Troop, "Company or Party is and are hereby required to use his utmost Endea-"vours, to deliver over such accused Person to the civil Magistrate; "and shall also be aiding and assisting to the Officers of Justice in seizing "and apprehending such Offender, in order to bring him to Trial; and "if any such commanding Officer shall wilfully neglect or refuse, upon "Application made to him for that Purpose, to deliver over any "such accused Person to the civil Magistrate, or to be aiding and "assisting to the Officers of Justice in the apprehending such Offender, "every such Officer so offending, and being thereof convicted, before "any two or more Justices of the Peace for the County where the Fact "is committed, by the Oath of two credible Witnesses, shall be deemed "and taken to be *ipso facto* cashiered, and shall be utterly disabled, to "have or hold any civil or military Office or Employment within this "Kingdom, or in his Majesty's Service; provided the said Conviction "be affirmed at the next Quarter Sessions of the Peace for the said "County, and a Certificate thereof be transmitted to the Judge Ad-"vocate, who is hereby obliged to certify the same to the next Court-"martial." An Officer or Soldier accused of a Crime, to be delivered over to the Civil Magistrate.

* 3. By the 19 *G.* 2. *c.* 21. *par.* 5. it is enacted, "That in case any com-"mon Soldier, belonging to any Regiment in his Majesty's Service, shall "be convicted of profane cursing or swearing, and shall not immediately "pay down the Penalty by him forfeited, or give Security for the "same, and also the Cost of the Information, Summons and Convic-"tion, as in and by this Act is directed, every such common Soldier, "instead of being committed to the House of Correction, as by this "Act is directed, shall by the said Justice, Mayor, Bailiff or other head "Officer, *Page 591 A Soldier guilty of cursing or swearing to be set in the Stocks.

" Officer, be ordered to be publickly ſet in the Stocks for the Space of " one Hour for every ſingle Offence; and for every Number of Of- " fences, whereof he ſhall be convicted at one and the ſame Time, two " Hours."

A wandering Soldier to ſuffer as a Felon.

4. By the 39 *Eliz. c.* 17. *par.* 2. After reciting, that divers lewd and licentious Perſons, contemning both Laws, Magiſtrates and Religion, have of late Days wandered up and down in all Parts of this Realm under the Name of Soldiers, abuſing the Title of that honourable Profeſſion to countenance their wicked Behaviours, and do continually aſſemble themſelves in the Highways and elſewhere in Troops, to the great Terror and Aſtoniſhment of her Majeſty's true Subjects, the Impeachment of her Laws and the Diſturbance of the Peace and Tranquillity of this Realm; and that many heinous Outrages, Robberies and horrible Murders are daily committed by theſe diſſolute Perſons, and unleſs ſome ſpeedy Remedy be had, many Dangers are like by theſe Means to enſue and grow towards the Commonwealth, it is enacted, " That all idle and wander- " ing Soldiers, or idle Perſons, which now are or hereafter ſhall be wan- " dering as Soldiers, ſhall ſettle themſelves in ſome Service, Labour, or " other lawful Courſe of Life without wandering, or otherwiſe repair to " the Places where they were born, or to their dwelling Places if they " have any, and there remain betaking themſelves to ſome lawful Courſe " of Life as aforeſaid, upon Pain that all Perſons offending contrary to " this Act to be reputed as Felons, and to ſuffer as in Caſe of Felony " without Benefit of Clergy."

A wandering Soldier with a forged Teſtimonial to ſuffer as a Felon.

5. By *par.* 3. it is enacted, " That every idle and wandering Soldier, " which, coming from his Captain from the Seas or beyond the Seas, " ſhall not have a Teſtimonial, under the Hand of ſome one Juſtice of " the Peace of or near the Place where he landed, ſetting down therein " the Place and Time when and where he landed, and the Place of his " Dwelling or Birth unto which he is to paſs, and a convenient Time " therein limited for his Paſſage, or having ſuch Teſtimonial ſhall wil- " fully exceed the Time therein limited above fourteen Days: And alſo " as well every ſuch idle and wandering Soldier, as every idle Perſon " wandering as a Soldier, which ſhall at any Time hereafter forge or " counterfeit any ſuch Teſtimonial, or have with him or them any ſuch " Teſtimonial forged or counterfeited as aforeſaid, knowing the ſame to " be counterfeited or forged, in all theſe Caſes every ſuch Act or Acts to " be Felony, and the Offenders to ſuffer as aforeſaid without Benefit of " Clergy."

But ſuch Sodier is not to be executed, if any Perſon will take him into Service for a Year.

6. By *par.* 4. it is enacted, " That it ſhall be lawful for the Juſtices of " Aſſize, Juſtices of Gaol Delivery, and the Juſtices of Peace of every " County, and for all Juſtices of Peace of Towns corporate, having " Authority to hear and determine Felonies, to hear and determine all " ſuch Offences in their General Seſſions; and to execute the Offenders, " which ſhall be convicted before them, as in Caſes of Felony is accuſ- " tomed; except ſome honeſt Perſon, valued at the laſt Subſidy next be- " fore the Time to ten Pounds in Goods or forty Shillings in Lands, or " elſe ſome honeſt Freeholder as by the ſaid Juſtices ſhall be allowed, will " be contented, before ſuch Juſtices as ſuch Perſons ſhall be arrainged of " Felony, to take him or them into his Service for one whole Year then " next following, and then before the ſaid Juſtices will be bound by Re- " cogniſance of ten Pounds, to be levied of his Lands, Goods, Tene- " ments and Chattels to the uſe of our Sovereign Lady the Queen, if " he keep not the ſaid Perſon or Perſons for one whole Year, and bring " him to the next Seſſions for the Peace and Gaol Delivery next enſuing " after the ſaid Year: And if any ſuch Perſon retained depart within the " Year, without the Licence of him that ſo retaineth him, then he to be " indicted,

*Page 592

" indicted, tried and adjudged as a Felon, and not to have the Benefit " of his Clergy."

(H) Of the Liberty given to Soldiers of exercising Trades.

1. BY the 22 *G.* 2. *c.* 44. *par.* 1. After reciting, that there are divers Officers and Soldiers, who have served his Majesty, some of which are Men that used Trades, others that were Apprentices to Trades who had not served out their Times, and others who by their own Industry have made themselves apt and fit for Trades; many of which would willingly employ themselves in those Trades which they were formerly accustomed to, or which they are apt or able to follow and make Use of; but are or may be hindred from exercising those Trades in certain Cities or Corporations and other Places within this Kingdom, because of certain By-laws and Customs of those Places, and of the Statute made in the fifth Year of Queen *Elizabeth*, it is enacted, " That all such Officers and Sol- " diers, who have been at any Time employed in his Majesty's Service since " his Accession to the Throne, and have not since deserted the said Service, " may set up and exercise such Trades as they are apt and able for, in any " Town or Place within the Kingdoms of *Great Britain* and *Ireland*, with- " out any Lett, Suit or Molestation, of any Person or Persons whatsoever, " for or by Reason or the using such Trades; and if any such Officer or " Officers, Soldier or Soldiers shall be sued, impleaded or indicted, in " any Court within this Kingdom, for using or exercising any such Trade as " aforesaid, then the said Officer or Officers, Soldier or Soldiers, making " it appear to the same Court where they are so sued, impleaded or indicted, " that they have served the King's Majesty as aforesaid, shall upon the ge- " neral Issue pleaded be found not guilty in any Plaint, Bill, Information or " Indictment exhibited against them; and such Person or Persons, who not- " withstanding this Act shall prosecute their said Suit by Bill, Plaint, Infor- " mation or Indictment, and shall have a Verdict pass against them, or be- " come nonsuit therein, or discontinue the said Suit, shall pay unto such " Officer or Officers, Soldier or Soldiers double Costs of Suit to be re- " covered as any other Costs at common Law may be recovered; and all " Judges and Jurors, before whom any such Suit, Information or Indict- " ment shall be brought, and all other Persons whatsoever, are to take No- " tice of this Act, and shall conform themselves thereunto, any Statute, " Law, Ordinance, Custom or Provision to the contrary in any wise not- " withstanding." Soldiers may exercise any Trade in any Place.

2. But by *par.* 2. it is provided, " That this Act shall not in any wise be " prejudicial to the Universities of *Oxford* or *Cambridge*, or either of them; " or extend to give Liberty to any Person to set up the Trade of a Vintner, " or to sell any Wine or other Liquors, within the said Universities, with- " out Licence had and obtained from the Vice-Chancellors of the same " respectively." The Privilege of the Universities saved as to the Licensing of Taverns.

3. By the 3 *G.* 3. *c.* 8. the Provisions of the 22 *G.* 2. *c.* 44. are extended to all Soldiers, who have been in his late or present Majesty's Service since the twenty-ninth Day of *November* one thousand seven hundred and forty-eight.

* 4. By the 2 *G.* 3. *c.* 10. *par.* 7. it is enacted, " That every Man, * Page 593 " having served in the Militia when drawn out and embodied, being a

A Militia Man, who is married and has been embodied may ſet up a Trade in any Place.

" married Man, may ſet up and exerciſe any Trade he is apt and able for, " as freely as any Soldier may do by Virtue of an Act paſſed in the twenty-" ſecond Year of his late Majeſty's Reign, intituled, *An Act to enable ſuch* " *Officers and Soldiers, as have been in his Majeſty's Service ſince his Ac-* " *ceſſion to the Throne, to exerciſe Trades.*"

MS Rep *Mott* v. *Williams*, Eaſter 31 G. 2. in *K. B.*

5. In an Action *Qui tam* for exerciſing the Trade of a Sadler it appeared, that the Defendant, who had not ſerved an Apprenticeſhip to that Trade, had been one of the *Blackwell Hall* Volunteers who aſſociated themſelves during the late Rebellion; and that, by one Article of their Aſſociation, they were not to put themſelves under the Command of any Officer appointed by his Majeſty, or to be ſubject to military Diſcipline, until the Rebels came within Sixty Miles of *London*. As this never did happen, and conſequently they were never in fact under the Command of any Officer appointed by his Majeſty, or ſubject to military Diſcipline, the Queſtion was, whether the Defendant did thereby acquire a Right under the 22 *G.* 2. *c.* 44. of exerciſing the Trade of a Sadler? It was holden that he did not; and by Lord *Mansfield*, Ch. J. we ſhould have been glad to have found the preſent Defendant within the Meaning of the Statute of the twenty-ſecond of the King: But that Statute does only extend to ſuch as have been Soldiers; and no Man is to be deemed a Soldier, unleſs he has been actually inliſted, and had the Articles of War read to him.

(I) Of divers Things, which did not fall under any of the foregoing Heads.

The Probate of a Soldier's Will to be exempt from the Stamp Duty.

1. BY the 5 *W.* & *M. c.* 21. and by the 9 & 10 *W.* 3. *c.* 25. *par.* 19. it is provided, " That nothing in theſe Acts contained ſhall extend, " to charge the Probate of any Will or Letters of Adminiſtration of any " common Soldier, who ſhall be ſlain or die in his Majeſty's Service, a Cer-" tificate being produced from the Captain of the Troop or Company, " under whom ſuch Soldier ſerved at the Time of his Death, and Oath " made of the Truth thereof, before the proper Judge or Officer by whom " ſuch Probate or Adminiſtration ought to be granted, which Oath ſuch " Judge or Officer is hereby authorized and required to adminiſter, and " for which no Fee or Reward ſhall be taken."

The antient Method of taxing Pariſhes, for the Relief of Soldiers, is now diſuſed.

2. By the 43 *Eliz. c.* 3. *par.* 2. It is provided, That every Pariſh ſhall be charged with a weekly Sum for the Relief of ſick, hurt and maimed Soldiers, and there are in the ſame Act Directions for applying the Money raiſed for this Purpoſe: But as the Practice is at this Day, to leave ſuch Soldiers to be provided for by the reſpective Pariſhes to which they belong, it is unneceſſary to mention thoſe Directions.

A Soldier having a Wife or Child may be examined as to the Place of his Settlement.

3. By the 17 *G.* 3. *c.* 3. *par.* 32. it is enacted, " That it ſhall and may " be lawful, for any two Juſtices of the Peace for the County, Town or " Place, where any Non-commiſſion Officer or Soldier ſhall be quartered, " in caſe ſuch Non-commiſſion Officer or Soldier have either Wife or " Child, or Children, to cauſe ſuch Non-commiſſion Officer or Soldier, " to be ſummoned before them in the Town or Place where ſuch Non-" commiſſion Officer or Soldier ſhall be quartered, in order to make " Oath of the Place of their laſt legal Settlement, which Oath the ſaid " Juſtices are hereby impowered to adminiſter; and ſuch Non-com-" miſſion Officers and private Soldiers as aforeſaid are hereby directed " to obey ſuch Summons, and to make Oath accordingly: And ſuch

" Juſtices

" Juſtices are hereby required to give an atteſted Copy of ſuch Affidavit,
" ſo made before them, to the Perſon making the ſame, to be by him
" delivered to his commanding Officer, in order to be produced when re-
" * quired; which atteſted Copy ſhall be at any Time admitted in Evi- *Page 594
" dence as to ſuch laſt legal Settlement, before any of his Majeſty's Juſ-
" tices of the Peace, or at any General or Quarter Seſſions of the Peace:
" Provided always, that in caſe any Non-commiſſion Officer or Soldier,
" ſhall be again ſummoned to make Oath as aforeſaid, then on ſuch at-
" teſted Copy of the Oath by him formerly taken being produced by him,
" or by any other Perſon on his Behalf, ſuch Non-commiſſion Officer or
" Soldier ſhall not be obliged to take any further Oath, with Regard to
" his laſt legal Settlement, but ſhall leave a Copy of ſuch atteſted Copy of
" Examination if required."

4. By *par.* 54. it is enacted, " That if any Perſon ſhall knowingly de- Penalty for
" tain, buy or exchange, or otherwiſe receive, any Arms, Clothes, Caps, buying the
" or other Furniture, belonging to the King, from any Soldier or De- Arms or
" ſerter, or any other Perſon, upon any Account or Pretence whatſoever, Clothes of a
" or cauſe the Colour of ſuch Clothes to be changed, the Perſon ſo of- Soldier.
" fending ſhall for every ſuch Offence forfeit the Sum of five Pounds; and
" upon Conviction, by the Oath of one or more credible Witneſs or Wit-
" neſſes before any of his Majeſty's Juſtices of the Peace, the ſaid Penalty
" of five Pounds ſhall be levied by Warrant under the Hands of the ſaid
" Juſtice or Juſtices of the Peace, by Diſtreſs and Sale of the Goods and
" Chattels of the Offender; and in caſe any ſuch Offender, who ſhall be
" convicted as aforeſaid, ſhall not have Goods and Chattels, whereon Diſ-
" treſs may be made to the Value of the Penalty recovered againſt him
" for ſuch Offence, or ſhall not pay ſuch Penalty within four Days after
" ſuch Conviction, then and in ſuch Caſe ſuch Juſtice of the Peace ſhall
" and may, by Warrant under his Hand and Seal, either commit the
" Offender to the common Gaol, there to remain without Bail or Main-
" prize for the Space of three Months, or cauſe ſuch Offender to be pub-
" lickly whipped, at the Diſcretion of ſuch Juſtice."

5. It is ſaid, that, as an Agent of a Regiment is but a Servant to the Ld. Raym.
Colonel, his Receipt can only charge the Colonel; there being no Privity 101.
between the King and him. *Beaumont* v. *Pine.*

6. In an Action of *Aſſumpſit* the Plaintiff declared, that he was and yet Ld. Raym.
is Captain of a Company of Soldiers, and that the Defendant, in Conſi- 312.
deration that the Plaintiff would permit *A. B.* a Soldier in his Company *Taylor* v.
to be abſent ten Days, promiſed the Plaintiff to bring back the ſaid *A. B.* *Jones.*
at the End of ten Days, or to pay him twenty Pounds; it was objected,
that there is not in this Caſe any Conſideration to ſupport the Action; for
that the Captain of a Company has not ſuch Property in a Soldier there-
unto belonging, as to give him Leave to abſent himſelf from the King's
Service: But by the Court, when a Captain has no Occaſion to employ a
Soldier in the King's Service, he may give him Leave to be abſent for a rea-
ſonable Time, ſuch Leave being a Benefit to the Soldier.

7. A Leaſe being forfeited for the Non-payment of Rent, the Leſſor 10 Mod. 383.
brought an Ejectment. Hereupon a Rule was made, that, upon the De- *Smith* v.
fendant's bringing into Court what was due for Rent with Coſts, the Pro- *Parks.*
ceedings in Ejectment ſhould be ſtayed: But the Leſſor afterwards obtained
another Rule for diſcharging this, unleſs the Defendant, who was a Sol-
dier and therefore intitled to Privilege, would give Security for the Pay-
ment of the Rent.

8. By the 17 *G.* 3. *c.* 3. *par.* 59. it is provided, " That ſo much of This Act to
" this Act, as relates to the Puniſhment of Mutineers and Deſerters with- extend to
" in this Realm, and to ſuch as ſhall conceal Deſerters, or ſhall know- Deſerters in
Ireland, &c.

" ingly buy, or exchange, or otherwiſe receive any Arms, Clothes, " Caps, or other Furniture belonging to the King, from any Soldier or " Deſerter, or cauſe the Colour of ſuch Clothes to be changed, ſhall ex- " tend, to all Intents and Purpoſes whatſoever, to ſuch Governors or other " Officers in Garriſons, and Forces as his Majeſty has now in Pay, or " ſhall have in Pay in *Ireland*, or in *Jerſey*, *Guernſey*, *Alderney*, *Sark*, " or *Man*, and the Iſlands thereto belonging, and ſhall be put in Execu- " tion in that Kingdom by all Juſtices of the Peace, and other Officers " reſpectively, according to the Tenor of, and during the Continuance of " this Act."

To what Times this Act is to be continued.

9. By *par.* 64. it is enacted, " That this Act ſhall be and continue in " Force, within the Realm of *Great Britain*, from the twenty-fourth " Day of *March* in the Year of our Lord One thouſand ſeven hundred " and ſeventy-ſeven, until the Twenty-fifth Day of *March* in the Year " of our Lord One thouſand ſeven hundred and ſeventy-eight, and ſhall " be and continue in Force within the Kingdom of *Ireland*, and in *Jer-* " *ſey*, *Guernſey*, *Alderney*, *Sark* and *Man*, and the Iſlands thereto belong- " ing, from the Twenty-fourth Day of *March* in the Year of our Lord " One thouſand ſeven hundred and ſeventy-ſeven, until the Firſt Day " of *May* One thouſand ſeven hundred and ſeventy-eight, and ſhall be " and continue in Force in the Iſland of *Minorca* and Garriſon of *Gibral-* " *tar*, and in his Majeſty's other Dominions beyond the Seas, from the " Twenty-fourth Day of *March* in the Year of our Lord One thouſand " ſeven hundred and ſeventy-ſeven, until the Twenty-fifth Day of *March* " in the Year of our Lord One thouſand ſeven hundred and ſeventy- " nine."

---

*Page 595

*STAMPS.

A Stamp is a Mark affixed to certain Inſtruments, Writings and Things.

The Uſe of this Mark is to denote, that the Duty impoſed upon the Inſtrument, Writing or Thing has been paid, or that Security has been given for the Payment thereof.

Some Stamps are by Law ordered to be made Uſe of, as in the Caſe of printed Linens, which are not under the Direction of the Commiſſioners for managing the Stamp Duties; but the preſent Deſign is to treat only of ſuch as are under their Management.

In doing this it will be proper to give an Account,

(A) Of the particular Stamp Duties, to which certain Inſtruments, Writings and Things are liable.

(B) Of ſome Regulations, which principally concern the Officers of the Stamp Duties.

(C) Of

(C) What the Conſequence is, of Ingroſſing or Writing any Matter liable to a Stamp Duty upon Vellum, Parchment or Paper which has not been duly ſtamped.

1. To any Perſon ſo ingroſſing or writing.
2. To ſome particular Perſon ſo ingroſſing or writing.
3. To the Inſtrument or Thing ſo ingroſſed or written.

(D) Of Regulations for preventing Frauds to the Prejudice of the Stamp Duties.

1. By writing a ſecond Matter liable to a Stamp Duty upon Vellum, Parchment or Paper which has not been a ſecond Time duly ſtamped.
2. In the Manner of writing certain Matters.
3. In legal Proceedings.
4. In News-Papers, Almanacks and Pamphlets.
5. In the Money or other Conſideration given with an Apprentice.
6. In Cards and Dice.
7. In ſome other Caſes.

(E) Of the pecuniary Penalties incurred by Perſons guilty of Offences againſt the Statutes impoſing Stamp Duties.

(F) Of the corporal Puniſhments, to which Perſons guilty of Offences againſt the Statutes impoſing Stamp Duties are liable.

---

* (A) Of the particular Stamp Duties, to which certain Inſtruments, Writings and Things are liable. *Page 596

1. MUCH the greater Part of the Stamp Duties were at firſt impoſed for a Time; but all the Statutes, by which ſuch Duties were impoſed, have been made perpetual, or have been ſo continued as to be at this Day in Force.

2. The Stamp Duties, to which divers Inſtruments, Writings or Things are liable, have been impoſed by divers Statutes: But as they have been more generally impoſed by three, *viz.* 5 *W. & M. c.* 21. 9 & 10 *W.* 3. *c.* 25. 12 *A ſt.* 2. *c.* 9. the Sums charged by each of theſe Statutes ſhall be placed in a Column which is ſubjoined to each. All other Stamp Duties ſhall be placed in a fourth Column, and the reſpective Statutes by which they were impoſed ſhall be mentioned in the Margin.

3. To prevent Repetition in the following Liſt of the Stamp Duties, every Duty is placed only under the Name of the Inſtrument or Thing therewith chargeable.

4. For

4. For Inſtance, if the Duty which a Perſon ought to pay upon his Admiſſion to be an Advocate is deſired to be known, it will be found only under the Word *Admiſſion*, and not under the Word *Advocate* likewiſe.

5. Only ſuch Articles are liable to the Payment of Stamp Duties in *Scotland*, as have the Words *in Great Britain* or *in Scotland* annexed to them.

		5 W. & M. c. 21.	9 & 10 W. 3. c. 25.	12 A. ſt. 2. c. 9.	
12 G. 1. c. 33.	Action entering of in an inferior Court which holds Plea of forty Shillings, but iſſues no Writ, Proceſs or Mandate	6 d.	6 d.		6 d.
10 A. c. 19.	Adjudication in *Scotland* - -				2 s. 3 d.
5 G. 3. c. 46.	Admiſſion to the Freedom of a Corporation or Company - -				2 s.
	Admiſſion into an Inn of Chancery -	1 s.	1 s.		
	Court -	1 s.	1 s.		
2 G. 3. c. 36.	one of the four Inns of Court	40 s.			
5 G. 3. c. 47.	And - - -	80 s.			
	the Univerſity of *Oxford* or *Cambridge*	1 s.	1 s.		
10 A. c. 19.	to a Copyhold Eſtate -				2 s. 3 d.
12 A. ſt. 1. c. 9.	No Duty is to be paid upon the Admiſſion to a Cuſtom Right or Tenant Right Eſtate.				
	Admiſſion to a Fellowſhip of the College of Phyſicians -	40 s.	40 s.	40 s.	
	to the Office of Advocate in a Court in *England*. -	40 s.	40 s.	40 s.	
	Scotland - -			40 s.	
	to the Office of Attorney in a Court in *England* -	40 s.	40 s.	40 s.	
	Scotland -			40 s.	
	to the Office of Clerk of a Court in *England*	40 s.	40 s.	40 s.	
	Scotland - -			40 s.	
	to the Office of Notary of a Court in *England* -	40 s.	40 s.	40 s.	
	Scotland - -			40 s.	
*Page 597	* to the Office of Proctor of a Court in *England* -	40 s.	40 s.	40 s.	
	Scotland -			40 s.	
	to any other Office in a Court in *England* - -	40 s.	40 s.	40 s.	
	Scotland - -			40 s.	
6 & 7 W. 3. c. 12. 9 & 10 W. 3. c. 25. 12 A. ſt. 2. c. 9.	A Perſon admitted to either of the Offices particularly mentioned, or to any Office in a Corporation or inferior Court, which is annual, and under the Value of ten Pounds, *per Annum* is exempted.				
2 G. 2. c. 23.	Admiſſion to the Office of Solicitor in any Court of Equity -				120 s.
2 G. 2. c. 23.	But if a Perſon have been admitted an Attorney in the Court of King's Bench, Common Pleas or Exchequer, or in one of the Courts of the Counties Palatine of *Cheſter*, *Lancaſter* or *Durham*, or in the Court of Great Seſſion in *Wales*, he may be admitted a				

Soli

	5 W. & M. c. 21.	9 & 10 W. 3. c. 25.	12 A. ſt. 2. c. 9.	
Solicitor in any Court of Equity without being liable to a further Stamp Duty.				
A Perſon, who has been admitted a Solicitor in one Court of Equity in *England*, may be admitted a Solicitor in any other Court of Equity without being liable to a further Stamp Duty.				2 G. 2. c. 23.
A Perſon, who has been admitted a Solicitor in any Court of Equity at *Weſtminſter*, may be admitted an Attorney of the Court of King's Bench or Common Pleas without being liable to a further Stamp Duty.				Ibid.
Advertiſement in a News Paper publiſhed weekly or oftner in *Great Britain*				1 s. 10 A. c. 19.
And in a News Paper or Pamphlet publiſhed at a Time exceeding one Week in *Great Britain* -				1 s. 30 G. 2. c. 19. 2 s. 10 A. c. 19.
A ſingle Advertiſement printed by itſelf is exempted.				
Affidavit - - -	6 d.	6 d.		6 d. 32 G. 2. c. 35.
Affidavits of burying in Woollen, and thoſe made before Cuſtom-houſe Officers, Juſtices of Peace, or Commiſſioners for raiſing Aids or Duties are exempted.				5 W. & M. c. 21. 9 W. 3. c. 25.
Affidavits, for obtaining the Allowance of the Duties of ſuch Soap as is uſed in the Woollen or Linen Manufacture, are likewiſe exempted.				12 A. ſt. 2. c. 9.
Allegation in a Court of Admiralty -	6 d.	6 d.		
the Cinque Ports	6 d.	6 d.		
Eccleſiaſtical -	6 d.	6 d.		
Almanack for one Year printed upon one Side of a Sheet of Paper in *Great Britain*				1 d. 9 A. c. 23.
And				1 d. 30 G. 2. c. 19.
* for one Year printed in any other Manner than upon one Side of Sheet of Paper in *Great Britain*				* Page 598 2 d. 9 A. c. 23.
And				2 d. 30 G. 2. c. 19.
if to ſerve for more than one Year for every Year in *Great Britain*				2 d. 9 A. c. 23.
And				2 d. 30 G. 2. c. 19.
If an Almanack contain more than one Sheet of Paper only one Sheet is to be ſtamped.				9 A. c. 23.
The perpetual Almanacks or Calendars in Bibles or Common Prayer Books are exempted.				Ibid.
Anſwer in a Court of Admiralty -	6 d.	6 d.		
the Cinque Ports -	6 d.	6 d.		
Eccleſiaſtical - -	6 d.	6 d.		
of Equity - -	1 s.	1 s.		
Appeal from a Court of Admiralty in *England*	40 s.	40 s.	40 s.	
Scotland			40 s.	

Appeal

		5 W. & M. c. 21.	9 & 10 W. 3. c. 25.	12 A. ſt. 2. c. 9.	
	Appeal from the Court of Arches -	40 s.	40 s.	40 s.	
	Prerogative Court of *Canterbury*	40 s.	40 s.	40 s.	
	York	40 s.	40 s.	40 s.	
32 G. 2. c. 35.	Appearance upon Common Bail - -	6 d.	6 d.		6 d.
	Special Bail - -	1 s.	1 s.		
4 A. c. 12.	The Duties impoſed by the 5 *W.* & *M.* *c.* 21. and the 9 & 10 *W.* 3. *c.* 25. upon Appearances are to be extended only to Appearances in Actions where no Bail is filed or put in.				
8 A. c. 9.	Apprentice, if the Money given with him do not exceed fifty Pounds, in the Pound in *Great Britain* - - -				6 d.
Ibid.	if it exceed fifty Pounds, in the Pound in *Great Britain* - -				1 s.
10 A. c. 19.	Appriſing in *Scotland* - -				2 s. 3 d.
	Attachment from a Court of Admiralty -	5 s.	5 s.		
	the Cinque Ports	5 s.	5 s.		
32 G. 2. c. 35.	Bail Common - - - -	6 d.	6 d.		6 d.
	Special - - - - -	1 s.	1 s.		
	Bill in a Court of Equity - -	1 s.	1 s.		
9 A. c. 23.	of Lading in *Great Britain* -				4 d.
30 G. 2. c. 19.	Bond in *England* - - -	6 d.	6 d.	6 d.	1 s.
16 G. 3. c. 34.	And - - -				1 s.
30 G. 2. c. 19.	in *Scotland* - - -			6 d.	1 s.
16 G. 3. c. 34.	And - - -				1 s.
	A Bail Bond or the Aſſignment thereof is only liable to pay - -	6 d.	6 d.		
	Brief for collecting Charity - -	40 s.			
9 A. c. 23.	Cards *per* Pack in *Great Britain* -				6 d.
29 G. 2. c. 13.	And -				6 d.
16 G. 3. c. 34.	And -				6 d.
9 A. c. 23.	Certificate for obtaining a Drawback in *Great Britain* - -				8 d.
2 G. 3. c. 36.	of the Degree of Barriſter -	40 s.			40 s.
5 G. 3. c. 47.	And				120 s.
	of a Degree in the Univerſity of *Oxford* or *Cambridge* -	40 s.			
Page 599	of Marriage - -	5 s.			
6 & 7 W. 3. c. 12.	A Certificate of the Marriage of a Seaman's Widow is exempted.				
30 G. 2. c. 19.	Charter Party in *England* - -	6 d.	6 d.	6 d.	1 s.
16 G. 3. c. 34.	And - -				1 s.
30 G. 2. c. 19.	*Scotland* - - -			6 d.	1 s.
16 G. 3. c. 34.	And - -				1 s.
12 G. 1. c. 33.	Citation from a Court Eccleſiaſtical -	6 d.	6 d.		6 d.
10 A. c. 19.	*Clare conſtat* in *Scotland* - - -				2 s. 3 d.
	Collation to a Benefice of the Value of ten Pounds in the King's Book -	40 s.	40 s.		
Ibid.	Cognition of Heir in *Scotland.* -				2 s. 3 d.
	Commiſſion from an Eccleſiaſtical Court not otherwiſe charged - - -	2 s. 6 d.	2 s. 6 d.		

Con-

	5 W. & M. c. 21.	9 & 10 W. 3. c. 25.	12 A. ſt. 2. c. 9	
Contract, if not a Deed obligatory -	6 d.	6 d.		
Copy of an Affidavit - - -	6 d	6 d.		6 d. 32 G. 2. c. 35.
Allegation in a Court of Admiralty	6 d.	6 d		
the Cinque Ports	6 d	6 d.		
Eccleſiaſtical	6 d.	6 d.		
Anſwer in a Court of Admiralty	6 d.	6 d.		
the Cinque Ports	6 d.	6 d.		
Eccleſiaſtical	6 d.	6 d.		
of Equity	1 d.	1 d.		1 d. Ibid.
a Bill in a Court of Equity - -	1 d.	1 d.		1 d. Ibid.
Citation from a Court Eccleſiaſtical	6 d.	6 d.		
Court Roll of a Manor -				2 s. 3 d. 10 A. c. 19.
Final Decree in a Court of Admiralty	6 d.	6 d.		
the Cinque Ports	6 d.	6 d.		
Eccleſiaſtical	6 d.	6 d.		
of Equity	6 d.	6 d.		
Depoſition in a Court of Admiralty	6 d.	6 d.		
the Cinque Ports	6 d.	6 d.		
Eccleſiaſtical	6 d.	6 d.		
of Equity	1 d.	1 d.		1 d. 32 G. 2. c. 35.
an Interrogatory in a Court of Equity	1 d.	1 d		1 d. Ibid.
Inventory exhibited in a Court of Admiralty	6 d.	6 d.		
the Cinque Ports	6 d.	6 d.		
Eccleſiaſtical	6 d	6 d.		
a Libel in a Court of Admiralty	6 d.	6 d.		
the Cinque Ports	6 d.	6 d.		
Eccleſiaſtical	6 d.	6 d.		
Monition from a Court Eccleſiaſtical	6 d	6 d.		
an Order from a Court at *Weſtminſter*	6 d	6 d.		6 d. Ibid.
a Pleading in a Court of Equity	1 d.	1 d.		1 d. Ibid.
Law	1 d.	1 d.		1 d. Ibid.
Poſtea - - -	6 d.	6 d.		
Proceeding in a Court of Equity	1 d.	1 d		1 d. Ibid.
Proceeding in a Court at *Weſtminſter* not otherwiſe charged -	6 d.	6 d		
Record of a Court at *Weſtminſter* not otherwiſe charged	6 d.	6 d.		
Niſi Prius. - - -	6 d.	6 d.		
Rule of a Court at *Weſtminſter* -	6 d.	6 d.		6 d. Ibid.
Sentence in a Court of Admiralty	6 d	6 d.		
the Cinque Ports	6 d.	6 d.		
Eccleſiaſtical	6 d.	6 d		
Will - - -	1 d.	1 d.		*Page 600
Debenture for a Drawback in *Great Britain*				8 d. 9 A. c. 23.
Decree of a Court of Admiralty - -	6 d.	6 d		
the Cinque Ports -	6 d.	6 d		
Eccleſiaſtical - -	6 d.	6 d		
of Equity - -	6 d	6 d.		
perſonal of a Court of Admiralty	2 s. 6 d	2 s. 6 d		
the Cinque Ports	2 s. 6 d	2 s. 6 d.		
Deed in *England* - - -	6 d.	6 d.	6 d.	1 s. 30 G. 2. c. 19.
And - - -				1 s. 16 G. 3. c. 34.

Deed

		5 W. & M. c. 21.	9 & 10 W. 3. c. 25.	12 A. ſt. 2. c. 9.	
30 G. 2. c. 19.	Deed in *Scotland* not charged with the Duty of 2 s. 3 d. by the 10 *A.* c. 19.			6 d.	1 s.
16 G. 3. c. 34.	And				1 s.
	Depoſition in a Court of Admiralty	6 d.	6 d.		
	the Cinque Ports	6 d.	6 d.		
	Eccleſiaſtical	6 d.	6 d.		
	of Equity	1 d.	1 d.		1 d.
42 G. 2. c. 35.	Dice *per* Pair in *Great Britain*				5 s.
9 A. c. 23.	And				5 s.
29 G. 2. c. 13.	And				2 s. 6 d.
16 G. 1. c. 34.	Diſmiſſion of a Bill in a Court of Equity	6 d.	6 d.		
	Diſpenſation to hold two Benefices from the Archbiſhop of *Canterbury*	40 s.	40 s.	40 s.	
	Maſter of the Faculties	40 s.	40 s.	40 s.	
	Donation of a Benefice of the Value of ten Pounds in the King's Book.	40 s.	40 s.		
5 G. 3. c. 46.	Entry or Memorandum in the Court Book or Roll of a Corporation or Company of an Admiſſion into the Corporation or Company				2 s.
2 G. 3. c. 36.	of the Degree of utter Barriſter in one of the four Inns of Court	40 s.			40 s.
5 G. 3. c. 47.	And				120 s.
	of a Degree in the Univerſity of *Oxford* or *Cambridge*	40 s.			
6 & 7 W. 3. c. 12.	The Degree of Batchelor of Arts is exempted				
12 G. 1. c. 33.	Entry of an Action in an inferior Court which holds Plea of forty Shillings, but iſſues no Writ, Proceſs or Mandate	6 d.	6 d.		6 d.
	Exemplification of a Grant or Letters Patent under the Great Seal or Seal of the Dutchy of *Lancaſter* of a Dignity	40 s.	40 s.	40 s.	
	Franchiſe	40 s.	40 s.	40 s.	
	an Honour	40 s.	40 s.	40 s.	
	a Liberty	40 s.	40 s.	40 s	
	Privilege	40 s.	40 s.	40 s	
	Promotion	40 s.	40 s.	40 s.	
	under the Seal of a Court	5 s.	5 s.		
	Faculty from the Archbiſhop of *Canterbury*	40 s.	40 s.	40 s.	
	Maſter of the Faculties	40 s.	40 s.	40 s	
10 A. c. 19.	Grant by Copy of Court Roll				2 s. 3 d.
	under the Great Seal or Seal of the Dutchy of *Lancaſter* of a Dignity	40 s.	40 s.	40 s.	
	Franchiſe	40 s.	40 s.	40 s.	
	an Honour	40 s.	40 s.	40 s.	
	a Liberty	40 s.	40 s.	40 s.	
	Privilege	40 s.	40 s.	40 s.	
	Promotion	40 s.	40 s.	40 s	
Page 601	under the Great Seal, the Seal of the Exchequer, the Seal of the Dutchy of *Lancaſter*, or the Privity Seal, the Grant not being directed to the Great Seal, of Lands	40 s.	40 s.		
	Profits	40 s.	40 s.		

Grant

	5 W. & M. c. 21.	9 & 10 W. 3. c. 25.	12 A. ſt. 2. c. 9.	
Grant of an Office or Employment above the Value of fifty Pounds *per Annum* in *England* - -	40s.	40s.	40s.	
Scotland - -			40s.	
of a Sum exceeding a hundred Pounds under the Great Seal, or the Privy Seal, ſuch Grant not being directed to the Great Seal -	40s	40s.	40s.	
of a Sum exceeding a hundred Pounds under the Great Seal of *Scotland* -			40s.	
Indenture in *England* - -	6d.	6d.	6d.	1s. 30G.2.c.19.
And -				1s. 16G.3.c.34.
in *Scotland* - -			6d.	1s. 30G.2.c.19.
And - -				1s. 16G.3.c.34.
An Indenture for binding of a Pariſh Child Apprentice is only liable to the Duty of - - -	6d.			
Inrolment in any Court of Record, or by any *Cuſtom Rotulorum* or Clerk of the Peace, of a Conveyance - - -	5s.			
Releaſe - - -	5s.			
Surrender of a Grant - -	5s			
an Office - -	5s.			
any other Deed - - -	5s.			
Inſtitution to a Benefice in *England* -	5s.	5s.	5s.	
Scotland -			5s.	
Interrogatory in a Court of Equity -	1d.	1d.		1d. 32G.2.c.35.
Inſtrument obligatory - -	6d.	6d		
Inventory exhibited in a Court of Admiralty	6d.	6d.		
the Cinque Ports	6d.	6d.		
Eccleſiaſtical	6d.	6d.		
Judgment ſigned in a Court at *Weſtminſter*	2s.6d	2s. 6d.		
Leaſe in *England* - -	6d	6d.	6d.	1s. 30G.2.c.19.
And - -				1s. 16G.3.c.34.
in *Scotland* - - -			6d.	1s. 30G.2.c.19.
And - - -				1s. 16G.3.c.34.
by Copy of Court Roll -				2s. 3d. 10 A. c. 19.
Letter of Attorney in *England* -	6d.	6d.	6d.	1s. 30G.2.c.19.
And -				1s. 16G.3.c.34.
in *Scotland* -			6d.	1s. 30G.2.c.19.
And -				1s. 16G.3.c.34.
Letters of Adminiſtration if the Eſtate be more than twenty Pounds -	5s	5s.		
Letters of Adminiſtration of the Eſtate of a Seaman or common Soldier dying in his Majeſty's Service are exempted.				5 W. & M. c. 21. 9W.3.c.25.
Letters of Mart in *England* - -	5s	5s.	5s.	
* *Scotland* - -			5s.	
Letters Patent under the Great Seal, or Seal of the Dutchy of *Lancaſter*, of a Dignity	40s.	40s.	40s.	
Franchiſe	40s.	40s.	40s.	

*Page 602

Letters

		5 W. & M. c. 21.	6 & 10 W. 3. c. 25.	12 A. ſt. 2. c. 9.	
	Letters Patent under the Great Seal, or Seal of the Dutchy of *Lancaſter*, of an Honour	40s.	40s.	40s.	
	a Liberty	40s.	40s.	40s.	
	Privilege	40s.	40s.	40s.	
	Promotion	40s.	40s.	40s.	
	Letters Patent for collecting Charity called Briefs are only liable to the Duty of -	40s.			
6 & 7 W. 3. c. 12.	Letters Patent containing a Commiſſion of Rebellion in Proceſs are exempted.				
	Libel in a Court of Admiralty -	6d.	6d.		
	the Cinque Ports -	6d.	6d.		
	Eccleſiaſtical -	6d.	6d.		
	Licence from a Court Eccleſiaſtical -	5s.	5s	5s.	
	an Ordinary - -	5s.	5s.	5s.	
	the Preſbytery in *Scotland* -			5s.	
	A Licence to a Schoolmaſter or Tutor is only liable to the Duties of - -	5s	5s.		
	A Licence for Marriage is only liable to the Duties of in *England* - -	5s.		5s.	
	Scotland - -			5s.	
9 A. c. 23.	Licence for retailing Ale in *Great Britain* -				1s.
29 G. 2. c. 12.	And -				20s.
Ibid.	Licences for keeping Alehouſes on the military Roads in *Scotland* are exempted.				
9 A. c. 23.	Licence for retailing Wine in *Great Britain*				4s.
30 G. 2. c. 19.	And if no other Licence be taken out -				100s.
Ibid.	But if an Ale Licence be taken out only -				80s.
Ibid.	And if a Spirituous Liquor Licence be taken out only - - -				40s.
14 G. 3. c. 49.	Licence for keeping a Madhouſe -				5s.
12 G. 1. c. 33.	Mandate from a Court holding Plea of 40s.	6d.	6d.		6d.
	Matriculation in the Univerſity of *Oxford* or *Cambridge* - - -	1s.	1s.		
	Monition from a Court of Admiralty -	2s. 6d	2s. 6d.		
	the Cinque Ports	2s. 6d	2s. 6d.		
Ibid.	Eccleſiaſtical	6d.	6d.		6d.
10 A. c. 19.	News Paper of Half a Sheet or leſs in *Great Britain* - - -				½d.
30 G. 2. c. 19.	And - -				½d.
16 G. 3. c. 34.	And - - -				½d.
10 A. c. 19.	The daily Accounts or Bills of Goods exported and imported and weekly Bills of Mortality, ſo as ſuch Accounts and Bills contain no other Matter than has uſually been compriſed therein, are exempted.				
	Notarial Act - - -	6d.	6d.		
10 A. c. 19.	*Novodamus* in *Scotland* - -				2s. 3d.
32 G. 2. c. 35.	Order of a Court at *Weſtminſter* -	6d.	6d.		6d.
	beneficial under his Majeſty's Sign Manual, except for the Service of the Army, Navy or Ordnance in *England*	2s. 6d	2s. 6d.	2s. 6d	
	Scotland -			2s. 6d	
10 A. c. 19.	Pamphlet of Half a Sheet or leſs in *Great Britain* - - -				½d.

	5 W. & M. c. 21.	9 & 10 W. 3. c. 25.	12 A. ſt. 2. c. 9.	
Pamphlet larger than Half a Sheet and not exceeding one Sheet, for every printed Copy				1 *d.* 10 A. c. 19.
larger than one Sheet and not exceeding ſix Sheets in 8vo, twelve in 4to, or twenty in Folio, for every Sheet in one Copy				2 *s. Ibid.*
Acts of Parliament, Orders of Council, Forms of Prayer, or any Act of State ordered by her Majeſty her Heirs or Succeſſors to be printed, the Votes or other Matters ordered by either Houſe of Parliament to be printed, Books commonly uſed in Schools, and Books containing only Matters of Devotion are exempted.				*Ibid.*
Pardon of a Crime in *England* - -	40 *s.*	40 *s.*	40 *s.*	
Scotland - -			40 *s.*	
The Pardon called the *Newgate* or Circuit Pardon is only liable to pay -	40 *s*			
Pardon of a Fine or Forfeiture - -	40 *s.*	40 *s.*		
And if the Fine or Forfeiture exceed one hundred Pounds in *England* -	40 *s.*	40 *s.*	40 *s*	
Scotland - -			40 *s.*	
Paſſport - - -	6 *d.*	6 *d.*		
Pleadings in a Court of Equity -	1 *s.*	1 *s.*		
Law -	1 *d.*	1 *d.*		1 *d.* 32 G. 2. c. 35.
Policy of Inſurance in *England* -	6 *d*	6 *d.*	6 *d.*	1 *s.* 30 G. 2. c. 19.
Scotland -			6 *d*	1 *s. Ibid.*
Every Policy within the Bills of Mortality is liable to a further Duty of -				2 *s.* 4 *d.* 10 A. c. 26.
And -				2 *d.* 5 G. 3. c. 35.
And in other Parts of *Great Britain* -	2 *s.* 6 *d*			*Ibid.*
Policy for inſuring the Property of more than one Perſon to the Amount of one Thouſand Pounds - - -	5 *s.*			7 G. 3. c. 44.
Above the Amount of One thouſand Pounds	10 *s.*			*Ibid.*
The Property of one Perſon above the Amount of One thouſand Pounds -	10 *s.*			8 G. 3. c. 25.
Poſtea - - -	2 *s.* 6 *d*	2 *s.* 6 *d.*		
Preſentation to a Benefice above the yearly Value of ten Pounds in the King's Books	40 *s.*	40 *s.*		
Probate of a Will, where the Eſtate is more than twenty Pounds - -	5 *s*	5 *s.*		
The Probate of the Will of a common Soldier or Seaman dying in his Majeſty's Service is exempted.				
Proceſs from any Court, except ſuch on which a *Capias* iſſues, holding Plea of forty Shillings - - -	6 *d.*	6 *d.*		6 *d.* 12 G. 1. c. 33.
And - - -				6 *d.* 32 G 2. c. 34.
from the Court of the Dutchy of *Lancaſter* - -	6 *d.*	6 *d.*		
* Procuration in *England* - - -	6 *d.*	6 *d*	6 *d.*	1 *s.* 30 G. 2. c. 19.
And - -				16 G. 3 c. 34.

* Page 604

		5 W. & M. c. 21.	9 & 10 W. 3. c. 25.	12 A. ſt. 2. c. 9.	
30G.2.c.19.	Procuration in *Scotland* - -			6d.	1s.
16G.3.c.34.	And -				1s.
30G.2 c.19.	Proteſt in *England* - -	6d.	6d.	6d.	1s.
16G.3.c.34.	And - -				1s.
30G.2.c 19.	in *Scotland* - -			6d.	1s.
16G.3.c.34.	And - -				1s.
	Recognizance - - -	5s.	5s.		
6 & 7. W.3. c. 12.	A Recognizance taken before a Juſtice of Peace is exempted.				
	Record of *Niſi Prius* - -	2s.6d	2s. 6d.		
2G.3. c. 36.	Regiſter of the Decree of Utter Barriſter in one of the four Inns of Court -	40s.			40s.
5G. 3. c.47.	And -				120s.
	a Degree in the Univerſity of *Oxford* or *Cambridge* -	40s.			
	The Degree of Batchelor of Arts is exempted				
6 & 7 W. 3. c. 12.	Relaxation of an Attachment from a Court of Admiralty - - -	5s.	5s.		
	a Fine or Forfeiture -	40s.	40s.		
	And if the Fine or Forfeiture exceed one hundred Pounds in *England* -	40s.	40s.	40s.	
	Scotland - -			40s.	
30G.2.c 19.	Releaſe in *England* - -	6d.	6d.	6d.	1s.
16G 3.c.34.	And - -				1s.
30G.2.c.19.	in *Scotland* - - -			6d.	1s.
16G.3.c.34.	And - -				1s.
10 A. c. 19.	Reſignation of heretable Right in *Scotland* -				2s. 3d.
	Reprieve from a corporal Puniſhment in *England* - - -	40s.	40s.	40s.	
	Scotland - - -			40s.	
Ibid.	Retour of Service of Heir in *Scotland* -				2s. 3d.
32G.2.c.35.	Rule of a Court at *Weſtminſter* -	6d.	6d.		6d.
10 A. c. 19.	Saiſine in *Scotland* - -				2s. 3d.
	Sentence of a Court of Admiralty -	5s.	5s.		
	Final of a Court of Admiralty -	6d.	6d.		
	the Cinque Ports	6d.	6d.		
	Eccleſiaſtical	6d.	6d.		
Ibid.	Service of Heir in *Scotland* - -				2s. 3d.
	Significavit - - -	5s.	5s.		
	Statute Merchant - -	5s.	5s.		
	Staple - - -	5s.	5s.		
Ibid.	Surrender of a Copyhold Eſtate -				2s. 3d.
Ibid.	A Surrender of a Copyhold Eſtate to the Uſe of a Will is exempted. -				
12 A. ſt. 1. c. 2.	A Surrender of a Cuſtom Right or Tenant Right Eſtate is likewiſe exempted				
10 A. c. 19.	Surrender of heretable Right in *Scotland* -				2s. 3d.
Ibid.	Transfer of Stock in *Great Britain* -				2s. 3d.
12 A. ſt. 2. c. 9.	And -				4s. 6d.
	Warrant beneficial under his Majeſty's Sign Manual, except for the Service of the Army, Navy or Ordnance in *England*	2s.6d	2s 6d.	2s.6d	
	Scotland -			2s.6d	
	Warrant of a Court of Admiralty -	2s.6d	2s. 6d.		

	5 W. & M. c. 21.	9 & 10 W. 3. c. 25.	12 A. st. 2. c. 9.	
Warrant of a Court of the Cinque Ports -	2s 6d.	2s. 6d.		*Page 605
Writ of Appeal except to a Court of Delegates	5s.	5s.		6d. 12G.1.c.33.
Bill of *Middlesex* - -	6d.	6d.		6d. *Ibid.*
And -				6d. 32G.1.c.35.
Capias - - -	6d.	6d.		6d. 12G.1.c.33.
And - - -				6d. 32G.2.c.35.
Certiorari - -	5s.	5s.		6d. 12G.1.c.33.
And -				6d. 32G.2.c.35.
Covenant for levying a Fine -	5s.			
Dedimus potestatem -	6d.	6d.		6d. 12G.1.c.33.
And -				6d. 32G.2.c.35.
Entry for suffering a Recovery -	5s.			
Error - - -	5s.	5s.		
Habeas Corpus - -	5s.			
Latitat - - -	6d.	6d.		6d. 12G.1.c 33.
And -				6d. 32G.2.c.35.
Quo minus - -	6d.	6d.		6d. 12G.1.c.33.
And -				6d. 32G.2.c.35.
Subpœna - - -	6d.	6d.		6d. 12G.1.c.33.
And -				6d. 32G.2.c.35.
every original Writ not particularly charged, except such as a *Capias* issues upon	6d.	6d.		6d. 12G.1.c.33.
And - -				6d. 32G.2.c.35.
every Writ out of a Court holding Plea of forty Shillings -	6d.	6d.		6d. 12G.1.c.33.
And -				6d. 32G.2.c.35.

6. If any of the Articles in this List, except that Sort of Almanacks and Pamphlets mentioned to be excepted, be contained in more than one Skin, Sheet or Piece of Parchment or Paper, every Skin, Sheet or Piece is liable to the Payment of the respective Duties. 5 W. & M. c. 21. 9 & 10 W. 3. c. 25. 12 A. st. 2. c. 9.

7. Besides the Things already mentioned to be exempted, the following are likewise exempted from Stamp Duties.

8. Bills of Exchange, Accounts, Bills of Parcels, Bills of Fees, Bills or Notes not sealed for the Payment of Money at Sight, or upon Demand, or at the End of certain Days. 5 W. & M. c. 21. 9 & 10 W. 3. c. 25.

9. Warrants of a Justice of the Peace, Proceedings of a Court-martial which relate to the Trial of a common Soldier, and all Orders, Decrees and Proceedings before Commissioners of Sewers or in the Court of Stannaries. 6 & 7 W. 3. c. 12. 9 & 10 W. 3. c. 25.

10. Warrants or Instruments signed by the Chief Justices in *Eyre*, or by any Warden, Lieutenant or other Officer of her Majesty's Forests or Chases, for any Matter or Thing relative to their respective Offices. 10 A. c. 26. s. 74.

11. Bonds and other Securities of the Bank. 3 G. 1. c. 8.

12. Bonds and other Securities of the *South-Sea* Company. 3G. 1. c. 9.

13. Bonds and other Securities of the two Companies for the Assurance of Ships and Merchandize at Sea, and lending Money on Bottomry. 6G. 1. c. 18.

14. All Persons, who shall be admitted to sue or defend *in Forma Pauperis*, are to be exempted from Stamp Duties in all Proceedings at Law and in Equity. 5 W. & M. c. 21. s. 14. 9 & 10 W. 3. c. 25. s. 63. 12G. 1. c. 33. s. 7.

•Page 606 (B) Of some Regulations which principally concern the Officers of the Stamp Duties.

Stamps for every particular Sum to be provided; and Notice of these to be given by Proclamation.

1. BY the 5 *W. & M. c.* 21. *par.* 7. it is enacted, "That the Commissioners for managing the Stamp Duties shall provide six several Marks or Stamps, differing from each other, for the several and respective Duties hereby granted, with which several Marks or Stamps all Vellum, Paper and Parchment, upon which any of the several and respective Things herein before charged shall be ingrossed or written, shall be stamped and impressed; which said several Marks and Stamps shall be published by Proclamation, to be issued under the Great Seal of *England*, a convenient Time before the twenty-eighth Day of *June* which shall be in the Year of our Lord one thousand six hundred and ninety-four, to the End that all Persons may have due Notice thereof; and that the said Marks or Stamps, or any of them, shall or may be altered or renewed from Time to Time as their Majesties their Heirs or Successors shall think fit, so as publick Notification be given thereof as aforesaid."

9 A. c. 23. s. 24.
10 A. c. 19. s. 103.
29 G. 2. c. 12. s. 2.
30 G. 2. c. 19. s. 17.

2. Whenever a new Duty has been imposed by a Statute of a Sum for which no Stamp was before provided, it has always been directed in such Statute, that a new Stamp or Mark should be provided and published by Proclamation a convenient Time before the Commencement of the Duty.

Penalty for not publishing such Proclamation.

3. By the 10 *Ann. c.* 19. *par.* 110. it is enacted, "That as often as her Majesty her Heirs or Successors shall think fit to alter any Marks or Stamps, to be provided and used for Vellum, Parchment or Paper, in Pursuance of this Act or any of the former Acts for imposing Stamp Duties, the Proclamation, which is to be made for the giving all Persons due Notice thereof, shall within thirty Days after the Date thereof be sent to the Mayor, chief Magistrate or other head Officer of every City, Corporation, Borough and Market Town throughout her Majesty's Kingdom of *Great Britain*; which Officers respectively shall cause the same to be published to the Inhabitants of such City, Corporation, Borough or Town, either on the next Market Day, or next *Sunday* in the Church immediately after the Time of Divine Service, upon Pain of forfeiting the Sum of Two Hundred Pounds."

Judges are to take judicial Notice of a Proclamation for the publishing of Stamps.

4. By the 10 *Ann. c.* 19. *par.* 180. After reciting, that some Doubt has arisen, whether the Judges are judicially to take Notice of the Proclamation issued by their late Majesties King *William* and Queen *Mary*, in Pursuance of an Act made in the fifth Year of their said Reign, and of the Types, Marks or Stamps thereby published, it is enacted, "That all Courts of Justice and Judges whatsoever ought, without any Proof or Allegation in that Behalf, judicially to take Notice of the said Proclamation, and of all the Types, Marks and Stamps thereby published, and which shall hereafter be published by any Proclamation of her Majesty her Heirs or Successors, in Pursuance of any Act or Acts of Parliament relating to the Stamp Duties or any of them, as and for the true and lawful Types, Marks and Stamps made and provided, or to be made and provided, in Pursuance of this and other the respective Acts of Parliament in that Behalf made."

9 & 10 W. 3. c. 25. s. 49.
12 A. st. 2. c. 9. s. 25.

5. Where a second or third Duty has by any Act been imposed upon the same Thing of a Sum for which a Mark or Stamp was before provided, it has till lately been directed in such Act, that such Mark or Stamp

should

* ſhould be affixed to the Vellum, Parchment or Paper it was to be in- *Page 607
groſſed or written upon a ſecond or third Time as the Caſe required.

6. But by the 30 *G.* 2. *c.* 19. *ſ.* 18. it is enacted, "That to prevent the "Multiplication of Stamps upon ſuch Pieces of Vellum or Parchment, "or ſuch Sheets or Pieces of Paper, on which ſeveral Duties are by ſe- "veral Acts of Parliament impoſed, it ſhall and may be lawful for the "Commiſſioners for managing the Stamp Duties, inſtead of the diſtinct "Stamps directed to be provided, to denote the ſeveral Duties on the "Vellum, Paper or Parchment charged therewith, to cauſe one new "Stamp to be provided, to denote the ſaid ſeveral Duties on every Piece "of Vellum or Parchment, or Sheet or Piece of Paper charged with the "ſaid ſeveral Duties." Several Duties impoſed upon the ſame Thing may be denoted by one Stamp.

7. By the 5 *W.* & *M. c.* 21. *par.* 10. it is enacted, "That if any Officer, "appointed for the marking or ſtamping Vellum, Parchment or Paper, "ſhall fix any Mark or Stamp to any Vellum, Parchment or Paper, be- "fore the ſeveral and reſpective Duties thereupon charged by this "Act ſhall be duly anſwered and paid, or be ſecured to be paid to "their Majeſties Uſe, he ſhall for every ſuch Offence forfeit the Sum "of One Hundred Pounds." Penalty on an Officer ſtampingany Thing before the Duty is paid.

8. One Moiety of this Penalty is given to their Majeſties, and the other Moiety to him or them that ſhall inform or ſue for the ſame in any of their Majeſties Courts of Record, by Bill, Plaint or Information, wherein no Eſſoin, Protection, Wager of Law or more than one Imparlance ſhall be allowed; and it may once for all be obſerved, that the Penalties incurred by Offences againſt the Statutes impoſing Stamp Duties are in the general diſpoſed of in the ſame Manner. 1 A. ſt. 2. c. 22. ſ. 6. 9 A. c. 23. ſ. 37. 10 A. c. 19. ſ. 107. 30 G. 2. c. 19. ſ. 25.

9. By the 5 *W.* & *M. c.* 21. *par.* 9. it is enacted, "That all Vellum, Parch- "ment and Paper, hereby intended to be charged with the ſeveral and "reſpective Duties aforeſaid, ſhall before any of the Matters or Things "herein before mentioned ſhall be thereupon ingroſſed or written be "brought to the head Office aforeſaid, or to ſome other Sub-commiſ- "ſioner or Officer to be appointed by the Commiſſioners as herein is di- "rected for that Purpoſe, to be ſtamped and marked; and the ſaid "Commiſſioners, Sub-commiſſioners and Officers aforeſaid are hereby "impowered and required forthwith, upon Demand to them made by "any Perſon or Perſons, to ſtamp and mark any Quantities or Parcels "of Vellum, Parchment or Paper, he or they paying to ſuch Officer or "Officers as ſhall be appointed in that Behalf the reſpective Duties hereby "directed to be paid for the ſame, without any other Fee or Reward, "which Stamp or Mark ſhall be a ſufficient Diſcharge for the ſeveral and "reſpective Duties hereby granted upon the ſaid Vellum, Parchment "or Paper which ſhall be ſo ſtamped or marked." Vellum, Parchment or Paper to be ſtamped before it is written upon.

10. In the ſubſequent Statutes impoſing Stamp Duties the Officers are in like Manner required, to ſtamp Parchment or Paper upon Demand without Fee or Reward. 9 & 10 W. 3. c. 25. ſ. 59. 9 A. c. 23. ſ. 25. 10 A. c. 19. ſ. 104. 12 A. ſt. 2. c. 9. ſ. 14.

11. And by the 30 *G.* 2. *c.* 19. *par.* 24. it is enacted, "That if any Offi- "cer, employed in the Execution of this Act in Relation to the ſaid "Duties, ſhall neglect or refuſe to do or perform any Matter or Thing "by this Act required to be done or performed by him, whereby any "of his Majeſty's Subjects ſhall or may ſuſtain any Damage whatſoever, "ſuch Officer ſo offending ſhall be liable, by an Action to be founded "on this Statute, to anſwer to the Party grieved all ſuch Damage with "treble Coſts of Suit." An Officer neglecting his Duty liable to anſwer the Damage with treble Coſts.

12. By the 5 *W.* & *M. c.* 21. *par.* 13. it is enacted, "That the Commiſ- "ſioners for managing the Stamp Duties ſhall take eſpecial Care, that "the ſeveral Parts of this Kingdom, the Dominions of *Wales*, and Town "of *Berwick upon Tweed*, ſhall from Time to Time be ſufficiently fur- "niſhed The Commiſſioners to take Care that the Kingdom be furniſhed with Stamps.

*Page 608 " * niſhed with ſtamped Vellum, Parchment, and Paper, ſo as their Majeſties Subjects may have it at their Election to buy the ſame of the " Officers or Perſons to be employed by the ſaid Commiſſioners at the " uſual or moſt common Rates above the ſaid Duty, or to bring their " own Vellum, Parchment or Paper to be ſtamped as aforeſaid."

The Price of ſtamped Vellum, Parchment and Paper to be ſet once a Year.

13. By the 6 & 7 *W.* 3. *c.* 12. *par.* 9. it is enacted, to the End that the Subjects may have ſtamped Vellum, Parchment and Paper at an eaſier Rate than formerly, " That the Lord High Treaſurer, or Commiſ- " ſioners of the Treaſury for the Time being ſhall once in the Year at " leaſt ſet the Prices of all Sorts of ſtamped Vellum, Parchment or Pa- " per that it ſhall be ſold at; and that the Commiſſioners for managing " the Stamp Duties ſhall ſtamp the Price ſo ſet upon every Skin or Piece " of Vellum or Parchment, or Sheet or Piece of Paper, ſo by them to " be ſold."

Whenever a Stamp is altered, the Vellum, Parchment or Paper ſtamped therewith to be changed.

14. By the 5 *W.* & *M. c.* 21. *par.* 16. it is enacted, " That as often as " their Majeſties their Heirs or Succeſſors ſhall think fit to alter or re- " new the ſaid Marks or Stamps or any of them, it ſhall be lawful for " all Perſons who ſhall at that Time have in their Cuſtody or Poſſeſ- " ſion any Vellum, Parchment or Paper marked with the Mark or " Stamp which ſhall be ſo altered or renewed, and upon which none of " the Matters or Things hereby charged ſhall be ingroſſed or written, " at any Time within ſixty Days after ſuch Intention of renewing or al- " tering ſhall be publiſhed by Proclamation as aforeſaid, to bring or " ſend ſuch Vellum, Parchment or Paper unto the Commiſſioners for " managing the Stamp Duties at their head Office in *London* or *Weſt-* " *minſter*, or to ſuch other Officers as ſhall be appointed as aforeſaid: " And the ſaid Commiſſioners and Officers reſpectively are hereby re- " quired to deliver or cauſe to be delivered unto the ſeveral Perſons, " who ſhall bring or deliver any Quantity of Vellum, Parchment or " Paper, the like Quantity of Vellum, Parchment or Paper and as good " in Quality ſtamped with ſuch new Stamp or Mark, without demand- " ing or taking directly or indirectly for the ſame any Sum of Money " or other Conſideration whatſoever, under the Penalty of forfeiting " for every Offence One Hundred Pounds."

9 & 10 W. 3. c. 25. 9 A. c. 23. 10 A. c. 19. 12 A. ſt. 2. c. 9. 12 G. 1. c. 33. 30 G. 2. c. 19.

15. The three laſt Clauſes, for furniſhing the Kingdom with ſtamped Vellum, Parchment and Paper, for fixing the Price of the ſame, and for exchanging the ſame upon any Renewal or Alteration of the Stamps, relate only to the Duties impoſed by the 5 *W.* & *M. c.* 21. But there are in the ſubſequent Acts impoſing other Stamp Duties Clauſes to the ſame Effect.

The Commiſſioners to make an Allowance for Copies of Almanacks unſold.

16. By the 9 *A. c.* 23. *ſ.* 38 it is enacted, " That in regard to the Un- " certainty how many Almanacks for one Year will be ſold, the Com- " miſſioners for managing the Stamp Duties ſhall and may deliver to " the Perſon or Perſons, Bodies Politick or Corporate, by or for whom " any Almanack or Almanacks is or are to be printed or publiſhed, " Paper marked or ſtamped according to the true Intent and Meaning " of this Act for the printing ſuch Almanack or Almanacks, upon his, " her or their giving ſufficient Security to pay the Amount of the Du- " ties hereby charged thereupon within the Space of three Months after " ſuch Delivery; and that the ſaid Commiſſioners, upon bringing to " them any Number of the Copies of ſuch Almanacks within the ſaid " Space of three Months, and Requeſt to them in that Behalf made, " ſhall cancel all the Stamps upon ſuch Copies, and abate to ſuch Perſon " or Perſons ſo much of the Money due on ſuch his, her or their Secu- " rity or Securities as ſuch cancelled Stamps ſhall amount unto, any " Thing herein contained to the contrary notwithſtanding."

17. By

* 17. By the 10 *Ann. c.* 19 *par.* 114. in regard to the Uncertainty how many Copies of News Papers or Pamphlets to be contained in one Sheet or in a leſſer Piece of Paper may be ſold; and to the Intent that the Duties granted thereupon may not be leſſened by printing a leſſer Number than might have been ſold, out of a Fear of Loſs from printing more Copies than may be ſold; it is enacted, "That the Commiſſioners for managing "the Stamp Duties or the major Part of them, or ſuch head Officers as "they ſhall appoint in this Behalf, ſhall and may cancel or cauſe to be "cancelled all the Stamps upon ſuch Copies of any Impreſſion of ſuch "News Paper or Pamphlets, as ſhall really and truly remain unſold in the "Hands of the Perſon or Perſons by or for whom the ſame ſhall be print-"ed or publiſhed: and upon Oath or Oaths made before the ſame Com-"miſſioners or the major Part of them, or ſuch head Officer, who are "hereby impowered to adminiſter the ſame, and to examine into all Cir-"cumſtances relating to the ſelling or diſpoſing of the printed Copies of "ſuch News Paper or Pamphlet, to the Satisfaction of ſuch Commiſſion-"ers or Head Officer, that all ſuch Copies ſo cancelled ſhall be really and "truly remaining and unſold in the Hands of the Perſon or Perſons, by or "for whom the ſame were printed or publiſhed, and that none of them "ſhall have been fraudulently returned or re-bought, after the ſame ſhall "have been ſold and diſpoſed of, ſhall and may cauſe the like Number of "other Sheets, Half Sheets or leſs Pieces of Paper to be ſtamped with "the ſame reſpective Stamps, *gratis*, and without paying any Duties for "the ſame, for the Perſon or Perſons who paid the Duties for ſuch Stamps "as ſhall be on ſuch Copies ſo remaining unſold, any Thing herein con-"tained to the contrary notwithſtanding: And the ſame Commiſſioners or "the major Part of them are hereby impowered to make ſuch Rules and "Orders, for regulating the Methods and limiting the Times for ſuch "Cancelling and Allowances as aforeſaid, with reſpect to ſuch ſeveral and "reſpective News Papers and Pamphlets, as they ſhall upon Experience "and Conſideration of the ſeveral Circumſtances find neceſſary or conve-"nient, for the effectual ſecuring the Duties on ſuch News Papers or "Pamphlets, and doing Juſtice to the Perſons concerned in printing and "publiſhing the ſame." *Page 609

The Commiſſioners to make an Allowance for Copies of News Papers and Pamphlets unſold.

18. By the 5 *W. & M. c.* 21. *par.* 12. it is enacted, "That the Com-"miſſioners for managing the Stamp Duties ſhall and may appoint a fit "Perſon to attend in any Court or Office, to take Notice of the Vellum, "Parchment or Paper upon which any of the Matter or Things hereby "charged ſhall be impoſed, written or put, and of the Marks or Stamps "thereupon, and of all other Matters and Things tending to ſecure their "Majeſties Duties ariſing by this Act; and that the Judges in the ſeveral "Courts, and ſuch others to whom it may appertain, at the Requeſt of "the ſaid Commiſſioners or any two or more of them, ſhall make ſuch "Orders in the reſpective Courts, and do ſuch other Matters and Things "for the better ſecuring the ſaid Duties, as ſhall be lawfully and reaſonably "deſired in that Behalf."

Inſpectors in Courts may be appointed, and the Judges are to make Orders for ſecuring the Stamp Duties.

19. By the 9 *Ann. c.* 23 *par.* 28. it is enacted, "That all publick "Officers, who ſhall have in their Cuſtody any publick Books, Files, "Records, Remembrances, Dockets or Proceedings, the Sight or Know-"ledge whereof may tend to the ſecuring of theſe or any her Majeſty's "Stamp Duties, or to the Proof or Diſcovery of any Fraud or Omiſſion "in relation thereto or to any of them, ſhall at any ſeaſonable Time or "Times permit any Officer or Officers, thereunto authorized by the "Commiſſioners for managing the Stamp Duties or the major Part of "them, to inſpect and view ſuch Books, Files, Records, Remembrances, "Dockets and Proceedings as aforeſaid, and to take thereout ſuch

Penalty for obſtructing the Inſpectors appointed.

" Notes and Memorandums as ſhall be neceſſary for the Purpoſes laſt men-
" tioned without Fee or Reward, upon Pain that ſuch Clerk or other Of-
*Page 610 " ficer or Officers, who ſhall refuſe or neglect ſo to do upon * reaſonable
" Requeſt in that Behalf made, ſhall for every ſuch Refuſal or Neglect for-
" feit the Sum of five Pounds with full Coſts of Suit."

(C) What the Conſequence is, of Ingroſſing or Writing any Matter liable to a Stamp Duty upon Vellum, Parchment or Paper which has not been duly ſtamped.

1. To any Perſon ſo ingroſſing or writing.

Penalty of five hundred Pounds for ingroſſing or writing on Vellum, Parchment or Paper not duly ſtamped.

1. BY the 5 *W. & M. c.* 21. *par.* 11. it is enacted, " That if any Per-
" ſon or Perſons ſhall ingroſs or write, or cauſe to be ingroſſed
" or written, upon any Vellum, Parchment or Paper any Matter or
" Thing for which the ſaid Vellum, Parchment or Paper is hereby charged
" to pay any Duty, before ſuch Time as the ſaid Vellum, Parchment or
" Paper ſhall be marked or ſtamped as aforeſaid, or upon which there ſhall
" not be ſome Stamp or Mark reſembling the ſame, or ſhall ingroſs or
" write, or cauſe to be ingroſſed or written, any Matter or Thing upon any
" Vellum, Parchment or Paper, that ſhall be marked or ſtamped for any
" lower Duty than is the Duty by this Act payable for what ſhall be ſo in-
" groſſed or written, ſuch Perſon ſo offending ſhall for every ſuch Offence
" forfeit the Sum of five hundred Pounds.

This Penalty reduced to five Pounds.

2. But by the 6 & 7 *W.* 3. *c.* 12. *par.* 7. it is enacted, " That the Pe-
" nalty of five hundred Pounds mentioned in 5 *W. & M. c.* 21. ſhall no
" longer ſtand and be in Force, but is altered and changed into the Penalty
" of five Pounds only; and that for the future in all Caſes, wherein by the
" ſaid Act the Offender was to forfeit the Sum of five hundred Pounds,
" he ſhall forfeit no more than five Pounds, to be recovered with Coſts of
" Suit, any Thing in the ſaid Act to the contrary notwithſtanding."

3. A Penalty of ten Pounds with full Coſts of Suit is inflicted by divers
9 & 10 W. 3. c. 25. ſ. 59. 9 A. c. 23. ſ. 27. ſubſequent Statutes for impoſing Stamp Duties, for any Offence of the
ſame Kind againſt either of them.

10 A. c. 19. ſ. 105. 12 A. ſt. 2. c. 9. ſ. 28. 12 G. 1. c. 33. ſ. 13. 30 G. 2. c. 19. ſ. 25.

2. To ſome particular Perſon ſo ingroſſing or writing.

A publick Officer of any Court to forfeit his Place, as well as to be liable to a Penalty.

4. By the 5 *W. & M. c.* 21. *par.* 11. it is enacted, " That if any Clerk
" Officer or Perſon, who in reſpect of any publick Office or Employ-
" ment is or ſhall be intitled or intruſted to make, ingroſs or write any
" Records, Deeds, Inſtruments or Writings by this Act charged to pay
" a Duty as aforeſaid, ſhall be guilty of any Fraud or Practice to deceive
" their Majeſties of any Duty by this Act payable, by making, ingroſſ-
" ing or writing any ſuch Record, Deed, Inſtrument or Writing, or
" cauſing the ſame to be made, ingroſſed or written, upon Vellum,
" Parchment or Paper not marked and ſtamped according to this Act,
" or upon which there ſhall not be ſome Mark or Stamp reſembling
" the

" the ſame, or upon Vellum, Parchment or Paper marked or ſtamped with " any Mark or Stamp which he ſhall know to be counterfeited, or by in- " groſſing or writing any ſuch Deed, Inſtrument or other Writing upon " Vellum, Parchment or Paper that ſhall be marked or ſtamped * for a * Page 611 " lower Duty as aforeſaid, that then every ſuch Clerk, Officer or Perſon " guilty of any ſuch Fraud or Practice, and being thereof lawfully con- " victed, ſhall over and above the Penalty aforeſaid forfeit his Office, Place " or Employment reſpectively, and be diſabled to hold or enjoy the ſame " for the future."

An Attorney to be diſabled from practiſing, as well as to be liable to a Penalty.

5. By the ſame *par.* it is enacted, " That if any Attorney belonging to " any Court whatſoever ſhall be guilty of any ſuch Fraud or Practice as " aforeſaid, and be convicted thereof, he ſhall over and above the Penalty " aforeſaid be diſabled for the future to practiſe as an Attorney."

An Officer incurs no Penalty for writing in a Book unſtamped, with Leave of the Commiſſioners.

6. But by the 1 *Ann. ſt.* 2. *c.* 22. *par.* 4. it is enacted, " That no Of- " ficer ſhall be ſubject to any the Penalties, Forfeitures, Diſabilities or " Incapacities in this or any of the former Acts for impoſing any Stamp " Duties mentioned, for writing or cauſing to be written any of the Mat- " ters or Things liable to Stamp Duties in any Book or Roll without any " Marks or Stamps thereon, which ſhall have been firſt ſhewn to and " ſigned by the Commiſſioners for managing the Stamp Duties, or " any three or more of them, or ſome Officer or Officers by them or the " major Part of them for that Purpoſe authorized and impowered, to ſig- " nify his or their Leave or Approbation, that the Matters or Things to " be written in ſuch Book or Roll may be therein written without any " Marks or Stamps thereon, ſo as the Perſon or Perſons having the Cuſtody " of ſuch Book or Roll do from Time to Time, when and as often as he " or they ſhall be thereto required, permit the ſaid Commiſſioners or any " of them, or any Officer or Agent, by them or the major Part of them " for that Purpoſe appointed, to inſpect and view ſuch Book or Roll, and " do alſo from Time to Time, when and as often as he or they ſhall be thereto " required by the ſaid Commiſſioners or the major Part of them, or any " other by them or the major Part of them authorized, pay unto the Re- " ceiver General for the Time being of the ſaid Duties, or ſuch other Of- " ficer or Perſon as the ſaid Commiſſioners or the major Part of them ſhall " appoint to receive the ſame, all ſuch Sum or Sums of Money, which ac- " cording to the true Intent and Meaning of the ſaid Acts or any of them " ought to be paid, in reſpect of all and every ſuch Matters and Things as " ſhall be written in ſuch Book or Roll, any Thing herein or in any of the " ſaid former Acts contained to the contrary thereof notwithſtanding."

An Officer of the Cuſtoms to forfeit ten Pounds and his Office.

7. By the 9 *Ann. c.* 23. *par.* 17. it is enacted, " That if any Officer of " the Cuſtoms ſhall ſign any Certificate or Debenture for drawing back " any Cuſtoms or Duties, not appearing to have been duly ſtamped ac- " cording to Law, every ſuch Officer ſo offending ſhall for every ſuch " Offence forfeit the Sum of ten Pounds together with full Coſts of Suit; " and every ſuch Officer of the Cuſtoms offending herein, and being con- " victed of ſuch Offence, ſhall over and beſides the Penalty or Forfeiture " as aforeſaid forfeit and loſe his Office or Employment, and be incapable " to hold the ſame."

A Steward to forfeit ten Pounds and his Office.

8. By the 10 *Ann. c.* 19. *par.* 105. it is enacted, " That if any Stew- " ard or other Officer, or his Deputy, ſhall write or ingroſs, or cauſe to " be written or ingroſſed, or ſign, any of the reſpective Matters and " Things by this Act charged, before the Vellum, Parchment or Paper " whereupon the ſame ſhall be reſpectively ingroſſed or written ſhall ap- " pear to have been duly ſtamped or marked as aforeſaid, he ſhall forfeit " the Sum of ten Pounds together with full Coſts of Suit, and ſuch Stew-

" ard,

" ard, or other Officer, or his Deputy, offending herein, and being convict-
" ed of any ſuch Offence, ſhall over and beſides the Forfeiture or Penalty
" aforeſaid forfeit and loſe his Office and Employment, and be incapable to
" hold the ſame."

*Page 612

3. To the Inſtrument or Thing ſo ingroſſed or written.

No Inſtrument written on unſtamped Paper to of any Avail until the Duty and a Penalty of five Pounds is paid.

9. By the 5 *W. & M. c.* 21. *par.* 11. it is enacted, " That if any Deed,
" Inſtrument or Writing, by this Act charged with the Payment of a Duty
" as aforeſaid, ſhall contrary to the true Intent and Meaning thereof be
" written or ingroſſed by any Perſon or Perſons whatſoever, not being a
" known Clerk or Officer who in reſpect of any publick Office or Employ-
" ment is or ſhall be intitled to the making writing or ingroſſing the ſame,
" upon Vellum, Parchment or Paper not marked or ſtamped according to
" this Act, or upon Vellum, Parchment or Paper marked or ſtamped for
" a lower Duty as aforeſaid, that then and in every ſuch Caſe there ſhall
" be due, anſwered and paid to their Majeſties over and above the Duty
" aforeſaid for every ſuch Deed, Inſtrument or Writing the Sum of five
" Pounds; and no ſuch Record, Deed, Inſtrument or Writing ſhall be
" pleaded or given in Evidence in any Court, or admitted in any Court to
" be good uſeful or available in Law or Equity, until as well the ſaid Duty
" as the ſaid Sum of five Pounds ſhall be firſt paid to their Majeſties Uſe,
" and a Receipt produced for the ſame under the Hand or Hands of ſome
" of their Majeſties Officers, which ſhall be appointed to receive the Du-
" ties abovementioned, and until the Vellum, Parchment or Paper, upon
" which ſuch Deed, Inſtrument or Writing ſhall be written or made, ſhall
" be marked or ſtamped with a lawful Mark or Stamp; and their Majeſ-
" ties Officer or Officers laſt-mentioned are hereby injoined and required,
" upon Payment or Tender of the ſaid Duty and Sum of five Pounds unto
" him or them, to give a Receipt for the ſame, and to mark or ſtamp the
" ſaid Vellum, Parchment or Paper with the Mark or Stamp that ſhall be
" proper for ſuch Deed, Inſtrument or Writing reſpectively."

9 & 10 W. 3. c. 25. ſ. 59. 9 A. c. 23. ſ. 27. 10 A. c. 19. ſ. 105. 10 A. c. 26. ſ. 71.

10. There is in divers other Statutes a Clauſe penned in nearly the ſame Words as this: But the Exception, as to the Perſon writing or ingroſſing being a known Clerk or Officer who in reſpect of any publick Office or Employment is or ſhall be intitled to the making writing or ingroſſing the ſame, is only in that of the 9 & 10 *W.* 3. *c.* 25."

12 A. ſt. 2. c. 9. ſ. 25. 12 G. 1. c. 33. ſ. 8. 30 G. 2. c. 19. ſ. 25.

Ld. Raym. 1445. *Rex* v. *Reeks.*

11. Upon a Trial at Bar of an Information in the Nature of a *Quo Warranto* an Inſtrument ſtamped with one Stamp was offered in Evidence, purporting to be the Admiſſion of five Perſons upon the nineteenth of *December* one thouſand ſeven hundred and twenty-one, amongſt whom the Defendant was the third Perſon named. *Raymond* Ch. J. and *Forteſcue* and *Reynolds* J. were of Opinion, that the Inſtrument ought not to be read; for that if not quite void for Uncertainty it could be only good for the Admiſſion of the Perſon firſt named. Then four Pieces of Parchment all duly ſtamped, which purported to be the ſeveral Admiſſions of the four Perſons laſt named on the ſaid nineteenth Day of *December*, were offered in Evidence: But it being proved by the Witneſs producing them, that they were not ſtamped till two Months after the ſaid Day, the ſame three Judges were of Opinion, that as theſe Parchments were not ſtamped at the Time of the Admiſſion, they could not be given in Evi-

Evidence, becauſe no Certificate of the Payment of the Penalties was produced.

12. But where the Penalty has been paid, and a Receipt for the Payment thereof is produced, an Inſtrument is good and available in all Courts although it were not ſtamped at the Time it was executed; for the Deſign of the ſeveral Statutes is only to prevent Frauds in the Stamp Duties.

* 13. Upon a Writ of Error it appeared from a Bill of Exceptions, that a Patent which had been given in Evidence was not ſtamped at the Time it was ſealed: And the Queſtion was, whether the Patent ought to have been admitted as Evidence? The whole Court were of Opinion, that being ſtamped at the Time of the Trial it was admiſſible Evidence; for that the Intention of the Stamp Acts is not to make unſtamped Deeds abſolutely void, but to add a Penalty, which has in the preſent Caſe been paid, for enforcing the Payment of the Stamp Duties. *Page 613 Str. 624. *Rex* v. the Biſhop of *Cheſter*.

14. A Motion was made to ſet aſide a Verdict becauſe a *Diſtringas* was not ſtamped at the Time of the Trial; but the Solicitor having taken Care to get it ſtamped before the *Poſtea* was brought in, no Rule was made; And by the Court; as the *Diſtringas* is now ſtamped, we cannot take Notice whether it were ſo or not at the Aſſize; and if it were not, Advantage ſhould have been then taken of the Defect. 8 Mod. 226. Anon. Str. 575.

15. From the Words of the ſeveral Statutes and from thoſe Caſes it appears, that nothing more is in the general intended than to make unſtamped Inſtruments void to certain Purpoſes; but by the 8 *A. c.* 9. *par.* 39. it is enacted, "That all Indentures of Apprenticeſhip, wherein ſhall not be truly "inſerted or written the full Sum and Sums of Money received, or in any "wiſe directly or indirectly given, paid, ſecured or contracted for, with or "in relation to any Clerk, Apprentice or Servant, or whereupon the Duties "payable by this Act ſhall not be paid or lawfully tendered, or which ſhall "not be ſtamped or lawfully tendered to be ſtamped, ſhall be void, and "not available in any Court or Place to any Purpoſe whatſoever." An Indenture of Apprenticeſhip not duly ſtamped is void.

16. And by *par.* 43. it is enacted, "That no Indenture, required by this "Act to be ſtamped, ſhall be given in Evidence in any Suit brought by a "Party thereunto, unleſs the Party, on whoſe Behalf it is intended to be "given in Evidence, do firſt make Oath, that to the beſt of his Knowledge "the Sum therein mentioned was all that was directly or indirectly given or "contracted for, in reſpect of ſuch Clerk, Apprentice or Servant, to or for "the Benefit of the Maſter or Miſtreſs, with whom ſuch Clerk, Apprentice "or Servant was placed."

17. An Apprentice had ſerved three Years: but the Maſter had never paid the Duty of Sixpence in the Pound for the Money received with him. This Caſe being referred to *Forteſcue* J. who went the Circuit, he was of Opinion, that as ſix Months Time was given for the Maſter to pay the Duty in, a Settlement was during that Time gained which could not afterwards be defeated; and the Seſſions held it to be a Settlement. Upon removing the Order of Seſſions it was quaſhed; and by the Court: this would be making the Indenture good to one Purpoſe, when by the 8 of *Ann. c.* 9. it is declared, that ſuch Indenture ſhall not be good to any Purpoſe whatſoever; and the poſitive Words of an Act of Parliament, however hard the Caſe is, are not to be broke through. Str. 903. The Inhabitants of *Curenden* v. the Inhabitants of *Leland*.

(D) Of Regulations for preventing Frauds to the Prejudice of the Stamp Duties.

1. AS many of the Stamp Duties were at firſt impoſed for a Time the Regulations concerning them were of Courſe temporary: But as the different Acts of Parliament, by which thoſe Duties were impoſed, have been all made perpetual, or are ſo continued as to be at this Day in Force, it may once for all be obſerved, that the Regulation do ſtill ſubſiſt.

*Page 614

* 1. By writing a ſecond Matter liable to a Stamp Duty upon Vellum, Parchment or Paper which has not been a ſecond Time duly ſtamped.

Penalty for fraudulently uſing the ſame Stamp for ſome ſecond Matter liable to a Stamp Duty.

2. By the 1 *An. ſt.* 2. *c.* 22. *par.* 2. it is enacted, "That if any Perſon or Perſons ſhall write or ingroſs, or cauſe to be written or ingroſſed, either the Whole or any Part of any Writ, Mandate, Bond, Affidavit or other Writing, Matter or Thing whatſoever, in reſpect whereof any Duty is payable by any of the Acts for impoſing Stamp Duties, on the Whole or any Part of any Piece of Vellum, Parchment or Paper, whereon there ſhall have been before written any other Writ, Mandate, Bond, Affidavit, or other Writing, Matter or Thing, in reſpect whereof any Duty was payable by any of the ſaid Acts, before ſuch Vellum, Parchment or Paper ſhall have been again marked or ſtamped according to the ſaid Acts; or ſhall fraudulently eraſe or ſcrape out, or cauſe to be eraſed or ſcraped out, the Name or Names of any Perſon or Perſons, or any Sum, Date or other Thing written in ſuch Writ, Mandate, Bond, Affidavit, or other Writing, Matter or Thing as aforeſaid, or ſhall fraudulently cut, tear or get off any Mark or Stamp from any Piece of Vellum, Parchment or Paper, or any Part thereof, with Intent to uſe ſuch Mark or Stamp for any other Writing, Matter or Thing, in reſpect whereof any Duty ſhall be payable by Virtue of any of the ſaid Acts, that then, ſo often, and in every ſuch Caſe, every Perſon ſo offending in any of the Particulars before mentioned ſhall for every ſuch Offence forfeit the Sum of twenty Pounds with full Coſts of Suit.

The Aſſignment of a Bail Bond need not be ſtamped at the Time of aſſigning the Bond.

3. But by the 4 *Ann. c.* 16. *par.* 20. it is enacted, "That a Sheriff or other Officer, at the Requeſt and Coſts of the Plaintiff in the Action or his Attorney, ſhall aſſign a Bail Bond or other Security taken by ſuch Sheriff or Officer from the Bail to the Plaintiff in the Action, by endorſing the ſame, and atteſting it under his Hand and Seal in the Preſence of two credible Witneſſes, which may be done without any Stamp.

But it muſt before an Action is brought upon the Bail Bond.

4. It is provided however by the ſame *par.* "That the Aſſignment ſo endorſed muſt be duly ſtamped, before any Action is brought upon the Bail Bond.

Several Matters written upon the ſame Vellum, Parchment or Paper to be charged ſeverally.

5. By the 12 *A. c.* 9. *par.* 24. it is enacted, "That where any more than one of any the Matters or Things hereby charged with any Stamp Duty ſhall be ingroſſed, written, entered or regiſtered upon one Piece of Vellum, Parchment or Paper, the ſaid reſpective Duties hereby granted ſhall be and hereby are charged upon every one of ſuch Matters or Things reſpectively."

6. A

*6. A Warrant of Attorney for entering up Judgment was written upon a Sheet of Paper, which likewiſe contained a Bond and had only one Stamp; whereas by the Statutes impoſing Stamp Duties it ought to have had two. Judgment having been entered up by Virtue of this Warrant, the Court was moved that the Judgment and Execution thereupon might be ſet aſide: But by the Court: there may be Reaſon to refuſe ſuch Warrant of Attorney in Evidence, but there is none to hold it void; for there is nothing in either of the Stamp Acts which makes it ſo. *Page 615 Salk. 612. Anon. Mich. 4 Ann.

7. This, which is an anonymous Caſe, is very ſhortly reported; and there was probably ſome other Reaſon for the Judgment; for that mentioned by the Reporter is ſo inconcluſive, that the Judgment of the Court cannot be preſumed to have been thereupon founded. It is not eaſy to conceive a Caſe, wherein ſuch Warrant of Attorney could have been offered in Evidence: But to allow the Poſſibility of ſuch a Caſe, if the Court would have been of Opinion, that it would not have been admiſſible Evidence, the Judgment entered up upon it ſeems to be bad; for in the Clauſe of the 5 & 6 of *W. & M. c.* 21. and of the 9 & 10 *W.* 3. *c.* 25. in which it is enacted, *that no Deed, Inſtrument or Writing ſhall be pleaded or given in Evidence in any Court, until the Vellum, Parchment or Paper, on which ſuch Deed, Inſtrument or Writing ſhall be written or made, ſhall be marked or ſtamped with a lawful Mark or Stamp*, it is added, *or be admitted in any Court to be good, uſeful or available in Law or Equity.*

8. By the 1 *Ann. ſt.* 2. *c.* 22. *par.* 5. it is enacted, "That all Writings Matters and Things, in reſpect whereof any Stamp Duties ſhall be payable, ſhall be written in ſuch Manner, that ſome Part thereof ſhall be upon or as near as conveniently can be to the Stamps or Marks, which ſhall in Purſuance of any Act of Parliament be placed upon the Vellum, Parchment or Paper whereupon the ſame ſhall be written or ingroſſed, upon Pain that the Perſon, who ſhall write or ingroſs, or cauſe to be written or ingroſſed, any ſuch Writing, Matter or Thing contrary to the Tenor and true Meaning hereof, ſhall for every ſuch Offence forfeit the Sum of Ten Pounds with full Coſts of Suit." Penalty for not writing Part of the Matter upon or near to the Stamps.

2. In the Manner of writing certain Matters.

9. By the 5 *W. & M. c.* 21. *par.* 15. it is enacted, "That to the End their Majeſties may not be defrauded of any of the Duties hereby granted, all Records, Writs, Pleadings and other Proceedings in Courts of Law and Equity, and all Deeds, Inſtruments and Writings whatſoever hereby charged, ſhall be ingroſſed and written in ſuch Manner as they have been uſually accuſtomed to be written or are now written." Records, Deeds and all Writings to be ingroſſed and written as they uſually have been.

10 In the 9 & 10 *W.* 3. *c.* 25. *par.* 64. there is a Clauſe to the ſame Effect.

3. In legal Proceedings.

11. By the 5 *W. & M. c.* 21. *par.* 4. for the preventing of Abuſes committed by arreſting Perſons without any Writ or legal Proceſs to juſtify the ſame, by Means whereof the Duty hereby given to the Crown upon ſuch Proceſs will be loſt, it is enacted, "That every Officer or Clerk belonging to the Court of King's Bench, Common Pleas or Exchequer, who ſhall ſign any Writ or Proceſs before Judgment to arreſt any Perſon or Perſons thereupon, ſhall at the Signing thereof ſet down Penalty upon a Clerk, not entering the Time of ſigning a Writ or Proceſs.

"upon

*Page 616 " * upon ſuch Writ or Proceſs the Day and Year of ſigning the ſame, " which ſhall be entered upon the Remembrance, or in the Book where " the Abſtract of ſuch Writ or Proceſs ſhall be entered, upon Pain to for- " ſeit the Sum of Ten Pounds for every Offence or Neglect of ſuch Officer " or Clerk aforeſaid."

12. In the 9 & 10 *W.* 3. *c.* 25. *par.* 42. there is a Clauſe to the ſame Effect.

Penalty upon a Sheriff delivering out a Warrant without having a Writ in his Cuſtody.

13. By the 6 *G.* 1. *c.* 21. *par.* 53. after reciting, that many Under Sheriffs and other Perſons acting as ſuch do make and deliver out Blank Warrants to Attornies, Bailiffs and others, for the arreſting and taking of Perſons into Cuſtody upon mean Proceſs, without having any Writ or other legal Proceſs in their Cuſtody to juſtify the ſame, whereby his Majeſties Duties are greatly leſſened and his Subjects aggrieved, it is enacted, " That " if any High Sheriff, Under Sheriff, or his or their Deputy or Deputies, " their Clerks or Agents ſhall make or cauſe to be made or delivered out " to any Perſon or Perſons whomſoever any Warrant or Warrants, either " Blank or filled up in part or in all, before they or ſome of them ſhall actu- " ally have in their Cuſtody the reſpective Writs upon which ſuch War- " rants ſhould and ought to iſſue, that then the ſeveral Perſons ſo offend- " ing, and every of them, ſhall forfeit the Sum of Ten Pounds for every " ſuch Offence."

Penalty upon a Sheriff, not ſetting down upon a Warrant the Time of delivering it out.

14. By *par.* 54. after reciting, that by one Statute made in the fifth Year of the Reign of King *William* and Queen *Mary* for granting to their Majeſties ſeveral Duties upon Stamped Vellum, Parchment and Paper, and by another made in the ninth Year of his ſaid Majeſty's Reign for granting to his Majeſty his Heirs and Succeſſors further Duties upon Stamped Vellum, Parchment and Paper, it was *inter alia* enacted, That every Officer or Clerk belonging to the Court of King's Bench, Common Pleas or Exchequer, who ſhould ſign any Writ before Judgment to arreſt any Perſon or Perſons thereupon, ſhould at the ſigning thereof ſet down upon ſuch Writ or Proceſs the Day and Year of his ſigning the ſame, under the Forfeiture of Ten Pounds for every ſuch Offence or Neglect, it is for the better preventing the Offence aforeſaid enacted, " That every Warrant, to be made out or " iſſued upon any ſuch Writ or Writs, ſhall have the ſame Day and Year " plainly and diſtinctly ſet down thereon as ſhall be ſo ſet down upon the " Writ itſelf, under the Forfeiture of Ten Pounds for every ſuch Neglect " or Omiſſion, to be paid by the Perſon who ſhall write, fill up, or deliver " out ſuch Warrant."

Penalty for not filing Common Bail in due Time.

15. By the 9 & 10 *W.* 3 *c.* 25 *par.* 33. it is enacted, " That when " Common Bail is to be filed in any Court whatſoever, or an Appearance is " to be upon ſuch Common Bail, the Defendant ſhall cauſe ſuch Appear- " ance or Common Bail to be entered or filed, within eight Days after the " Day upon which the Proceſs on which the Defendant is arreſted ſhall be " returnable, upon Penalty of five Pounds to be paid to the Plaintiff, for " which the Court ſhall immediately award Judgment, whereupon the " Plaintiff may take out Execution."

Str. 737. *White* v. *Holland.*

16. Upon Debate it was holden that an abſolute Rule ſhould be made in the firſt Inſtance for Judgment for five Pounds, for not having filed Common Bail according to the 9 & 10 *W.* 3. *c.* 25. the Words of the Statute being, that the Court ſhall immediately award Judgment, whereupon the Plaintiff may take out Execution.

Penalty upon an Officer or Attorney in certain Caſes.

17. By the 1 *Ann. ſt.* 2. *c.* 22. *par.* 1. for the Prevention of ſeveral Frauds, whereby her Majeſty's Duties by the ſeveral Acts of Parliament in that Behalf made impoſed on ſtamped Vellum, Parchment and Paper have been very much leſſened, it is enacted, " That if any Clerk, Officer, Attorney, " Solicitor or other Perſon, to whom it ſhall appertain, or who ſhall be " employed or intruſted, to enter or file any Action, Plaint, Bail, Ap- " pearance,

" pearance, Admiſſion or other Matter or Thing, in reſpect whereof any " Duty ſhall be payable by Virtue of the ſaid Acts or any of them, ſhall " neglect to enter, file or record the ſame, as by Law the ſame ought " * to be entered, filed or recorded, within the Space of four Months * Page 617 " after ſuch Clerk, Officer, Attorney, Solicitor or other Perſon ſhall have " received any Money, for or in reſpect of the entering, filing or record- " ing of any ſuch Action, Plaint, Bail, Appearance, Admiſſion, or other " Matter or Thing, or ſhall have promiſed or undertaken to enter, file or " record the ſame; or ſhall neglect to enter, file or record any ſuch Ac- " tion, Plaint, Bail, Appearance, or other Matter or Thing, before any " ſubſequent, further or other Proceeding, Matter or Thing in, upon or " relating to the ſame ſhall be had, entered, filed or recorded; or if any " Clerk, Officer, Attorney, Solicitor, or other Perſon or Perſons ſhall " tranſact, enter, record or file any ſuch Suit or other Proceeding, Matter " or Thing ſubſequent and relating to ſuch Action, Plaint or Appearance, " before the ſame ſhall have been duly entered, filed or recorded, that " then every ſuch Clerk, Officer, Attorney, Solicitor or other Perſon, ſo " neglecting or offending, ſhall for every ſuch Offence or Neglect forfeit " the Sum of twenty Pounds with full Coſts of Suit."

18. But by the ſame *par.* it is provided, " That nothing in this Act " contained ſhall extend, or be conſtrued to extend, to oblige or compel " any Clerk, Officer or other Perſon to enter or file an Appearance, where " a Judgment is entered by Confeſſion, any Thing therein contained to the " contrary notwithſtanding."

19. By *par.* 3. it is enacted, " That every Perſon, who ſhall in any Suit " or Information, commenced or brought upon in Purſuance of this Act, " be convicted of any Offences herein before mentioned, ſhall likewiſe " incur the Forfeitures and Diſabilities which ſuch Offender would have " incurred, if he had been convicted of writing contrary to the Acts im- " poſing Stamp Duties, or any of them, the Entry of any Plaint or Action, " or any Writ, Bond, or other Writing, Matter or Thing on Vellum, " Parchment or Paper not marked or ſtamped according to the ſaid Acts, " nor having any Stamp or Mark thereon reſembling any of the Marks or " Stamps in the ſaid Acts or any of them mentioned."

A Forfeiture and Diſability are likewiſe incurred by an Officer or Attorney in ſuch Caſes.

20. By the 6 *G.* 1. *c.* 21. *par.* 56. it is enacted, " That all Pains, Pe- " nalties and Proviſions given and laid on by this Act, and by an Act " paſſed in the firſt Year of the Reign of her late Majeſty Queen *Anne*, " intituled, *An Act for preventing Frauds in her Majeſty's Duties upon* " *ſtamped Vellum, Parchment and Paper*, for the Puniſhment and Preven- " tionof ſuch Frauds and Omiſſions as are herein and therein mentioned or " intended, relating to the Duties then in Being, ſhall extend, and be " conſtrued to extend, to the like Frauds and Omiſſions, relating to any " of his Majeſty's other Stamp Duties, impoſed or laid on ſince the making " of the ſaid laſt mentioned Act."

The Penalties inflicted by 1 *Ann.* c. 222. extended to the like Frauds againſt ſubſequent Stamp Acts.

21. But by the 5 *Ann. c.* 19. *ſ.* 29. After reciting, that by reaſon of the doubtful Wording of the Statute made in the firſt Year of her Majeſty's Reign, intituled, *An Act for preventing Frauds in her Majeſty's Duties upon ſtamped Vellum, Parchment and Paper*, the Attornies and Clerks of the ſeveral Courts of Record at *Weſtminſter* may be in Danger of incurring the Penalties, Forfeitures and Diſabilities, mentioned in the ſaid Act and other former Acts relating to the ſaid Duties, by reaſon of their proceeding in any Actions or Suits in any of the ſaid Courts, before the Attorney or Clerk of the adverſe Party hath entered, filed or recorded ſuch Bail, Appearance, or other Matter or Thing, as he or they ought to have entered, filed or recorded in the ſaid reſpective Courts, it is for the explain-

The Attorney or Clerk of one Party is not liable to any Penalty or Diſability, by Reaſon of a Neglect of the Attorney or Clerk of the other Party.

explaining thereof enacted, "That no Perſon or Perſons ſhall forfeit, incur "or be proſecuted for any Penalty, Forfeiture or Diſability mentioned in "the ſaid Act, for or by Reaſon of his or their having tranſacted, entered, *Page 618 "recorded or filed any further or other Proceeding, * Matter or Thing, "ſubſequent or relating to any Action, Plaint, Bail or Appearance, which "by any other Perſon or Perſons ought to have been entered, filed or "recorded in any of the ſaid Courts, before the ſame hath been or ſhall be "duly entered, filed or recorded, any Thing in the ſaid ſeveral Acts or "any of them or in the preſent Act to the contrary thereof in any wiſe "notwithſtanding."

4. In News-Papers, Almanacks and Pamphlets.

The Paper for printing a News Paper upon to be ſtamped before it is uſed.

22. By the 10 *Ann. c.* 19. *par.* 104. it is enacted, "That all Paper, "upon which any News Paper or Pamphlet ſhall be printed, the Paper "to be uſed in printing Pamphlets exceeding one Sheet of Paper only ex- "cepted, ſhall before ſuch Printing be brought to the head Office for "ſtamping or marking Vellum, Parchment or Paper, and the Commiſſi- "oners for managing the Stamp Duties by themſelves, or by their Officers "employed under them, ſhall and they are hereby impowered and re- "quired, forthwith upon Demand to them made by any Perſon or Per- "ſons, to ſtamp or mark any Quantities or Parcels of Paper, he or they "paying to the Receiver General of the Stamp Duties for the Time be- "ing, or to his Deputy or Clerk, for the Uſe of her Majeſty her Heirs "and Succeſſors, the reſpective Duties payable for the ſame by this "Act."

Penalty for printing or ſelling an unſtamped News Paper.

23. By *par.* 105. it is enacted, "That if any Perſon or Corporation "ſhall print any News Paper or Pamphlet, Pamphlets exceeding one "Sheet only excepted, or ſell, utter or expoſe to Sale any ſuch News "Paper or Pamphlet, before the Paper whereupon the ſame ſhall be re- "ſpectively printed ſhall appear to have been duly ſtamped or marked, "then every ſuch Perſon or Corporation ſo offending ſhall for every ſuch "Offence forfeit the Sum of ten Pounds, together with full Coſts of "Suit."

Penalty for not paying the Duties on Advertiſements.

24. By *par.* 118. it is enacted, "That all and every Perſon and Per- "ſons, who ſhall print or publiſh any Advertiſement, ſhall, within the "Space of thirty Days after the Printing or Publication of ſuch Advertiſe- "ment, pay the Duty or Duties thereon hereby charged to the reſpective "Perſons to whom the ſame are hereby appointed to be paid, and in De- "fault of ſuch Payment within the Time herein before for that Purpoſe "limited, the Printer or Publiſher of every ſuch Advertiſement ſhall be "liable to pay treble the Duties before by this Act chargeable thereupon, "to be recovered with full Coſts of Suit."

Proviſion for ſecuring the Duties on Advertiſements.

25. By the 5 *G.* 3. *c.* 46. *par.* 10. after reciting, that whereas the "Printers and Publiſhers only are liable to the Duties impoſed upon Ad- "vertiſements, whereby great Loſſes happen to the Revenue, it is enacted, "That neither the Commiſſioners of the Stamp Duties, nor any Officer "for diſtributing Stamps, ſhall deliver any ſtamped Paper for printing any "Pamphlet, or any publick News, Intelligence or Occurrences, to be "contained in one Sheet or any leſſer Piece of Paper, unleſs the Perſon "applying firſt give Security for Payment of the Duties for the Advertiſe- "ments which ſhall be printed thereupon."

What Books are to be deemed Al- manacks.

26. By the 10 *A. c.* 19. *par.* 175. it is for the better aſcertaining her Majeſty's Duties upon Calendars and Almanacks enacted, "That all "Books and Pamphlets, ſerving chiefly to the Purpoſe of an Almanack, "by whatſoever Name or Names entitled or deſcribed, ſhall be charged "with

" with the Duties impoſed by an Act in that Caſe made in the firſt Seſſion " of this preſent Parliament, but not with any of the Duties charged by " this Act on Pamphlets or other printed Papers."

* By *par.* 111. it is, for the better collecting and ſecuring the Duties hereby charged upon Pamphlets containing more than one Sheet of Paper, enacted, " That one printed Copy of every ſuch Pamphlet, " which ſhall be printed or publiſhed within the Cities of *London* or " *Weſtminſter*, or within the Limits of the weekly Bills of Mortality, " ſhall within the Space of ſix Days after the printing thereof be " brought to the Head Office for marking or ſtamping Vellum, Parch- " ment or Paper; and the Title thereof with the Number of Sheets " contained therein, and the Duty hereby charged thereon, ſhall be re- " giſtered or entered in a Book there to be kept for that Purpoſe, which " Duty ſhall be thereupon paid to the Receiver General of the Stamp Du- " ties or his Deputy or Clerk, who ſhall thereupon forthwith give a " Receipt for the ſame on ſuch printed Copy, or the ſame ſhall be ſtamped " to denote the Payment of the Duty hereby charged on ſuch Pamphlet: " And that one printed Copy of every ſuch Pamphlet as laſt mentioned, " which ſhall be printed or publiſhed in any Part of *Great Britain*, not " being within the Limits laſt before mentioned, ſhall within the Space " of fourteen Days after the printing thereof be brought to ſome Head " Collector of the Stamp Duties, who is hereby required forthwith to " enter the Title thereof with the Number of Sheets contained therein, " and the Duty hereby charged thereon, in a Book to be by him kept " for that Purpoſe, which Duty ſhall be thereupon paid to ſuch Collec- " tor, who ſhall thereupon give a Receipt for the ſame on ſuch printed " Copy." *Page 619

A printed Copy of a Pamphlet to be entered at the Stamp Office.

28. By *par.* 112. it is enacted, " That if any Pamphlet containing more " than one Sheet of Paper ſhall be printed or publiſhed, and the Duty " hereby charged thereon ſhall not be duly paid, and the Title thereof " regiſtered, and one Copy thereof ſtamped where required ſo to be, " within the reſpective Times herein before for thoſe ſeveral Purpoſes " limited, that then the Author, Printer, Publiſher, and all other Perſons " concerned in or about the Printing or Publiſhing of ſuch Pamphlet, " ſhall loſe all Property therein, and in every Copy thereof, although the " Title thereto were regiſtered in the Book of the Stationers in *London*, " according to the late Act of Parliament made in that Behalf, ſo as any " Perſon notwithſtanding the ſaid Act may freely print and publiſh the " ſame, paying the Duty payable in reſpect thereof by virtue of this Act, " without being liable to any Action, Proſecution or Penalty for ſo doing; " any Thing in the ſaid Act of Parliament, for veſting the Copies of " printed Books in the Authors or Purchaſers of ſuch Copies, or in any " By-Law contained, or any Cuſtom or other Thing to the contrary not- " withſtanding: And the Printer and Publiſher of ſuch Pamphlet, and " every other Perſon concerned in the Printing or Publiſhing thereof, " ſhall in ſuch Caſes forfeit the Sum of twenty Pounds with full Coſts of " Suit."

Penalty for not entering a printed Copy of a Pamphlet at the Stamp Office.

29. By *par.* 113. it is enacted, " That no Perſon whatſoever ſhall ſell " or expoſe to Sale any ſuch Pamphlet, without the true reſpective Name " or Names, and the Place or Places of Abode of ſome known Perſon or " Perſons, by and for whom the ſame was really and truly printed or pub- " liſhed, written or printed thereupon, upon Pain that every Perſon of- " fending herein ſhall for every ſuch Offence forfeit the Sum of twenty " Pounds with full Coſts of Suit."

Penalty for ſelling a Pamphlet without the true Name of the Printer or Publiſher.

5. In

5. In the Money or other Conſideration given with an Apprentice.

Penalty for not inſerting the Sum given with an Apprentice in an Indenture. *Page 620

30. By the 8 *Ann. c.* 9. *par.* 35. it is enacted, "That the full Sum or "Sums of Money received, or in any wiſe directly or indirectly given, "paid, agreed or contracted for, with or in relation to any Clerk, Ap"prentice or Servant, which ſhall be within the Kingdom of *Great* "*Britain* put or placed to with any Maſter or Miſtreſs to learn any "* Profeſſion, Trade or Employment, ſhall be truly inſerted and written "in Words at length in ſome Indenture or other Writing, which ſhall "contain the Covenants, Articles, Contracts or Agreements relating to the "Service of ſuch Clerk, Apprentice or Servant as aforeſaid, and ſhall "bear Date upon the Day of the Signing, Sealing or other Execution of "the ſame, upon Pain that every Maſter or Miſtreſs, to or with whom "or to whoſe Uſe any Sum of Money whatſoever ſhall be given, paid, "ſecured or contracted for, in reſpect of any ſuch Clerk, Apprentice or "Servant, which ſhall not be truly and fully ſo inſerted and ſpecified in "ſome ſuch Indenture or other Writing, ſhall for every ſuch Offence for"feit double the Sum ſo given, paid, ſecured or contracted for; the one "Moiety of which Forfeiture ſhall be to her Majeſty, her Heirs and Suc"ceſſors, and the other Moiety to any Perſon or Perſons, who ſhall inform "and ſue for the ſame by Action of Debt, Bill, Plaint or Information in "any Court of Record at *Weſtminſter*, or in the Exchequer of *Scotland*, "at any Time after the executing, making or ſigning of any ſuch Inden"ture or Writing, or making any ſuch Contract or Agreement, and within "one Year after the Time limited or appointed for the Service of ſuch "Clerk, Apprentice or Servant to or with ſuch Maſter or Miſtreſs ſhall be "expired."

An Apprentice where the Duties are not paid incapacitated from exerciſing the Trade.

31. By *par.* 39. it is enacted, "That all Indentures or Writings as "aforeſaid, wherein ſhall not truly be inſerted and written the full Sum "and Sums of Money received, or in any wiſe directly or indirectly given, "paid, ſecured or contracted for, with or in Relation to ſuch Clerk, Ap"prentice or Servant as aforeſaid, or whereupon the Duties payable by "this Act ſhall not be duly paid or lawfully tendered, or which ſhall not "be ſtamped or lawfully tendered to be ſtamped according to the Tenor "and true Meaning of this Act, within the reſpective Times herein for "that Purpoſe ſeverally and reſpectively limited, ſhall be void and not "available in any Court or Place or to any Purpoſe whatſoever; and the "Clerk, Apprentice or Servant, whom the ſame ſhall concern or relate to, "ſhall in ſuch Caſe be utterly incapable of being free of any City, Town, "Corporation or Company, and of following or exerciſing the intended "Profeſſion, Trade or Employment, any Charter, Cuſtom or By-Law to "the contrary notwithſtanding"

No Indenture of Apprenticeſhip to be admitted in Evidence for a Party thereto, unleſs Oath be made that the Sum given with ſuch Apprentice is truly inſerted.

32. By *par.* 45. it is enacted, "That no Indenture or Writing, required "by this Act to be ſtamped, ſhall be given or admitted in Evidence in any "Suit to be brought by any of the Parties thereunto, unleſs the Party, "in whoſe Behalf the ſame ſhall be given or admitted in Evidence, do "firſt make Oath, that to the beſt of his or her Knowledge the Sum or "Sums, therein for that Purpoſe inſerted or mentioned, was or were "really and truly all that was directly or indirectly given, paid, ſe"cured or contracted for, on Behalf or in Reſpect of ſuch Clerk, Ap"prentice or Servant as aforeſaid, to or for the Benefit of the Maſter or "Miſtreſs, to or with whom ſuch Clerk, Apprentice or Servant was put or "placed."

33. By

33. By *par.* 45. it is enacted, "That where any Thing or Things, not "being lawful Money of *Great Britain*, ſhall directly or indirectly be "given, aſſigned, conveyed, delivered, contracted for or ſecured, to or "for the Uſe or Benefit of any Maſter or Miſtreſs, with or in reſpect of any "ſuch Clerk, Apprentice or Servant, for whom a Duty is chargeable by "this Act, the Duties hereby granted and laſt mentioned ſhall be anſwered "and paid for the full Value and Values of ſuch Thing or Things, and the "ſame Duties for the ſaid Values ſhall be ſecured and anſwered in the ſame "Manner and Form, and under the like Pains, Penalties, Forfeitures and "Incapacities, as are before in this Act provided for ſecuring the ſaid Rates "upon Monies given or paid, or agreed to be given or paid, with ſuch "Clerks, Apprentices or Servants."

Penalty for not paying the Duties of a Thing, although not Money, given with an Apprentice.

* 34. But by the 9 *Ann. c.* 21. *par.* 65. After reciting, that ſeveral Perſons have through Neglect or Inadvertency omitted to pay the ſeveral Rates and Duties, payable on the Account of Monies or other Conſideration given with any Clerk or Apprentice, and to have the Indentures or Contracts ſtamped within the Times for thoſe Purpoſes reſpectively limited by the Act of Parliament in that Caſe made, whereby ſuch Clerks and Apprentices will according to that Act be diſabled to follow or exerciſe the intended Trades, Profeſſions or Employments, unleſs ſome further Proviſion be made, it is enacted, "That upon Payment of the reſpective Rates and "Duties, which have been ſo omitted or neglected to be paid, on or be"fore the twenty-ninth Day of *September* in the Year of our Lord One "thouſand ſeven hundred and eleven, to ſuch Perſon or Perſons to whom "the ſame ought to be paid according to the ſaid former Act, and tender"ing to be ſtamped ſuch Indentures or Contracts, ſo omitted to be ſtamp"ed, on or before the twenty-fifth Day of *December* in the ſaid Year One "thouſand ſeven hundred and eleven, the ſame Indentures or Contracts "ſhall be ſtamped, and ſhall be good and available in Law or Equity, and "the Clerks or Apprentices therein named ſhall be capable of following and "exerciſing the reſpective intended Trades, Profeſſions or Employments, "as fully as if the Rates and Duties ſo omitted to be paid had been duly "paid, and the Indentures or Contracts ſtamped within the reſpective "Times in the ſaid Act for thoſe Purpoſes limited, any Thing therein con"tained to the contrary notwithſtanding."

*Page 621

Further Time given for the Payment of the Duties on what is given with an Apprentice.

35. A Clauſe to the ſame Effect has been ſince inſerted in a great Number of Statutes.

36. By the 9 *Ann. c.* 21. *par.* 66. it is enacted, "That if any Maſter or "Miſtreſs ſhall hereafter neglect to pay the Duties or Rates, payable on the "Account of Money or other Conſideration given with any Clerk, Appren"tice or Servant, within the reſpective Times herein and by an Act paſſed "in the eighth Year of her Majeſty's Reign for that Purpoſe limited, ac"cording to the true Intent and Meaning of the ſame, every ſuch Maſter "ſhall for every ſuch Neglect forfeit the Sum of fifty Pounds."

Further Penalty on a Maſter neglecting to pay the Duties.

37. By the 18 *G.* 2. *c.* 22. *par.* 24. it is enacted, "That if any Maſter "or Miſtreſs ſhall neglect to pay the Rates and Duties, by two ſeveral "Acts of Parliament made and paſſed in the eighth and ninth Years of "the Reign of her late Majeſty Queen *Anne* charged on the Money "given with any Clerk, Apprentice or Servant, within the reſpective "Times in and by the ſaid Acts limited and appointed in that Behalf, "according to the true Intent and Meaning of the ſame, every ſuch "Maſter and Miſtreſs ſhall for every ſuch Offence forfeit and pay double "the Rates and Duties, charged and directed to be paid and levied by "the ſaid Acts or either of them, over and above all Penalties and For-

Further Penalty on a Maſter neglecting to pay the Duties.

"feitures

" feitures thereby inflicted, for all Monies which ſhall be given, paid, " contracted or agreed for with or in relation to every ſuch Clerk, Ap- " prentice or Servant."

Encouragement given to an Apprentice, to pay the Duties if the Maſter do not.

38. By *par.* 25. it is enacted, " That if any Maſter or Miſtreſs of any " Clerk, Apprentice or Servant reſpectively ſhall neglect to pay the ſaid " Rates and Duties, ſo charged by the ſaid Acts or either of them, within " the reſpective Times therein limited in that Behalf, whereby the Penalties " or Forfeitures incurred by virtue of this Act will become charged upon " and payable by them reſpectively; and any ſuch Clerk, Apprentice or " Servant reſpectively ſhall and do in that Caſe pay, or cauſe to be paid, " the Rates and Duties charged by the ſaid former Acts or either of them, " and alſo the Penalties and Forfeitures inflicted and incurred by this pre- " ſent Act, at any Time within one Year after the ſame ſhall ſo reſpective- " ly become charged, incurred and made payable by virtue of this Act as *Page 622 " aforeſaid, ſuch Maſter or Miſtreſs not * having then paid the ſaid Rates, " Duties, Penalties and Forfeitures reſpectively, although required by ſuch " Clerk, Apprentice or Servant ſo to do, then and in ſuch Caſe it ſhall and " may be lawful to and for any ſuch Clerk, Apprentice or Servant, within " three Months after ſuch Payment of the ſaid Rates, Duties, Penalties " and Forfeitures reſpectively by him, her or them as aforeſaid, to demand " of his or her Maſter or Miſtreſs, or of his, her or their Executors or Ad- " miniſtrators, ſuch Sum or Sums of Money as was or were paid to ſuch " Maſter or Miſtreſs for or in reſpect of ſuch Clerkſhip, Apprenticeſhip or " Servitude; and in caſe ſuch Sum or Sums of Money ſhall not be paid " within three Months after ſuch Demand thereof made, it ſhall and may " be lawful to and for any ſuch Clerk, Apprentice or Servant, to ſue for " and recover the ſame with full Coſts of Suit againſt ſuch Maſter or Miſ- " treſs, his, her or their Executors or Adminiſtrators; and every ſuch " Clerk, Apprentice or Servant ſhall and may, immediately after Payment " of ſuch Rates, Duties, Penalties and Forfeitures as aforeſaid, be diſ- " charged from his, her or their Clerkſhip, Apprenticeſhip and Servitude " reſpectively, and from all Actions, Penalties, Forfeitures and Damages " for not ſerving the Time, which he, ſhe or they were reſpectively " bound, contracted for or agreed to ſerve ſuch Maſter or Miſtreſs re- " ſpectively."

All Penalties diſcharged upon Payment of double Duties by the Maſter.

39. By the 20 *G.* 2. *c.* 45. *par.* 5. it is enacted, " That if any Maſter " or Miſtreſs, who by reaſon of neglecting to pay the Rates and Duties " for Money or other Conſideration, received with any Clerk, Apprentice " or Servant, ſhall become liable to forfeit and pay double Rates and " Duties, as by an Act paſſed in the eighteenth Year of his preſent Ma- " jeſty is directed, ſhall reſpectively pay the ſaid double Rates and Du- " ties, unto the Perſon or Perſons to whom the ſame ought to have been " paid in Purſuance of the ſaid Act and other Acts in that Behalf made, " and alſo tender the Indentures or Contracts to be ſtamped, at any Time " within two Years after the End or Determination of the Apprentice- " ſhip or Service of any ſuch Clerk, Apprentice or Servant reſpectively, " and before any Suit or Proſecution ſhall have been commenced, for " recovering any of the Penalties or Forfeitures inflicted or incurred by " the ſaid former Acts or any of them, then and in ſuch Caſe the In- " dentures or Contracts of ſuch Clerk, Apprentice or Servant reſpec- " tively ſhall be good and available in Law or Equity, and may be given " in Evidence in any Court whatſoever; and the Clerks, Apprentices " or Servants therein named ſhall be capable of following and exerciſing " their reſpective intended Trades and Employments, as fully as if the " Rates and Duties ſo omitted had been duly paid within the reſpective

" Times

" Times in the ſaid former Acts or any of them limited and appointed; " and all and every Perſon and Perſons, who ſhall have incurred any " Penalties by the Omiſſions aforeſaid, upon Payment of ſuch double " Rates and Duties as aforeſaid within the reſpective Times herein laſt " before limited in that Behalf, ſhall be and they are hereby acquitted and " diſcharged of and from the ſaid Penalties and Forfeitures, any Thing " in the ſaid former Acts or any of them to the contrary notwith- " ſtanding."

40. By *par.* 6. it is enacted, " That if any Maſter or Miſtreſs ſhall by " Reaſon of ſuch Neglect as aforeſaid become liable to forfeit ſuch dou- " ble Rates and Duties as aforeſaid, and any Clerk, Apprentice or " Servant reſpectively ſhall and do at any Time after ſuch Forfeiture " incurred, either in the Preſence of one or more credible Witneſs or " Witneſſes, or by Writing under the Hand of ſuch Clerk, Apprentice " or Servant reſpectively, ſigned in the Preſence of one or more credible " Witneſs or Witneſſes, require his or her Maſter or Miſtreſs reſpective- " ly to pay the double Rates or Duties ſo forfeited and incurred, and " ſuch Maſter or Miſtreſs ſhall not within three Months after ſuch Re- " queſt, pay the ſame, and any ſuch Clerk, Apprentice or Servant ſhall, " * at any Time within two Years after the Determination of his Clerk- " ſhip, Apprenticeſhip or Servitude, pay the ſaid double Rates and Du- " ties, ſo forfeited and incurred and not paid by his or her Maſter " or Miſtreſs reſpectively as aforeſaid, then and in ſuch Caſe it ſhall and " may be lawful to and for any ſuch Clerk, Apprentice or Servant, " within three Months after ſuch Payment of the ſaid double Rates and " Duties by him, her or them as aforeſaid, to demand of his or her " Maſter or Miſtreſs, or of his, her or their Executors or Adminiſtrators, " double the Sum or Sums of Money or other Conſideration reſpectively " given, paid, and agreed or contracted to be paid to ſuch Maſter or " Miſtreſs, for or in reſpect of ſuch Clerkſhip, Apprenticeſhip or Servi- " tude; and in Caſe ſuch Sum or Sums of Money ſhall not be paid with- " in three Months after ſuch Demand thereof made, it ſhall and may " be lawful to and for any ſuch Clerk, Apprentice or Servant, to ſue for " and recover the ſame with full Coſts of Suit againſt ſuch Maſter or " Miſtreſs, his, her or their Executors or Adminiſtrators; and every ſuch " Clerk, Apprentice or Servant, ſo paying ſuch double Rates or Duties " as aforeſaid, ſhall and may immediately after Payment thereof reſpec- " tively, and upon ſignifying by Writing under his or her Hand that he or " ſhe deſires to be diſcharged from his her or their Clerkſhip, Apprentice- " ſhip and Service reſpectively, be accordingly diſcharged from the " ſame reſpectively, and from all Actions, Penalties, Forfeitures and " Damages for not ſerving the Time, for which he, ſhe or they were " reſpectively bound, contracted for or agreed to ſerve ſuch Maſter or " Miſtreſs reſpectively."

Encouragement given to an Apprentice to pay the double Duties, if the Maſter do not.

* Page 623

41. By *par.* 7. it is provided, " That every ſuch Clerk, Apprentice or " Servant ſhall avail him or herſelf, and have ſuch and the ſame Benefit or " Advantage, of the Time he or ſhe ſhall reſpectively have continued with " and ſerved ſuch Maſter or Miſtreſs reſpectively, as he or ſhe could or " might have done, in Caſe of an Aſſignment or Turning over to any new " or other Maſter or Miſtreſs."

42. By *par.* 8. it is provided, " That in caſe, where any Proſecution " ſhall be commenced againſt any Maſter or Miſtreſs, for recovering any " of the Penalties and Forfeitures inflicted and incurred by the ſaid for- " mer Acts or any of them, the Clerk, Apprentice or Servant of ſuch " Maſter or Miſtreſs reſpectively ſhall pay ſuch double Rates and Duties, " at any Time within two Years after the End of his, her or their Clerk- " ſhip, Apprenticeſhip or Servitude, every ſuch Clerk, Apprentice or " Servant reſpectively ſhall, upon Payment of ſuch double Rates and " Duties

Encouragement given to an Apprentice to pay the double Duties, after a Proſecution is commenced againſt the Maſter.

" Duties as aforeſaid, be capable and qualified to follow his, her or their " reſpective Trades and Employments; and the Indentures or Contracts of " ſuch Clerk, Apprentice and Servant reſpectively ſhall be good and avail- " able in Law and Equity, and may be given in Evidence in any Court " whatſoever; any Thing in this Act or the ſaid former Acts or any of " them to the contrary notwithſtanding."

6. In Cards and Dice.

Penalty for not giving Notice of the Place where Cards or Dice are made.

43. By the 9 *Ann. c.* 23. *par.* 41. it is enacted, " That all Makers of " playing Cards and Dice in *Great Britain*, before they ſhall begin to " make any Cards or Dice, ſhall give or ſend Notice in Writing of the " uſual Houſe or Place where they intend to make the ſame; which No- " tice ſhall be given or ſent to the Commiſſioners for managing the Stamp " Duties, or to their Officers next adjacent to the Place where ſuch Cards " or Dice ſhall be made; and the like Notice ſhall be given or ſent by " every ſuch Maker of Cards or Dice as often as they ſhall change their " Place; and as often as any Perſon or Perſons ſhall ſet up or exerciſe " the Employment of making Cards or Dice, in any Houſe or Place *Page624 " * in *Great Britain*, the like Notice ſhall be given or ſent, upon Pain that " every Perſon making Default in giving ſuch Notice as aforeſaid ſhall " for every ſuch Offence forfeit the Sum of fifty Pounds; and all and every " Perſon and Perſons, who ſhall make any Cards or Dice in any Houſe or " Place not notified as aforeſaid, ſhall for every ſuch Offence forfeit the " Sum of fifty Pounds."

Further Penalty for not giving Notice of ſuch Place.

44. By the 10 *Ann. c.* 19. *par.* 166. it is enacted, " That if any Perſon " ſhall make any Cards or Dice in any Houſe or Place, before he ſhall " have given due Notice of his or her Intention to make Cards or Dice in " ſuch Houſe or Place, according to the Form and Effect of an Act made " in the ninth Year of her Majeſty's Reign, ſuch Perſon ſhall, over and " above the Penalties impoſed by that Act, forfeit all the Cards and Dice, " and all Materials and Utenſils for making Cards and Dice, which ſhall " be found in ſuch Houſe or Place, or which ſhall have been made and " manufactured there before ſuch Notice ſhall have been given."

Penalty for removing Materials begun to be made into Cards or Dice.

45. By the ſame *Par.* it is enacted, " That no Materials, begun to be " wrought for the making of Cards or Dice, ſhall be removed from the " Place wherein the ſame ſhall have been ſo begun to have been wrought, " until the ſame ſhall have been completely made and worked into Cards or " Dice, or the Duties for the Cards or Dice therewith intended to be made " ſhall be paid or ſecured, upon Pain that every Perſon who ſhall remove " or permit to be removed any ſuch Materials contrary to the true Meaning " hereof, ſhall forfeit double the Amount of the Duty on the Cards or " Dice, which might have been made from ſuch Materials, with full Coſts " of Suits."

Penalty for removing Cards or Dice before they are ſealed or marked.

46. By the 9 *Ann. c.* 23. *par.* 41. it is enacted, " That no Maker of Cards " or Dice, chargeable with Duties by this Act, ſhall remove or ſuffer to be " removed the ſame from the Houſe or Place of making thereof, until ſuch " Mark upon the Dice, and ſuch Seal upon the Paper and Thread enclo- " ing every Pack of Cards, ſhall be put thereupon, as the Commiſſioners " for managing the Stamp Duties ſhall from Time to Time deviſe and " appoint, to denote the charging of the ſaid Duties, upon Pain of forfeiting " all ſuch Cards and Dice, and treble the Value thereof, as ſhall be remov- " ed contrary to this Act."

Cards or Dice may be removed for Exportation.

47. But by the 10 *Ann. c.* 19. *par.* 170. it is for the Ecouragement of the Exportation of Cards and Dice into foreign Parts enacted, that it ſhall " be lawful to remove any Cards or Dice from the Place where the ſame

" are

" are made, without ſealing, marking or ſtamping the ſame, or paying any " the Duties payable for the ſame by this or any former Act of Parliament; " provided that within one Month after the ſame ſhall be made, and be- " fore the ſame ſhall be ſo removed, a Bond be entered into to her Majeſty, " her Heirs or Succeſſors, with ſufficient Surety or Sureties in a Penal Sum " of double the Duties on ſuch Cards or Dice, with Condition for the ex- " porting ſuch Cards or Dice into ſome Part or Port beyond the Seas, " within a Time to be limited in ſuch Bond, and that the ſame or any of " them ſhall not be relanded again in any Part of *Great Britain*, and that " ſuch Bond be left in the Hands of the Commiſſioners for managing the " Stamp Duties, and a Certificate be given by them or ſuch Officer as " ſhall be in that Behalf appointed, that ſuch Bond is entered into with " relation to ſuch Cards or Dice, any Thing in the Act for impoſing a " Duty upon Cards or Dice made in the ninth Year of her Majeſty's Reign " to the contrary notwithſtanding."

Penalty for ſelling Cards marked for Exportation.

48. By the 29 *G.* 2. *c.* 13. *par.* 6. after reciting, that great Frauds are committed by the Makers of Cards and Dice, under Pretence that the ſame are intended for Exportation, it is enacted, " That all playing Cards " made in *Great Britain*, which ſhall be intended for Exportation, ſhall " before they are packed up for Exportation be incloſed in Paper and " Thread in Packs or Parcels, in ſuch Manner as the Commiſſioners " * for managing the Stamp Duties ſhall direct and appoint, in order to *Page 625 " diſtinguiſh them from other Cards liable to Duties; and that for the " ſaid Purpoſe one Card in every Pack of playing Cards ſo made or in- " tended for Exportation, or ſo many Cards in every ſuch Pack as the " ſaid Commiſſioners ſhall direct and appoint, ſhall alſo be marked or " ſtamped on the ſpotted or painted Side thereof with ſuch Mark and " in ſuch Manner as the ſaid Commiſſioners ſhall direct; and if any " Perſon or Perſons ſhall vend, utter or expoſe to Sale, to be uſed in " *Great Britain*, any playing Cards ſo diſtinguiſhed as Cards for Exporta- " tion, every Perſon ſo offending ſhall for every Pack of Cards ſo vended, " uttered or expoſed to Sale as aforeſaid forfeit and pay the Sum of " Twenty Pounds."

The Bond for exporting Cards or Dice not to be vacated, until a Certificate be produced of their being ſhipped as ſuch.

49. By *par.* 7. it is enacted, " That no Bond, which ſhall be entered in- " to for exporting Cards or Dice, ſhall be vacated or delivered up, until " Proof be made, that ſuch Cards or Dice have been entered and ſhipped " for Exportation as Cards and Dice and not as Stationary Wares; and " until a Certificate of ſuch Entry and Shipping ſigned by the proper " Officer or Officers of the Cuſtoms be produced, which Certificate the ſaid " Officer or Officers are hereby directed and required to give without Fee " or Reward; any Thing in the Act made in the fifth Year of the Reign " of his late Majeſty King *George* the Firſt to the contrary notwith- " ſtanding."

Penalty for not making a true Entry of all Cards and Dice made, and paying the Duty for the ſame.

50. By the 9 *Ann.* *c.* 23. *par.* 42. it is enacted, " That the Makers of " Cards and Dice ſhall once in every twenty-eight Days make true Entry " upon Oath, with the Commiſſioners for managing the Stamp Duties, or " with their Officer next adjacent to the Place of making ſuch Cards and " Dice, which Oath the ſaid Commiſſioners or any three of them, or the " ſaid Officer have hereby Power to adminiſter, of all the Cards and Dice " by ſuch Makers thereof reſpectively made within the Time for which " every ſuch Entry ought to be made; and ſhall once in every ſix Weeks " pay all the Duties owing from ſuch Maker, upon Pain of forfeiting the " Sum of Twenty Pounds for every Default in making ſuch Entry and dou- " ble the Duty for Non-payment thereof."

Further Proviſion for ſecuring the Duty on Cards.

51. By the 6 *G.* 1. *c.* 21. *par.* 57. after reciting the Subſtance of this laſt Clauſe, and that the reſpective Card Makers do often make up Cards the Duties on which amount to fifty Pounds and upwards *per* Week, and that each

each Card Maker may make up treble that Quantity if he ſhall think fit, whereby they have an Opportunity of being greatly in Arrear to his Majeſty, and the ſaid Duties are thereby often in Danger of being loſt, in regard the ſame Act hath made no Proviſion whatſoever for ſecuring the ſaid Duties until the ſaid ſix Weeks ſhall expire, be the Danger ever ſo apparent, it is enacted, "That every Card Maker ſhall be obliged, at "the reſpective Times of entering every Parcel or Quantity of playing "Cards, to enter into a Bond to his Majeſty, his Heirs and Succeſſors, with "ſufficient Surety or Sureties in the penal Sum of treble the Duties on "ſuch Cards, with Condition for the true Payment of his Majeſty's "Duties on ſuch Cards within the Space of ſix Weeks next after the Date "of ſuch Bond; any Thing in any Law to the contrary notwith-"ſtanding."

Penalty for endeavouring to conceal Cards or Dice.

52. By the 9 *Ann. c.* 23. *par.* 43. it is enacted, "That every Maker of "Cards or Dice, who ſhall endeavour to defraud her Majeſty by any "Concealment, ſhall for every ſuch Offence forfeit the Sum of Twenty "Pounds."

Penalty for ſelling unmarked Cards or Dice.

53. By the 10 *Ann. c.* 19. *par.* 162. it is enacted, "That no playing Cards "or Dice ſhall be ſold or expoſed to Sale, or uſed in any public Gaming "Houſe, unleſs the Paper and Thread, incloſing or which ſhall have "incloſed the ſame, ſhall have been reſpectively ſealed and ſtamped *Page626 "* according to the Act in that Behalf made, and unleſs one of the Cards "of each Pack or Parcel of Cards ſhall be alſo marked or ſtamped on the "ſpotted or painted Side thereof, with ſuch Mark or Marks as the Commiſ-"ſioners for managing the Stamp Duties ſhall direct or appoint; upon Pain "that every Perſon or Perſons, who ſhall ſell or expoſe to Sale any Cards "or Dice, which ſhall not have been ſo reſpectively ſealed marked and "ſtamped as is reſpectively required, ſhall forfeit for every Pack or Parcel "of ſuch Cards and every one of ſuch Dice ſo ſold or expoſed to Sale the "Sum of five Pounds."

Further Penalty for ſelling unmarked Cards.

54. By the 6 *G.* 1. *c.* 21. *par.* 55. it is enacted, "That if any Perſon or "Perſons ſhall ſell or expoſe to Sale any playing Cards, the ſame not being "at the Time of ſuch ſelling or expoſing to Sale actually ſtamped on the "ſpotted or painted Side, and alſo incloſed in Paper and Thread ſealed and "ſtamped, as by the Act of the tenth Year of her late Majeſty is directed, "then every Perſon ſo offending ſhall for every ſuch Offence forfeit the Sum "of ten Pounds with full Coſts of Suit."

Penalty for ſelling waſte Cards unmarked on the back Side.

55. By the 29 *G.* 2. *c.* 13. *par.* 10. it is enacted, "That if any Maker "of playing Cards, or any other Perſon ſhall ſell or diſpoſe of any Cards, "commonly called *Waſte Cards*, unleſs he or ſhe ſhall before ſuch Sale "mark the back or plain Side of every painted or pictured Card in ſuch "Manner as to render the ſame unfit to be uſed in Play, every Perſon "ſo offending ſhall for every ſuch Offence forfeit the Sum of twenty "Pounds."

Penalty for ſuffering Cards marked for Exportation to be uſed in a public Gaming Houſe.

56. By *par.* 6. it is enacted, "That if any Perſon or Perſons ſhall uſe, "or permit to be uſed, in any public Gaming Houſe, any playing Cards "diſtinguiſhed as Cards for Exportation, every Perſon ſo offending ſhall "for every Pack of Cards ſo uſed, or permitted to be uſed, forfeit the Sum "of twenty Pounds."

All Pieces marked to denote any Chance to be deemed Dice.

57. By the 10 *Ann. c.* 19. *par.* 168. it is, to prevent evading the Payment of the Duties on Dice by new Inventions of any Thing uſed or to be uſed in Play inſtead of Dice, enacted, "That all Pieces of Ivory, Bone "or other Matter, made or uſed for any Game or Play, with any Let-"ters, Figures, Spots or other Marks thereupon, to denote any Chance "or Chances, are and ſhall be deemed and adjudged to be Dice, and "be charged accordingly with the full Duties on Dice; and if there

"ſhall

" ſhall be more than ſix Chances ſignified on any one of ſuch Pieces of " Ivory, Bone or other Matter, then ſuch one Piece ſhall be charged with " the full Duty of five Shillings payable for a Pair of Dice, and if there " ſhall be more than the Number of Chances uſually in a Pair of Dice, " then ſuch one Piece ſhall be further charged with a further Duty, pro- " portionate to the Number of Chances exceeding thoſe of one Pair of " Dice."

Penalty for uſing the ſame Label or Stamp for Cards a ſecond Time, or for new marking Dice.

58. By the 6 *G.* 1. *c.* 21. *par.* 55. after reciting, that a Practice hath of late prevailed, for Perſons to cut out and tear off the Mark or Stamp upon the ſpotted or painted Side of playing Cards, after ſuch Cards have been ſold, uſed or played with, and by paſting on or affixing the ſame Stamp and Mark on other Cards do frequently make one Mark or Stamp ſerve for two or three ſeveral Packs of Cards; and that the Seal and Stamp upon the outſide Papers incloſing each Pack of Cards are frequently made Uſe of again, after they have been ſold and diſpoſed of, to incloſe other Packs of playing Cards, by which fraudulent Practices his Majeſty's Revenue is leſſened and diminiſhed, it is enacted, " That if any Perſon " or Perſons ſhall fraudulently cut, tear or get off any Mark or Stamp, " in reſpect whereof or whereby any Duties are denoted to be paid or " payable to his Majeſty on playing Cards, or ſhall file, ſquare or new " ſpot any Dice which have been ſold or played with, or ſhall fraudu- " *lently incloſe any Parcel or Pack of playing Cards in any outſide *Page 627 " Paper ſealed and ſtamped as aforeſaid, then every Perſon ſo offending " ſhall for every ſuch Offence forfeit the Sum of Ten Pounds with full " Coſts of Suit.

Penalty for ſelling or buying a Label which has been uſed.

59. By the 29 *G.* 2. *c.* 13. *par.* 8. after reciting, that a fraudulent Practice hath prevailed of ſelling and buying Covers and Labels, which have been before made Uſe of to denote the Duty payable upon Cards, it is enacted, " That if any Perſon ſhall ſell or buy any ſuch Cover or Label, in " order to be made Uſe of for the incloſing any Pack or Parcel of Cards, " every Perſon ſo offending ſhall for every ſuch Offence forfeit the Sum of " Twenty Pounds."

But either Buyer or Seller informing is diſcharged thereof.

60. But by *par.* 9. it is enacted, " That if either the Buyer or Seller of " any ſuch Cover or Label ſhall inform againſt the other Party, concerned " in buying or ſelling ſuch Cover or Label, the Party ſo informing " ſhall be admitted to give Evidence againſt the Party informed " againſt, and ſhall be indemnified againſt the Penalties by him or her " incurred."

Penalty for hindering an Officer from ſearching a Card Maker's Houſe or public Gaming Houſe.

61. By the 10 *Ann.* *c.* 19. *par.* 169. it is enacted, " That it ſhall and " may be lawful for any Officer or Officers, thereunto appointed by the " Commiſſioners for managing the Stamp Duties, to enter into any " Houſe or Place where Cards or Dice are or ſhall be made or expoſed " to Sale, or ſuſpected to be privately made, or into any publick " Gaming Houſe, Room or Place, and there to ſearch and ſee what " Quantities of Cards or Dice ſhall be making, and whether the Cards " or Dice ſo ſold or expoſed to Sale, or ſo uſed in Play be duly ſealed, " marked and ſtamped, according to the true Meaning of this Act and " of the Act made in the ninth Year of her Majeſty's Reign; and if " the Owner or Occupier of any Houſe or Place where Cards or Dice " are or ſhall be made, ſold or expoſed to Sale, or of any ſuch publick " Gaming-Houſe, ſhall at any Time refuſe Entrance or Liberty of " Search to ſuch Officer or Officers, ſuch Owner or Occupier ſhall for " every ſuch Refuſal forfeit the Sum of Ten Pounds with full Coſts of " Suit."

Cards or Dice made in unentered Places may be ſeized.

62. By the 6 *G.* 1. *c.* 21. *par.* 59. it is enacted, " That in caſe the Com- " miſſioners for managing the Stamp Duties ſhall be informed or have " Cauſe to ſuſpect, that any Perſon or Perſons do make any playing " Cards

" Cards or Dice in any Houſe or Place in *Great Britain*, without ſend-
" ing or giving Notice thereof in Writing to the ſaid Commiſſioners at
" their Head Office, and Affidavit being made thereof by the Perſon or
" Perſons ſo informing or giving Notice, before one or more Juſtice or
" Juſtices of the Peace for the County or Place where ſuch Cards or
" Dice ſhall be making or made, declaring the Grounds of his or their
" Knowledge or Suſpicion, that then and in ſuch Caſe it ſhall and may
" be lawful for any Officer or Officers acting under the Commiſſioners
" for managing the Stamp Duties, in the Day Time, and in the Preſence
" of a Conſtable or other Officer of the Peace who is hereby required
" to be aſſiſting therein, by Warrant from ſuch Juſtice or Juſtices of the
" Peace to be directed to ſuch Officer or Officers, which Warrant the
" ſaid Juſtice or Juſtices of the Peace are hereby required to grant,
" to break open the Door or any Part of ſuch Houſe or Place,
" where any ſuch Cards or Dice are ſo ſuſpected to be made or
" making, and to enter into ſuch Houſe or Place, and to ſeize
" all ſuch Cards, Dice, Tools or Materials with which they are made
" or making, that ſhall be then and there found, and to detain and
" keep the ſame in ſuch Houſe or Place as the ſaid Commiſſioners
" ſhall direct or appoint; and in Caſe the ſame ſhall not within five Days
" after ſuch Seizure be claimed and replevied by the true and lawful
" Owners thereof, then the ſaid Cards, Dice, Tools and other Mate-
*Page628 " * rials ſhall be forfeited, and ſhall and may be ſold by the Direction of
" the ſaid Commiſſioners; one Moiety of the Produce thereof, all ne-
" ceſſary Charges being firſt deducted out of the Whole, to be paid to the
" Uſe of his Majeſty his Heirs or Succeſſors, and the other to the Party or
" Parties who ſhall diſcover the ſame."

The Powers and Penalties of former Acts extended to the New Duties on Cards and Dice.

63. By the 29 *G.* 2. *c.* 13. *par.* 4. it is enacted, " That all Powers, Pro-
" viſions, Penalties and Forfeitures, and all other Matters and Things, pre-
" ſcribed or appointed in any Act or Acts of Parliament relating to the
" like Duties and not hereby altered, ſhall be of full Force and Effect, with
" relation to the additional Duties hereby charged on Cards and Dice, and
" ſhall be applied and put in Execution for raiſing, levying, collecting and
" ſecuring the additional Duties hereby charged, according to the true In-
" tent and Meaning of this Act, as fully as if the ſame Powers, Proviſions,
" Penalties and Forfeitures had ſeverally and reſpectively been hereby
" enacted with relation to the additional Duties hereby charged on Cards
" and Dice."

A new Stamp to be prepared for the Ace of Spades.

64. By the 5 *G.* 3. *c.* 46. *par.* 9. after reciting, that great Frauds are
" committed in the Duties on Playing Cards, it is enacted, " That every
" Maker of Playing Cards in *Great Britain* ſhall ſend to the Commiſſioners
" of the Stamp Duties or their Officers a ſufficient Quantity of Paper, in
" order to have as many Aces of Spades marked thereon as ſuch Maker
" ſhall deſire, and no Pack of Cards ſhall be uſed in Playing or exported
" without one of ſuch Aces; and the Commiſſioners ſhall cauſe a new Stamp
" to be prepared, with ſuch Device as they ſhall think proper, to denote
" the ſaid Ace of Spades, ſo as in ſuch Device there be ſome diſtinguiſh-
" ing Mark between Cards made for home and Cards for foreign Conſump-
" tion; and the Commiſſioners may from Time to Time alter ſuch Device
" as they ſhall think proper."

65. By *par.* 10. it is enacted, " That every Maker of Cards ſhall ſend
" to the Commiſſioners of the Stamp Duties, or their Officers, Jews or
" Wrappers made for incloſing Cards for Uſe in *Great Britain*, with his
" Name and any other Particular or Thing printed thereon, as the Com-
" miſſioners ſhall direct, in order that the ſame may be ſtamped and de-
" livered again to ſuch Maker as Occaſion may require; and the Com-

" miſſioners

" miſſioners ſhall denote one of the Sixpenny Duties charged on playing " Cards on every ſuch Jew or Wrapper."

66. By *par.* 13. it is enacted, " That if any Maker of Cards ſhall in " making up any Pack of Cards uſe any Ace of Spads, Jew or Wrap- " per, that has been uſed before, he ſhall for every ſuch Offence forfeit " Twenty Pounds."

67. And by *par.* 14. it is enacted, " That if any Perſon ſhall buy or " ſell any ſuch Ace of Spades, Jew or Wrapper, in order to be made Uſe " of for incloſing any Pack or Parcel of Cards, he ſhall for every ſuch Of- " fence forfeit Twenty Pounds."

7. In ſome other Caſes.

68. By the 10 *Ann. c.* 19. *par.* 176. after reciting, that great Loſs hath happened of the Duties upon ſtamped Vellum, Parchment and Paper from clandeſtine Marriages, it is enacted, " That every Perſon in Holy Orders, " who ſhall marry any Perſon in any Church or Chapel, or in any other " Place, without Publication of the Banns of Matrimony between the re- " ſpective Parties, or without Licence firſt had and obtained from the " proper Ordinary for the ſaid Marriage, ſhall for every ſuch Offence " forfeit the Sum of One hundred Pounds; and if ſuch Offender ſhall be " * a Priſoner in any Gaol other than a County Gaol at the Time of ſuch " Offence committed, and ſhall be duly convicted of ſuch Offence, then " upon Oath made of ſuch Impriſonment before any Judge of one of her " Majeſty's Courts of Record at *Weſtminſter*, and upon producing a Copy " of the Record of ſuch Conviction to be likewiſe proved upon Oath before " the ſaid Judge, which Oath the ſaid Judge is hereby impowered to " adminiſter, the ſaid Judge is hereby required to grant his Warrant to " the Keeper of the Gaol where ſuch Offender is a Priſoner, which War- " rant ſuch Keeper is hereby required to obey, to remove ſuch Offender " to the Gaol of that County where ſuch Offender is a Priſoner, there " to remain charged in Execution with the Penalty inflicted by this Act, " and with all and every the Cauſes of his former Impriſonment; and if " any Keeper of any Priſon ſhall be privy to, or knowingly permit, any " Marriage to be ſolemnized in his ſaid Priſon, before the Publication of " ſuch Banns or Licence obtained, he ſhall for every ſuch Offence forfeit " the Sum of one hundred Pounds."

Penalty for marrying a Perſon without a Publication of Banns or a Licence.

* Page 629

69. By the 6 *G.* 1. *c.* 21. *par.* 56. after reciting, that a Practice hath obtained, to take the uſual Recognizances from Perſons for whom Ale Licences are intended for ſelling Ale or other exciſeable Liquors, and to take a Liſt of their Names and the Fees for ſuch Licences, but to omit to make out the ſame, in order to avoid the Payment of the Stamp Duties, given thereon by an Act made in the ninth Year of the Reign of her late Majeſty, it is enacted, " That all Mayors, Town Clerks and other Perſons, who ſhall " take any ſuch Recognizances, ſhall be obliged to make out Ale Licences " duly ſtamped before ſuch Recognizances be taken, under the Penalty " of ten Pounds for every ſuch Offence."

Penalty for not making out Licences to ſell Ale.

70. By the 11 *G.* 1. *c.* 30. *par.* 44. After reciting, that ſeveral Perſons have endeavoured to evade the Payment of the Stamp Duties on Policies of Inſurance, by giving Promiſſory Notes inſtead of Policies for the inſuring of Goods, Ships or Merchandizes at Sea, to the great Detriment and Loſs of his Majeſty's Revenue, it is enacted, " That when any " Veſſel, Goods or Merchandize ſhall be inſured, a Policy duly ſtamped " ſhall be iſſued or at leaſt made out within the Space of three Days at " furtheſt, and the Inſurer or Inſurers, neglecting to make out ſuch Po- " licy within the Time aforeſaid, ſhall forfeit the Sum of one hundred " Pounds

Penalty for not making out a Policy of Inſurance within three Days.

" Pounds for every ſuch Offence; and all Promiſſory Notes for Inſu-
" rances of Ships, Goods or Merchandizes, at Sea or going to Sea are
" hereby declared void, and nothing ſhall be recovered thereon by the
" Inſured."

71. By the 5 *G.* 3. *c.* 46. *par.* 39. it is enacted, " That it ſhall be
" lawful for all Perſons, who ſhall at any Time have in their Cuſtody or
" Poſſeſſion any ſtamped Vellum, Parchment or Paper, written, or ingroſſ-
" ed upon, which ſhall be inadvertently and undeſignedly ſpoiled, obli-
" terated, or by any other Means rendered unfit for the Purpoſe intended,
" before the ſame is executed by any Party or Parties, and which ſhall
" not have been uſed for any other Purpoſe, or in any other Manner what-
" ſoever, nor any Money or other Conſideration paid or given to the
" Attorney, Solicitor or other Perſon, employed to tranſact the Buſineſs
" intended to have been carried into Execution by ſuch Writing, or In-
" groſſment, or to the Writer or Ingroſſer of thereof, for the Duty or
" Duties marked, ſtamped or impreſſed thereon, to bring or ſend ſuch
" ſtamped Paper, Vellum, or Parchment, unto the ſaid Commiſſi-
" oners of the ſtamp Duties at their head Office in *London* or *Weſt-*
" *minſter*; and upon Oath made to the Satisfaction of the ſaid Commiſ-
" ſioners, which Oath the ſaid Commiſſioners, or any three or more of
" them, are hereby authorized to adminiſter, that ſuch ſtamped Vellum,
" Parchment, or Paper, ſo written or ingroſſed upon, or ſpoiled, ob-
" literated, or by any other Means rendered unfit for the Purpoſe in-
" tended, hath not been executed by any Party or Parties, or uſed for
" any other Purpoſe, or in any other Manner whatſoever; and that no
" Money or other Conſideration hath been paid or given for the Duty or
" Duties, marked, ſtamped, or impreſſed thereupon, ſave and except
" the Money firſt paid for ſuch Duty or Duties to the ſaid Commiſſioners
" or the Receiver General of the ſtamp Duties, or other proper Officer
" appointed to collect and receive the ſame, the ſaid Commiſſioners are
" hereby required to ſtamp and mark, or cauſe to be ſtamped and mark-
" ed, for the ſeveral Perſons, who ſhall ſo bring and deliver any Quan-
" tity of ſtamped Vellum, Parchment, or Paper, ſo written or ingroſſed
" upon, ſpoiled, obliterated, or by any other Means rendered unfit for
" Uſe or Service, the like Quantity of Vellum, Parchment or Paper,
" ſo written or ingroſſed upon, ſpoiled, obliterated, or by any other
" Means rendered unfit for Uſe or Service, without demanding or tak-
" ing, directly or indirectly, for the ſame any Sum of Money or other
" Conſideration whatſoever."

72. By the 5 *G.* 3. *c.* 35. *par.* 5. it is enacted, " That all Powers, Re-
" gulations, Proviſions, Articles, Clauſes, Penalties, Forfeitures, Diſtribu-
" tion of Penalties and Forfeitures, and all other Matters and Things
" preſcribed, inflicted and appointed, by any former Act or Acts of Par-
" liament, relating to the Duties on Vellum, Parchment and Paper, not
" hereby altered, ſhall be in full Force and Effect, with Relation to
" the additional ſtamp Duties hereby impoſed; and ſhall be applied
" and put in Execution, for the managing aud raiſing, levying, collect-
" ing, ſecuring, reſerving, and paying thereof, and accounting for the
" ſame, as fully to all Intents and Purpoſes, as if ſuch Powers, Regula-
" tions, Proviſions, Articles, Clauſes, Penalties, Forfeitures, Diſtribution
" of Penalties and Forfeitures, and other Matters and Things, were
" herein repeated, re-enacted and applied to the ſaid ſtamp Duties here-
" by granted."

5 G. 3. c. 46.
5 G. 3. c. 47.
7 G. 3. c. 44.
16 G. 3. c. 34.

73. There is a Clauſe to the ſame Effect in divers ſubſequent Statutes, by which ſtamp Duties are impoſed.

(E) Of the pecuniary Penalties incurred by Offenders againſt the Statutes impoſing Stamp Duties.

1. BY the 10 *Ann. c.* 19. *par.* 172. it is enacted, "That it ſhall and may "be lawful for any two or more Juſtices of the Peace, reſiding "near to the Place where any pecuniary Forfeiture not exceeding twenty "Pounds, upon this or any of the Acts of Parliament touching any the "Duties under the Management or Care of the Commiſſioners for ma-"naging the Stamp Duties, ſhall be incurred, or any Offence againſt any "of the ſame Acts ſhall be committed, in any wiſe relating to the ſame "Duties or of any of them, by which any Sum of Money only may be for-"feited, to hear and determine the ſame; which ſaid Juſtices of the "Peace are hereby authorized and required, upon any Information ex-"* hibited, or Complaint made in that Behalf, within one Year after "Seizure made or ſuch Offence committed, to ſummon the Party ac-"cuſed and alſo the Witneſſes on either Side, and, if upon his Appear-"ance or Contempt the Party accuſed ſhall be convicted of the Offence "alledged againſt him, to award and iſſue out Warrants under their "Hands and Seals, for levying any pecuniary Penalties ſo adjudged on the "Goods of the Offender, and to cauſe Sale to be made thereof in caſe "they ſhall not be redeemed in ſix Days, rendering to the Party the Over-"plus if any; and if any Party ſhall find himſelf aggrieved or remain "unſatisfied with the Judgment of the ſaid Juſtices, then he, ſhe or they "ſhall or may by Virtue of this Act complain or appeal to the Juſtices "of the Peace, at the next General Quarter-Seſſions for that County, "Riding or Place, who are hereby impowered to ſummon and examine "Witneſſes upon Oath, and finally to hear and determine the ſame, and "in Caſe of Conviction to iſſue Warrants for levying the Penalties as "aforeſaid."

Two Juſtices of the Peace may determine in all Caſes, where the Penalty does not exceed twenty Pounds.

* Page 630

By *par.* 173. it is provided, "That it ſhall and may be lawful to and "for the ſaid reſpective Juſtices, where they ſhall ſee Cauſe, to mitigate "or leſſen any ſuch Penalties as they in their Diſcretions ſhall think fit, "the reaſonable Coſts and Charges of the Officers and Informers, as "well in making the Diſcovery as in the Proſecution of the ſame, being "always allowed over and above ſuch Mitigation, and ſo as ſuch Miti-"gation do not reduce the Penalties to leſs than double the Duties "over and above ſuch Coſts and Charges; any Thing contained in this "Act or any other Act of Parliament to the contrary notwithſtand-"ing."

The Juſtices may mitigate any Penalty.

3. By *par.* 174. it is provided, "That no Writ or Writs of *Certiorari* "ſhall ſuperſede Execution, or other Proceedings, upon any Order or "Orders made by the Juſtices aforeſaid in Purſuance of this Act, but "that Execution and other Proceedings ſhall be had and made there-"upon; any ſuch Writ or Writs or Allowance thereof notwithſtand-"ing."

The Proceedings of the Juſtices not to be removed by a Writ of *Certiorari*.

(F) Of the corporal Punishments, to which Persons guilty of Offences against the Statutes imposing Stamp Duties are liable.

Hawkers of an unstamped News Paper to be imprisoned.

1. BY the 16 *G.* 2. *c.* 26. *par.* 5. after reciting, that great Numbers of News Papers, Pamphlets and other Papers subject and liable to the Stamp Duties, and which are not stamped according to Law, are daily sold, hawked, carried about, uttered and exposed to Sale by divers obscure Persons, who have no known or settled Habitation, to the great Loss of the fair Trader and the Prejudice of his Majesty's Revenue; and that several Doubts and Difficulties have arisen relating to the Execution of the Laws formerly made, and now in Being, for preventing of such Practices and punishing the Offenders, it is enacted, "That in case any "Person or Persons shall sell, hawk, carry about, utter or expose to Sale, "any News Paper, or any Book, Pamphlet or Paper, deemed or con-"strued to be a News Paper within the Intention and Meaning of any of "the Acts of Parliament relating to the Stamp Duties now in Force, not "being stamped or marked as in the said Acts are directed or appointed, "it shall and may be lawful for any Justice of the Peace, to commit "every such Offender, being thereof convicted before him by their own "Confession, or by the Oath of one or more credible Witness or Wit-
*Page631 "nesses, to the House of Correction for any Time not * exceeding three "Months, and it shall and may be lawful for any Person, to seize, ap-"prehend and carry before a Justice of the Peace of the County, City, "Riding, Division or Place where such Offence shall be committed any "such Person so offending as aforementioned; and every Person, so seiz-"ing or apprehending such Offender and carrying him or her before such "Justice of the Peace as aforesaid, shall upon Conviction of every such "Offender, and producing a Certificate of such Conviction under the "Hand of such Justice, which Certificate such Justice is hereby requir-"ed to give without Fee or Reward to be taken for the same, be enti-"tled to the Reward of twenty Shillings, to be paid by the Receiver-Ge-"neral of his Majesty's Stamp Duties."

Hawkers of an unstamped Almanack to be imprisoned.

2. By the 30 *G.* 2. *c.* 19. *par.* 26. it is, for preventing the Diminution of the Revenue arising from the Duties payable on Almanacks, by subjecting the Venders of unstamped Almanacks to the same Penalties, as by an Act passed in the sixteenth Year of his Majesty's Reign are inflicted on Venders of unstamped News Papers, enacted, "That if any Person "shall sell, utter or expose to Sale any Almanack, liable to any Duty by "this or any former Act imposed, such Almanack not being stamped or "marked as by this or any former Act is directed, every Person so of-"fending shall for every such Offence be liable to the same Punishment, "as is inflicted on any Hawker of unstamped News Papers by the "said Act made in the sixteenth Year of the Reign of his present Ma-"jesty; and every Justice of the Peace shall have the like Power to "convict such Offender, as by the said Act is granted with Relation to the "Conviction of Offenders against the said Act; and every Person who "shall apprehend such Offender shall be intitled to the like Reward, as "by the said Act is granted for the Apprehension of Offenders against the "said Act."

3. By the 12 *G.* 3. *c.* 48. it is enacted, "That if any Person shall "write or engross, or cause to be written or engrossed, either the Whole "or any Part of any Writ, Mandate, Bond, Affidavit, or other Writ-

"ing,

" ing, Matter or Thing whatſoever, in reſpect whereof any Duty is or " ſhall be payable by any Act or Acts made, or to be made in that Be- " half, on the Whole, or any Part of any Piece of Vellum, Parchment, " or Paper, whereon there ſhall have been before written any other Writ, " Bond, Mandate, Affidavit, or other Matter or Thing, in reſpect " whereof any Duty was or ſhall be payable as aforeſaid, before ſuch " Vellum, Parchment or Paper ſhall have been again marked or ſtamped, " according to the ſaid Acts; or ſhall fraudulently eraſe or ſcrape out, " or cauſe to be eraſed or ſcraped out, the Name or Names of any Per- " ſon or Perſons, or any Sum, Date, or other Thing, written in ſuch " Writ, Mandate, Affidavit, Bond, or other Writing, Matter or Thing " as aforeſaid; or fraudulently cut, tear, or get off any Mark or Stamp, " in reſpect whereof, or whereby any Duties are or ſhall be payable, or " denoted to be paid or payable as aforeſaid, from any Piece of Vellum, " Parchment, Paper, playing Cards, outſide Paper of any Parcel or " Pack of playing Cards, or any Part thereof, with Intent to uſe ſuch " Stamp or Mark for any other Writing, Matter or Thing, in reſpect " whereof any ſuch Duty is or ſhall be payable, or denoted to be paid " or payable as aforeſaid, then, in every ſuch Caſe, every Perſon offend- " ing in any of the Particulars before-mentioned, and every Perſon, know- " ingly and wilfully aiding, abetting, or aſſiſting any Perſon or Perſons " to commit any ſuch Offence or Offences as aforeſaid, ſhall be deemed " and conſtrued to be guilty of Felony, and being thereof convicted by " due Courſe of Law, ſhall be tranſported to one of his Majeſty's Plan- " tations beyond the Seas, for a Term not exceeding ſeven Years: And if " any ſuch Perſon or Perſons ſo convicted or tranſported ſhall voluntarily " eſcape or break Priſon, or return from Tranſportation before the Ex- " piration of the Time, for which he, ſhe, or they ſhall be ſo tranſported " as aforeſaid, ſuch Perſon or Perſons being thereof lawfully convicted, " ſhall ſuffer Death as a Felon without Benefit of Clergy, and ſhall be " tried for ſuch Felony in the County where he, ſhe, or they ſhall be " apprehended."

4. By the 5 *W. & M. c.* 21. *par.* 11. it is enacted, " That if any " Perſon or Perſons whatſoever ſhall at any Time or Times hereafter " counterfeit or forge any Stamp or Mark, to reſemble any Stamp or Mark " which ſhall be provided or made in purſuance of this Act; or ſhall coun- " terfeit or reſemble the Impreſſion of the ſame upon any Vellum, Parch- " ment or Paper, thereby to defraud their Majeſties their Heirs or Succeſ- " ſors of any the Duties hereby granted; or ſhall utter, vend or ſell any " Vellum, Parchment or Paper with ſuch counterfeit Mark or Impreſ- " ſion thereupon, knowing ſuch Mark or Impreſſion to be counterfeited, " then every ſuch Perſon ſo offending, being thereof convicted in due Form " of Law, ſhall be judged a Felon, and ſhall ſuffer Death as in Caſes of " Felony without the Benefit of Clergy."

The Perſon guilty of counterfeiting a Stamp, or of ſelling Paper marked with a counterfeit Stamp, to ſuffer Death.

5. There is a Clauſe to the ſame Effect in the Statute impoſing Stamp Duties paſſed in the ninth and tenth Years of the Reign of *William* the Third, and in that paſſed in the eighth Year of the Reign of Queen *Anne*.

9 & 10 W. 3. c. 25. ſ. 59. 8 A. c. 9. ſ. 41.

6. In the 9 *Ann. c.* 23. *par.* 34. there is a Clauſe to the ſame Effect with the following Addition, " That if any Perſon whatſoever ſhall pri- " vately and fraudulently uſe any Stamp, provided or uſed or to be pro- " vided or uſed in purſuance of this or any former Act or Acts of Par- " liament relating to the Duties upon ſtamped Vellum, Parchment and " Paper, ſo as thereby to defraud her Majeſty, her Heirs or Succeſſors, " of any Duty payable by this or any ſuch former Act or Acts of Par- " liament; then every ſuch Perſon ſo offending, and being thereof con-

The Perſon fraudulently uſing a Stamp to ſuffer Death.

" victed

" victed in due Form of Law, ſhall be adjudged a Felon, and ſuffer Death
" as in Caſes of Felony without Benefit of Clergy."

10 A. c. 19. 115. 10 A. c. 26. 172. 7. In two ſubſequent Statutes impoſing Stamp Duties there is a Clauſe to the ſame Effect.

*Page 632 The Perſon procuring a counterfeit Stamp to be uſed to ſuffer Death.

* 7. By the 6 *G.* 1. *c.* 21. *par.* 60. for aſcertaining a Doubt which hath ariſen, whether a Perſon who cauſeth or procureth a Mark or Stamp, to reſemble any Mark or Stamp to be provided or uſed for any of the Duties under the Management of the Commiſſioners for managing his Majeſty's Stamp Duties, to be counterfeited or forged, ought to be adjudged a Felon by Virtue of the Acts of Parliament relating to the ſaid Duties or any of them, it is enacted, " That any Perſon, cauſing or procuring to
" be forged or counterfeited any Stamp or Mark, to reſemble any Stamp
" or Mark provided made or uſed, or to be provided made or uſed, in
" purſuance of any Act or Acts of Parliament relating to the ſaid Duties
" or any of them, or cauſing or procuring any Vellum, Parchment, Pa-
" per, Cards or Dice, to be marked or ſtamped with ſuch counterfeit
" Mark or Stamp, ſhall and ought to be adjudged to have actually done
" and committed the ſame himſelf, and to be a Felon, and to ſuffer Death
" as in Caſes of Felony without Benefit of Clergy."

The foregoing Clauſes extended to Stamps directed to be uſed by any of the Stamp Acts.

9. The foregoing Clauſes are by the 30 *G.* 2. *c.* 19. *par.* 27. reduced into one Clauſe, which is extended to the Stamps directed to be uſed by that or any former Statute; it being thereby enacted, " That if any
" Perſon ſhall counterfeit or forge, or procure to be counterfeited or
" forged, any Seal, Stamp or Mark, to reſemble any Seal, Stamp or Mark
" directed or allowed to be uſed by this or any other Act of Parliament,
" for the Purpoſe of denoting the Duties by this or any other Act of
" Parliament granted, or ſhall counterfeit or reſemble the Impreſſion of
" the ſame, with an Intent to defraud his Majeſty his Heirs and Suc-
" ceſſors of any of the ſaid Duties; or ſhall utter vend or ſell any
" Vellum, Parchment or Paper liable to any Stamp Duty with ſuch
" counterfeit Stamp or Mark, knowing the ſame to be counterfeit; or
" ſhall privately and fraudulently uſe any Seal, Stamp or Mark, direct-
" ed or allowed to be uſed by this or any other Act of Parliament re-
" lating to the Stamp Duties, with Intent to defraud his Majeſty, his
" Heirs and Succeſſors of any of the ſaid Duties, every Perſon ſo of-
" fending, and being thereof lawfully convicted, ſhall be adjudged a
" Felon, and ſhall ſuffer Death as in Caſes of Felony without Benefit of
" Clergy."

5 G. 3. c. 35. 5 G. 3. c. 46. 5 G. 3. c. 47. 7 G. 3. c. 44. 16 G. 3. c. 34. 10. There is a Clauſe to the ſame Effect in divers ſubſequent Statutes, by which Stamp Duties are impoſed.

The Perſon ſelling Cards with a counterfeit Stamp to ſuffer Death.

11. By the 16 *G.* 3. *par.* 15. it is enacted, " That if any Perſon ſhall
" utter, vend or ſell any Cards with a counterfeit Seal, Stamp or Mark,
" knowing the ſame to be counterfeit, with Intent to defraud his Majeſty,
" his Heirs or Succeſſors, every Perſon ſo offending, and being thereof law-
" fully convicted, ſhall be adjudged a Felon, and ſhall ſuffer Death as in
" Caſes of Felony without Benefit of Clergy."

* STATUTE. *Page 633

A Statute is a written Law, made by the King and the two Houſes of Parliament.

The Manner of paſſing Bills in Parliament has been ſhewn under the Title Court of Parliament.

The Remainder of what falls under this Title ſhall be conſidered in the following Order.

(A) Of ſome Things neceſſary to the Validity of a Statute.
(B) Of ſome Things incidental to a Statute.
(C) From what Time a Statute begins to have Effect.
(D) How long a Statute continues in Force.
(E) Of the vaſt Power of a Statute.
(F) Of a publick or private Statute.
(G) Of an affirmative or negative Statute.
(H) Whoſe Province it is to conſtrue a Statute.
(I) Rules to be obſerved in the Conſtruction of a Statute.

1. Words and Phraſes, the Meaning of which in a Statute has been aſcertained, are when uſed in a ſubſequent Statute to be underſtood in the ſame Senſe.
2. In the Conſtruction of one Part of a Statute every other Part ought to be taken into Conſideration.
3. If divers Statutes relate to the ſame Thing, they ought to be all taken into Conſideration in conſtruing any one of them.
4. The common Law ought to be regarded in the Conſtruction of a Statute.
5. The Intention of the Makers of a Statute ought to be regarded in the Conſtruction of the Statute.
6. In what Caſes, a Statute ought to have an equitable Conſtruction.
7. A Statute, which concerns the publick Good, ought to be conſtrued liberally.
8. A Remedial Statute ought to be conſtrued liberally.
9. A Penal Statute ought to be conſtrued ſtrictly.
10. Some other Rules, which ought to be obſerved in the Conſtruction of a Statute.

(K) How

Page634 (K) How a Perſon guilty of Diſobedience to a Statute may be puniſhed.

(L) Of pleading a Statute.

1. A publick Statute.
2. A private Statute.
3. Some general Rules for pleading a Statute.
4. Some Rules for pleading a Statute, which relate to particular Parts of the Pleadings.
5. Of Miſrecital in Pleading a Statute.
6. Of Surpluſage in Pleading a Statute.

(A) Of ſome Things neceſſary to the Validity of a Statute.

2 Inſt. 585. 1. IT has been ſaid, that a Parliament may be holden without ſummoning the Lords Spiritual thereto: But the better Opinion is, that they ought to be ſummoned; becauſe they have by the Law and Cuſtom of Parliament as good a Right to ſit in the Houſe of Lords as the Lords Temporal.

Ibid. 2. If the Spiritual Lords, after having been ſummoned, voluntarily abſent themſelves, the King, Lords Temporal and Commons may make a Statute without them.

2 Inſt. 585, 586. 3. This is conſtantly the Caſe, where a Bill is brought into Parliament for attainting a Perſon. The Lords Spiritual are forbid by the Canon Law to be preſent at the paſſing of ſuch Bill; yet if the Bill do paſs it is a valid Statute.

Ibid. 4. If the Spiritual Lords, being preſent, refuſe to give their Aſſent to, or proteſt againſt the paſſing of a Bill, yet if the Bill do paſs it is a valid Statute.

4 Inſt. 516. (a) 11 R. 2. ſt. 2. c. 2. (b) 11 R. 2. ſt. 2. c. 2. 5. Two Bills being read in Parliament, one intitled, (a) *A Confirmation of the Statute of Proviſors, and the Forfeiture of him that accepteth a Benefice againſt that Statute*; the other intituled, (b) *The Penalty of him that bringeth a Summons or Sentence of Excommunication againſt any Perſon upon the Statute of Proviſors, and of a Prelate executing it*, both which tended to reſtrain the Authority claimed by the Pope of diſpoſing of Eccleſiaſtical Benefices within this Realm, the Archbiſhops of *Canterbury* and *York*, in the Name of the whole Clergy of their Provinces, made a ſolemn Proteſtation in open Parliament, that they would in no wiſe aſſent to any Law in Reſtraint of the Pope's Authority. This Proteſtation was at their Requeſt inrolled; yet both Bills were paſſed by the King, Lords Temporal and Commons, and are among the printed Statutes.

2 Inſt. 585. 6. As all Votes in Parliament, whether in the Affirmative or in the Negative, ought to be abſolute, if the Biſhops annex any Condition to their Votes, their Votes are void, and the Statute is good without their Concurrence.

Rot. Parl. 6H. 6. n. 27. 2 Inſt. 587. 7. A Bill was brought into Parliament in the Time of *Henry* the Sixth, *That no Man ſhould contract or marry himſelf to any Queen of* England *without the ſpecial Licence and Aſſent of the King, on Pain of loſing all his* *Page635* *Goods and Lands.* The Biſhops and Clergy aſſented thereto, *as far forth*

as the ſame ſwerveth not from the Law of God and the Church; and ſo as the ſame importeth no deadly Sin. This was holden to be no Aſſent, and it was ſpecially entered, that the Statute was enacted by the King, Lords Temporal and Commons.

8. Notwithſtanding it be ſpecially entered in the Parliament Roll, that a Statute was enacted by the King, Lords Temporal and Commons, it is not to be inferred that the Prelates were not ſummoned to Parliament: But it muſt be intended that they voluntarily abſented themſelves; or refuſed to give their Aſſent to or proteſted againſt the paſſing of a Bill; or gave ſuch Votes as were *contra Legem et conſuetudinem parliamenti.* 2 Inſt. 585, 587.

9. Some ancient Statutes are penned in the Form of Charters, Ordinances, Commands or Prohibitions from the King, without mentioning either Lords or Commons, and ſome others have only the general Words, *It is provided*, or *It is ordained*, without ſaying by whom: But as theſe have conſtantly been received as Statutes, the Preſumption is, that they were made by lawful Authority. Hawk. Pref. to the Stat. 1 Inſt. 98.

10. The Difference according to Lord *Coke* between a Statute and an Ordinance is, that the latter has not had the Aſſent of the King, Lords and Commons, but is made by only one or two of thoſe Powers. 4 Inſt. 25.

11. Mr. *Prynne*, in his Remarks upon this Paſſage, ſays there is no ſuch Difference, nor any Difference between a Statute and an Ordinance. To prove this, he produces more than a hundred printed Statutes, in which the Words *Act* and *Ordinance* are uſed indifferently or coupled together as ſynonymous Terms. He likewiſe cites a Clauſe, contained in all Writs for electing Knights, Citizens and Burgeſſes of Parliament, which runs thus, *ad faciendum et conſentiendum hijs quæ de communi concilio Regni Noſtri contingerint ordinari*; and infers, that ſome Acts of Parliament have been called Ordinances from the Word *ordinari* in this Clauſe. Prynne's Animadv. on 4 Inſt. 13. Prynne's Irenarch. Redivin. 27. to 74.

12. If a Statute be againſt common Right or Reaſon, or repugnant, or impoſſible to be performed, the Common Law ſhall controul it and adjudge it to be void. 8 Rep. 118. *Bonham's* Caſe. 2 Inſt. 527. Finch 74.

13. It has been holden that a Statute contrary to natural Equity, *as to make a Man Judge in his own Cauſe*, is void; for that *Jura Naturæ ſunt immutabilia.* Hob. 87. 8 Rep. 118.

14. But it is ſaid in another Caſe where in this Caſe is cited, that the Judges will not hold a Statute to be void, unleſs it be clearly contrary to natural Equity; for that they will ſtrain hard rather than hold a Statute to be void. 11 Rep. 63. *Foſter's* Caſe. 10 Mod. 115.

15. Before the Art of Printing was introduced into *England* all Statutes were at the End of every Seſſion of Parliament tranſcribed on Parchment, and ſent to the Sheriff of every County, and with them a Writ from the King, commanding him to proclaim them throughout his Bailiwick. After he had proclaimed them, which was uſually done in the County Court, the Tranſcripts were there depoſited, that any Perſon might read or take Copies of them. 2 Inſt. 526, 644. 4 Inſt. 26.

16. But a Statute was even at the Time when this laudable Practice prevailed equally binding, although it had not been ſo proclaimed. 4 Inſt. 26. 2 Inſt. 526.

17. It has been holden, that the Title of a Statute is no Part of the Statute: Becauſe this is uſually framed by the Clerk of that Houſe in which the Bill firſt paſſes; and is ſeldom read more than once. 3 Rep. 33. *Poulter's* Caſe. Hard. 324. Ld. Raym 77.

18. The Cuſtom of prefixing Titles to Statutes did not begin till about the eleventh Year of the Reign of *Henry* the Seventh. Ld. Raym. 77.

19. The *Chance* v. *Adams.* Hard. 324.

*Page 636 * 19. The Preamble of a Statute does uſually contain the Motives and
6 Mod. 62 Inducements to the making of it: But it has been holden, that it is no Part
Mills v. of the Statute.
Wilkins.
8 Mod. 144.

(B) Of ſome Things incidental to a Statute.

1 Inſt. 235. 1. WHEREVER the Proviſion of a Statute is general, every Thing
2 Inſt. 222. which is neceſſary to make ſuch Proviſion effectual is ſupplied by the Common Law.

1 Hawk. 305. 2. If an Offence be made Felony by a Statute, ſuch Statute does by
3 Inſt. 47, 49, 50. neceſſary Conſequence ſubject the Offender to the like Attainder and Forfeiture, and does require the like Conſtruction, as to thoſe who ſhall be accounted Acceſſaries before or after the Fact and to all other Intents and Purpoſes, as a Felony at the Common Law does.

1 H.H.P.C. 652. 3. Miſpriſion of Felony is as well incidental to a Felony created by a Statute as to one at the Common Law.

12 Rep. 130, 131. 2 Inſt. 306. 4. Wherever a Power is given by a Statute, every Thing neceſſary to the making of it effectual is given by Implication: For the Maxim is, *Quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud.*

Bro. Waſte, pl. 68. 5. If an Action of Waſte ſhould now be given by a Statute againſt Tenant in Tail after Poſſibility of Iſſue extinct, treble Damages would although not mentioned be recoverable: For ſuch Damages are recoverable under a former Statute, by which an Action of Waſte is given; and wherever an old Action is given in a new Caſe, all that before appertained to the Action is likewiſe given.

(C) From what Time a Statute begins to have Effect.

1 Rol. Abr. 465. *Hawes's* Caſe. 1. EVERY Statute begins to have Effect, unleſs ſome other Time be appointed, from the firſt Day of that Seſſion of Parliament in which it is made.

Bro. Relat. pl. 35. Bro. Parl. pl. 86. 4 Inſt. 25, 27. Hob. 309. Sid. 310.

Ld. Raym. 371. *Rex* v. *Gale.* Plow. 79. 2. But where a particular Time for the Commencement of a Statute is appointed, it only begins to have Effect from that Time.

Bro. Parl. pl. 86. Hob. 222.

1 Jo. 22. *Standen* v. *The Univerſity of Oxford.* 3. If two Statutes relative to the ſame Subject are made in the ſame Seſſion of Parliament, and no Time is fixed for the Commencement of either, neither ſhall have Priority: For both have relation to the ſame Day and Inſtant of Time; and they ſhall, although contained in two Chapters, be conſtrued as if they had been only one Statute.

4. It is in the general true, that no Statute is to have a Retroſpect beyond the Time of its Commencement; for the Rule and Law of Parliament is, that *Nova conſtitutio futuris formam debet imponere non præteritis.*

5. A Treaty

* 5. A Treaty of Marriage being on Foot between the Plaintiff and a Perſon whom he afterwards married, and had 2000 *l.* with as a Portion, *Shooter*, who was of Kin to the Plaintiff, promiſed to give him as much or to leave him as much by his Will. This Promiſe was made before the 24th Day of *June* 1677. *Shooter* died in the *September* following, without having paid the Money, or made Proviſion by his Will for the Payment. An Action was brought againſt his Executors, and the Queſtion made upon a ſpecial Verdict was whether this Promiſe, it not being in Writing, was within the 29 *Car.* 2. *c.* 3. whereby it is enacted, "That from "and after the twenty-fourth Day of *June*, which ſhall be in the Year "of our Lord One thouſand ſix hundred and ſeventy-ſeven, no Action ſhall "be brought to charge any Perſon upon any Agreement made upon Con- "ſideration of Marriage, unleſs the Agreement upon which ſuch Action "ſhall be brought, or ſome Memorandum or Note thereof, ſhall be in "Writing and ſigned." Judgment was for the Plaintiff: And by the Court: It cannot be preſumed, that the Statute was to have a Retroſpect, ſo as to take away a Right of Action which the Plaintiff was intitled to before the Time of its Commencement. *Page 637

2 Mod. 310. *Gilmore* v. *The Executors of Shooter.*

6. But a Statute may have a Retroſpect to a Time antecedent to that of its Commencement.

7. If a Parſon hold a Farm upon Condition not to alienate, and afterwards a Statute is made which inflicts a Puniſhment upon a Parſon who alienates a Farm holden by him, the Condition remains good.

2 Brownl. 142. *Portington* v. *Rogers.*

8. It is ſaid that if *A.* covenant not to do an Act which is lawful, and a Statute be made afterwards which compels him to do the Act, the Statute repeals the Covenant: Or that if *A.* covenant to do an Act which is lawful, and by a Statute made afterwards he be forbidden to do the Act, the Statute repeals the Covenant.

Salk. 198. *Brewſter* v. *Kitchell*, Hil. 9 W. 3.

9. But it has in a later Caſe been holden, that in conſtruing a Statute made after the entering into a Contract, the Senſe of the Words ought not to be ſtrained ſo as to avoid the Contract, to the Benefit whereof ſome Perſon was intitled at the Time the Statute was made.

Ld. Raym. 1352. *Wilkinſon* v. *Meyer*, Eaſt. 10 G. 1.

(D) How long a Statute continues in Force.

1. SOME Statutes are temporary, others are perpetual.

2. A Temporary Statute continues in Force, unleſs it be ſooner repealed, until the Time for which it is made expires; a perpetual one until it is repealed.

3. Every Statute for the Continuance of which no Time is limited is perpetual, although it be not expreſsly declared ſo.

4. It is laid down, that if a Statute, which was to have Continuance only for ſeven Years, have been after the Expiration of that Term made perpetual by another Statute, only the latter Statute is to be conſidered as in Force.

Lit. Rep. 213. *The Caſe of the College of Phyſicians.*

5. This Caſe does not ſeem to be Law. The Statute againſt Perjury, made in the fifth Year of the Reign of Queen *Elizabeth*, was only to have Continuance till the End of the next Parliament. Another Parliament commenced in the thirteenth Year of her Reign, another in the twenty-ſeventh, and another in the twenty-eighth: But this Statute was not made perpetual till the twenty-ninth Year of her Reign. * The firſt Statute has however been always holden to be in Force, and the Offence of Perjury is conſtantly charged in an Indictment to have been committed againſt the Form of that Statute. *Page 638

Owen 135. *Weſt's* Caſe. Cro. Eliz. 750. Lutw. 221.

Str. 1066. *Rex* v. *Morgan.* 6. In an Indictment for Perjury in an Affidavit for holding to Bail, the Affidavit was alledged to have been taken by virtue of the 12 *G.* 1. *c.* 29. a Statute made for five Years, but which was afterwards continued with ſome Alterations by the 5 *G.* 2. *c.* 27. It was objected for the Defendant, that it ought to have been alledged that the Affidavit was taken by virtue of the latter Act, and eſpecially as this is not a mere continuing Statute, the former being thereby altered. The Objection was overruled; and by Lord *Hardwicke* Ch. J. When a Statute is continued, every Perſon is eſtopped to ſay that it it not in force; and as there is no Alteration in the latter Statute as to the Subject-Matter of the preſent Indictment, it is no more than a Continuance of the former *quoad hoc.*

Lutw. 221. Anon. Owen. 135. Cro. Eliz. 750. 7. It is moreover in divers Books laid down, that, if before the Expiration of a temporary Statute it be made perpetual by another Statute, the former Statute is as much in force, as if it had been at firſt made perpetual.

4 Inſt. 43. 8. Divers Parliaments have attempted to prevent the Repeal of their Statutes by ſubſequent Parliaments; But this never could be effected; for a ſubſequent Parliament has always Power to abrogate, ſuſpend, qualify or make void, in the whole or in part any Statute made by a former Parliament, notwithſtanding any Words of Reſtraint or Prohibition contained in ſuch Statute.

Jenk. Cent. 2 9. Some Parts of *Magna Charta*, although it be expreſly declared by the 42 *E.* 3. *c.* 3. that all Statutes contrary thereto ſhall be void, have been repealed, and other Parts have been altered by ſubſequent Statutes; yet ſuch Statutes have been conſtantly holden to be in force.

2 Inſt. 686. 10. If a Statute, which has been repealed, be afterwards revived, the repealing Statute becomes of no force.

12 Rep. 7. *The Biſhops* Caſe. 2 Inſt. 686. 11. By the Repeal of a repealing Statute the original Statute is revived.

12 Rep. 7. *The Biſhops* Caſe. 12. If a Statute have been repealed by three different Statutes, and only two of the repealing Statutes are repealed, the third continues in Force, and repeals the original Statute.

Jenk. 233. pl. 6. 13. If a Statute be repealed, all Acts done under it whilſt it was in force are good: But if a Statute be declared to be null, all Acts done under it whilſt it was in force are void.

11 Rep. 61. *Foſter*'s Caſe. Show. 520. Ld. Raym. 160. 4 Inſt. 43. 14. Every Affirmative Statute is a Repeal by Implication of a precedent Affirmative Statute, ſo far as it is contrary thereto: For *leges poſteriores priores abrogant.*

Raym. 397. Anon. 15. But if a Statute before perpetual be continued by an affirmative Statute for a limited Time, this does not amount to a Repeal thereof at the End of that Time.

6 Mod. 287. *The Inhabitants of St. Clements* v. *The Inhabitants of St. Andrew's.* 16. If two Statutes repugnant to each other be made in the ſame Seſſion of Parliament, the latter only ſhall have Effect.

Fitzgib. 195. *The Attorney General* v. *The Governor of Chelſea Water Works.* 17. If the latter Part of a Statute be repugnant to the former Part thereof it ſhall ſtand, and ſo far as it is repugnant be a Repeal of the former Part; becauſe it was laſt agreed to by the Makers of the Statute.

11 Rep. 63. *Foſter*'s Caſe. *Page 639. 1 Rol. Rep. 88. 10 Mod. 118. 18. But the Law does not favour a Repeal by Implication, nor is it to be allowed unleſs the Repugnancy be quite plain: For as ſuch Repeal carries with it * a Reflection upon the Wiſdom of the former Parliament, it has ever been confined to the repealing as little as poſſible of the preceding Statute.

19. Al-

19. Although two Acts of Parliament are *seemingly* repugnant, yet if there be no Clauſe of *non Obſtante* in the latter, they ſhall if poſſible have ſuch Conſtruction, that the latter may not be a Repeal of the former by Implication. Dyer 347. *Weſton's* Caſe. Bro. Parl. pl. 9. 11 Rep. 63. Hard. 344.

(E) Of the vaſt Power of a Statute.

1. A Statute can do no Wrong; but it may do ſome Things which ſeem very ſtrange: For it may diſcharge a Perſon from the Allegiance he lives under, and reſtore him to a State of Nature. 12 Mod. 688. *The City of London* v. *Wood.*

2. An Eſtate may be made to ceaſe by a Statute in the ſame Manner as if the Party poſſeſſing had been dead; as is done by the 21 *H.* 8. *c.* 13. which declares, that if a Perſon accept a ſecond Benefice the firſt ſhall be void, in the ſame Manner as if the Incumbent had died. 6 Rep. 40. *Mildmay's* Caſe.

3. A Man may be enabled by a Statute to have or be an Heir, who otherwiſe could not have or be an Heir. 1 Lev. 75. *Wheatley* v. *Thomas.*

4. An Eſtate Tail may be limited by a Statute without a Donor; and the Validity of ſuch a Limitation is not to be meaſured by the Rules of the Common Law: For a Statute can controul the Rules of the Common Law. Raym. 355. *Murrey* v. *Eyton.* 1 Jon. 105.

5. A Man can only forfeit ſuch Eſtate as he has, as if Tenant in Tail with Remainder over forfeit the Remainder is ſaved: But if the Land of Tenant in Tail be given to the King by a Statute, the Remainder is not ſaved. Godb. 315. *Sheffield* v. *Ratcliffe.*

6. If the King become intitled by a Statute to the Land of *J. S.* he takes it diſcharged of all Tenure. Bro. Parl. pl. 77.

7. If Land ſubject to a Rent-charge be given to a Perſon by a Statute, the Rent-charge is thereby diſcharged. Bro. Parl. pl. 28.

8. A Statute cannot make it lawful for *A.* to commit Adultery with the Wife of *B.* for the Law of God forbids this: But it may diſſolve her Marriage with *B.* and enable her to marry *A.* 12 Mod. 688. *The City of London* v. *Wood.*

9. A Statute may make a Woman a Man to ſome civil Purpoſes; for it may make her a Mayor or a Juſtice of the Peace. 2 Jon. 12. *Crow* v. *Ramſay.*

(F) Of a publick or private Statute.

1. A Statute which relates to all the Subjects of the Realm is a publick Statute. 8 Rep 138. *Barrington's* Caſe.

2. Although the Words of a Statute are particular: Yet if the Intent be general, it is a publick Statute. 10 Rep. 101. *Beaufage's* Caſe

* 3. If the Intent of a Statute be particular, it ſhall, notwithſtanding the Words are general, be deemed a private Statute. *Page 640 Plow. 204. *Stradling* v. *Morgan.*

4. A Statute which concerns the King is a publick Statute: For every Subject has an Intereſt in the King, who is the Head of the Body Politick; and 4 Rep. 77. *Holland's* Caſe.

8 Rep. 28, 138. Hob. 227. and conſequently ought to be as ſenſible of that which affects him, as a Member of the natural Body is of what the Head at any Time feels.

Sid. 209. *Rex.* v. *Pawlin.* 5. The Preamble of the 13 & 14 *Car.* 2. *c.* 12. recites divers Miſchiefs to the Publick which ariſe for want of proper Regulations concerning the Poor: And by *Par.* 4. it is enacted, "That, for the Redreſs of the "Miſchiefs intended to be remedied, a Workhouſe ſhall be erected in "the County of *Middleſex*." This Statute has been holden to be a publick Statute; becauſe it concerns the Safety of the King's Perſon, and the publick Peace, that a Stop ſhould be put to ſuch Miſchiefs: And the Clauſe for erecting a Workhouſe has been holden to be publick; becauſe as it refers to the Miſchiefs mentioned in the Preamble, a Remedy is thereby provided for ſuch Miſchiefs in the County of *Middleſex*.

12 Mod. 249. Anon. 12. 12 Mod. 613. 10 Rep. 57. Plow. 65. Hob. 227. Sid. 24. 6. A Statute which concerns the publick Revenue is a publick Statute: But ſome Clauſes therein may, if they relate to private Perſons only, be private; for a Statute may be public in one Part and private in another.

Skin. 429. *Rex* v. *Baggs.* 7. Although a Statute be of a private Nature, as if it concern a particular Trade, yet if a Forfeiture be thereby given to the King it is a publick Statute.

Ld. Raym. 120. *Jones* v. *Axen.* 8. In an Action of Debt upon a Bond the Defendant pleaded a certain Statute for the Diſcharge of poor Priſoners, but did not ſet it out. Exception was taken, that the Statute ſhould have been pleaded at large, becauſe it is a private Statute: Inaſmuch as it does not extend to all poor Priſoners but to ſuch only as were in Priſon at a Time therein mentioned: But by the Court; This ſhall be conſtrued to be a publick Statute. 1. Becauſe all the People of *England* may be intereſted as Creditors of the Priſoners. 2. It is a charitable Act and therefore ought to have a more favourable Conſtruction. 3. As it is a long Act and difficult to be pleaded, poor Priſoners could never bear the Expence of pleading it ſpecially.

Ld. Raym. 390. *Pitts* v. *Polebampton.* 12 Mod. 249. 9. But the 8 & 9 *W.* 3. *c.* 18. for the Relief of Creditors by making Compoſition with their Debtors, in caſe two Thirds in Number and Value do agree thereto, was holden to be a private Statute.

Ld. Raym. 709. *Ingram* v. *Foot.* 12 Mod. 613. 10. The Judges are not obliged to take Notice of a Statute of general Pardon, unleſs they are by ſuch Statute directed ſo to do: For as a Statute of general Pardon does only relate to Offenders, it is not a publick Statute; and it is by no Means a Conſequence, that becauſe a Man is enabled to give ſuch Statute in Evidence upon the general Iſſue, the Judges muſt take Notice of it as to any other Purpoſe.

4 Rep. 76. *Holland's* Caſe. 11. A Statute which concerns Trade in general is a publick Statute; the Genus Trade being compoſed of all Kinds of Trade.

4 Rep. 76. *Holland's* Caſe. 12. But a Statute, which relates only to a particular Trade, or to a particular Perſon of that Trade, is a private Statute: Becauſe the particular Trade is a Species of the Genus Trade, and the particular Perſon is an Individual of that Species.

4 Rep. 120. *Dumpor's* Caſe. 2 Rol. Abr. 465. 4 Rep. 76. 13. The Statute againſt Non-reſidence and that againſt Pluralities are publick Statutes; becauſe they extend to every Species of the Spiritualty.

4 Rep. 76. *Holland's* Caſe. 2 Rol. Abr. 466. Cro. Jac. 112. 2 Mod. 57. 14. But a Statute which concerns only a certain Species of the Spiritualty, as the Biſhops; or an Individual of a certain Species, as a particular Biſhop; is a private Statute.

15. The

* 15. The Statute of first *Weſtminſter*, which ſays, *that no Sheriff or other Miniſter of the King ſhall take any Reward to do his Office, but be ſatisfied with what he receives from the King*, is a publick Statute; becauſe it extends to all Officers. *Page641 4 Rep. 76. *Holland's* Caſe.

16. The 23 *H.* 6. *c.* 10. which is confined to Sheriffs, has in divers Caſes been holden to be a private Statute. 2 Saund. 154. *Benſon* v. *Welby*. Trin. 22 Car. 2. Plow. 65. Sid. 24, 439.

17. But the contrary has been laid down in other Caſes; and in one ſubſequent to the Caſe in *Saunders Holt* Ch. J. was of Opinion, that this is a publick Statute. 2 Lev. 103. *Okey* v. *Sell*. Paſch. 26. Car. 2. 1 Lev. 83. Sid. 23.

18. The Statute made in the Time of *Henry* the Sixth, by which *all Corporations and Licences granted by that Prince are declared to be void*, was holden to be a private Statute; becauſe, as it does not extend to all Corporations, it is not general, but particular in a Generalty, or to ſpeak with more Propriety general in a Particularity. Plow. 65. *Dyer* v. *Manningham*. Bro. Parl. pl. 6.

19. In many Statutes which would otherwiſe have been private, there are Clauſes, by which they are declared to be publick Statutes. 4 Rep. 76. Dyer 119.

(G) Of an Affirmative or Negative Statute.

1. SOME Statutes are from their being in affirmative Terms called Affirmative Statutes; others obtain the Name of Negative Statutes; becauſe they are penned in negative Terms.

2. It is a Maxim of Law, that an Affirmative Statute does not take away the Common Law. 2 Inſt. 200. 1 Inſt. 111, 115. Show. Parl. Ca. 64.

3. By the 43 *E.* 3. *c.* 11. it is enacted, "That the Pannel of Aſſize "ſhall be arrayed four Days before the Day of Aſſize;" Yet if this be done two Days before the Day of Aſſize it is good; for two Days were ſufficient at the Common Law, and where a Statute is affirmative it does not take away the Common Law. Bro. Parl. pl. 70.

4. The Statute of *Marlbridge*, *c.* 21. and the Statute of 2 *Weſtm. c.* 39. are, "That after Complaint made to the Sheriff he may take the *Poſſe* "*comitatus*, and make Replevin." Notwithſtanding this Statute the Sheriff may take the *Poſſe comitatus* to ſerve any Proceſs with, as he could before at the Common Law; for an Affirmative Statute does not take away the Common Law. Bro. Parl. pl. 108.

5. Although an Affirmative Statute do not take away the Common Law, it is nevertheleſs binding; and a Party may make his Election to proceed upon the Statute, or at the Common Law. 2 Inſt. 200. Bro. Parl. pl. 70. 1 Rep. 64. Cro. Eliz. 104.

6. It is in the general true, that if an Affirmative Statute, which is introductive of a new Law, direct a Thing to be done in a certain Manner, that Thing ſhall not, even although there are no negative Words, be done in any other Manner. Plow. 206. *Stradling* v. *Morgan*. Hob. 298. Sid. 56.

7. But where the Queſtion was, whether an Appointment of Overſeers, made after the Expiration of the Time limited by a Statute for ſuch Appointment, was valid? It was holden to be ſo; and by the Court: The 43 *Eliz. c.* 2. ought to have a liberal Conſtruction; becauſe it is a Statute Stra. 1123. *Rex.* v. *Sparrow*. *Page642

tute under which Proviſion is to be made for the Poor. As it was not in the Power of the Pariſh to compel the Juſtices to make an Appointment within the Time, the Appointment ought *ex neceſſitate* to be holden good. Although that Statute be introductive of a new Law, no Negative ought to be implied againſt the Meaning and Juſtice thereof.

11 Rep. 64. *Foſter's* Caſe. 8. If a new Power be given by an Affirmative Statute to a certain Perſon, or to certain Perſons, by the Deſignation of that one Perſon, although it be an Affirmative Statute, all other Perſons are in the general excluded from the Exerciſe of the Power; it being a Maxim, that *incluſio unius eſt excluſio alterius.*

Plow. 206. *Stradling* v. *Morgan.* 9. If an Action founded upon a Statute be directed to be brought before the Juſtice of *Glamorgan* in his Seſſions, it cannot be brought before any other Perſon or in any other Place.

11 Rep. 59. *Foſter's* Caſe. 10. It being by the 31 *E.* 3. *c.* 12. provided, "That Error in the Exchequer Chamber ſhall be amended before the Chancellor and Treaſurer, ſuch Error cannot be amended before any other Perſon or Perſons."

11. By the 26 *G.* 2. *c.* 22. for eſtabliſhing the *Britiſh Muſeum*, ſome Acts are directed to be done by the Majority of the Truſtees. It was ſo clear, that theſe Acts could not be done by the Majority of the Truſtees preſent at a Meeting, unleſs that Majority were likewiſe a Majority of the whole Truſtees, that the 27 *G.* 2. *c.* 16. was made for enabling the Majority of thoſe Truſtees who ſhall be preſent, provided that ſeven are preſent, at any Meeting to do theſe Acts.

11 Rep. 64. *Foſter's* Caſe. 12. But the Deſignation of a certain Perſon, to whom a new Power is given by an Affirmative Statute, does not exclude another Perſon who was by a precedent Statute authorized to do it from doing the ſame Thing.

Stamf. Prer. 69. 11 Rep. 64. 13. By the 8 *H.* 6. *c.* 16. it is provided, *That after Office found he who finds himſelf aggrieved may within a Month offer his Traverſe, and to take the Premiſſes to Farm; and that the Chancellor, Treaſurer, or other Officer ſhall demiſe them to him to Farm.* By the *H.* 8. *c.* 16. Liberty is given to the Perſon aggrieved, *to do this at any Time within the Space of three Months.* Afterwards the 32 *H.* 8. *c.* 40. authorizes the Maſter of the Wards, *to grant a Leaſe of the Lands of a Ward or an Ideot while they remain in the Hands of the Crown.* This laſt Statute, notwithſtanding the Deſignation of a new Perſon, ſhall not take away the Power given by the former: For if, before any Leaſe is granted by the Maſter of the Wards, the Chancellor or Treaſurer do grant a Leaſe of the Premiſſes, the Maſter of the Wards cannot afterwards demiſe them.

1 Rep. 64. *Foſter's* Caſe. 14. An Affirmative Statute, even if there are negative Words in it, does not in many Caſes exclude the Juriſdiction of the Court of *King's Bench*; becauſe the Pleas there are before the King himſelf.

Bro. Parl. pl. 72. 15. A negative Statute does ſo bind the Common Law, that a Man cannot afterwards make uſe thereof.

2 Inſt. 105. Bro. Parl. pl. 72. 16. At the Common Law, if a Lord diſtrained for Cuſtoms, Services or other Duties when none were behind, an Action of Treſpaſs lay: But ſince the Statute of *Marlbridge*, the Words of which are, *Si quis major vel minor diſtrictiones faciat ſuper tenementum ſuum, pro ſervitijs vel conſuetudinibus quæ ſibi deberi dicat, vel pro re altera, unde ad Dominum feodi pertineat diſtrictiones facere, et poſtea convincatur quod tenens ea ſibi non debet, non ideo puniatur dominus per redemptionem*, it has been holden that in ſuch Caſe no Action lies at the Common Law.

2 Inſt. 68. Bro. Parl. pl. 72. 17. A Woman, as well as a Man, might at the Common Law have had an Appeal of the Death of one of her Anceſtors: But a Woman can now only have an Appeal in the Caſe of her Huſband's Death; it being by

by *Magna Charta c.* 34. declared, *quod Nullus capiatur aut imprisonetur propter appellum fœminæ de morte alterius quam viri sui* *. *Page 643

18. An affirmative Statute does not take away a Custom. 1 Inst. 111, 115.

19. It is laid down that a Custom is good against a negative Statute, unless a new Law be thereby introduced: For that if the Statute be only declaratory of the Common Law, as a Man might have alledged a Custom against the Common Law, so he may against such Statute. 1 Inst. 115.

20. But it has been since holden, that no Prescription or Custom is good against a negative Statute, whether it be declaratory of the Common Law, or introductory of a new Law. 1 Jon. 271. Ld. *Lovelace*'s Case. 2 Bulstr. 36. Show. 420. Show. Parl. Ca. 175.

(H) Whose Province it is to construe a Statute.

1. THE Power of construing a Statute is in the Judges; who have Authority over all Laws, and more especially over Statutes, to mould them according to Reason and Convenience to the best and truest Use. Hob. 346. *Sheffield* v. *Ratcliffe*. Plow. 109. 3 Rep. 7.

2. But only the Judges of the temporal Courts have the Power of construing a Statute. Mar. 90. pl. 148. 2 Inst. 614.

3. An Ordinary cannot impose a new Condition in a Bond of Administration, but must take such Bond in the Words of 21 *H.* 8. *c.* 5. and when an Action is brought upon it, the Meaning of that Statute and of the Condition must both be ascertained by a Court of Common Law. Hob. 83. *Slawney*'s Case.

4. A Question arising, whether a Person were a Bankrupt? It was objected, that as the Jury had only found the Evidence, and had not drawn the Conclusion, the Court cannot do this. The Objection was not allowed; and by the Court: The Court may conclude from the Evidence, whether the Person were a Bankrupt within the Meaning of any Statute. 2 Jon. 142. *Dodsworth* v. *Anderson*.

5. In an Action brought for the Penalty given by the 5 *Ann. c.* 14. it was found by a special Verdict, that the Defendant carried on the Trade of a Poulterer; that for the carrying on of this Trade he kept an open Shop, wherein he bought and sold Geese, Chickens and other Poultry; that he had a Hare in his Custody, and did sell the Hare to *J. S.* for four Shillings; and that at the Time of having the Hare in his Custody, and of selling it, he was seised in Fee of an Estate of one hundred Pounds a Year. The Question being, whether the Plaintiff were a Chapman within the Meaning of the 5 *Ann. c.* 14.? It was holden that he was not. In arguing this Question it was said, that as the Jurors have only found Facts, and have not expressly found that the Defendant was a Chapman within the Meaning of that Statute, the Plaintiff ought not to have Judgment, although the Court should be of Opinion, that the Defendant was a Chapman within the Meaning of that Statute. The Opinion of the Court upon this Point was, that as the Question, whether the Defendant were a Bankrupt within the Meaning of that Statute? does in a great Measure depend upon the Construction of that Statute, it is a proper Question for the Determination of the Court; and that the Facts found are sufficient to enable the Court to determine it. In this Case the Authority of *Dodsworth* v. *Anderson*, 2 *Jon.* 142. was recognized. Sayer 121. *Hearle, qui tam*, v. *Boulter*. Hil. 28 G. 2.

(I) Rules

(I) Rules to be obſerved in the Conſtruction of a Statute.

1. Words and Phraſes, the Meaning of which in a Statute has been aſcertained, are when uſed in a ſubſequent Statute to be underſtood in the ſame Senſe.

Salk 609. *Rex* v. *Barlow.* Vern. 154. 1. EXCEPTION was taken to an Indictment upon the 14 *Car.* 2. *c.* 12. againſt Churchwardens and Overſeers, for not having made a Rate to reimburſe a Conſtable, that the Statute only puts it in their Power by the Word *may* to make ſuch Rate, but does not require the doing it as a Duty, for the Omiſſion of which they are puniſhable: The Exception was not allowed; and by the Court: Where a Statute directs the doing of a Thing for the ſake of Juſtice or the publick Good, the Word *may* means the ſame as the Word *ſhall*. The 23 *H.* 6. ſays the Sheriff *may* take Bail; but the Conſtruction has been that he *ſhall* do this.

Bro. Coro. 204. 1 Inſt. 391. 2 Inſt. 434. 3 Inſt. 91. 2. Every Crime, the Perpetrator of which is by any Statute ordained to have Judgment of Life or Member, is a Felony; although the Word *Felony* be not contained in the Statute.

Hob. 293. 1 Hawk. 107.

1 Inſt. 391. 3 Inſt. 145, 146. Hob. 270, 293. 3. But if an Offence be only prohibited by a Statute upon Pain of forfeiting all that the Offender has; or of forfeiting his Body and Goods; or of being at the King's Will for Body, Land and Goods; it ſhall amount to no more than a Miſdemeanor.

1 Hawk. 107. 4 Inſt. 171. 4. If an Act of Parliament ſay, *an Offender ſhall be puniſhed according to his Demerit*, theſe Words import only, that he ſhall be puniſhed in the ordinary Courſe of Juſtice by Indictment.

Salk. 606. Anon. 5. When a Statute gives a Penalty *to be recovered before Juſtices of the Peace*, but preſcribes no Method of recovering it, the proper Method is by Indictment.

MS. Rep. *Rex* v. *Williams*, Trin. 30 G. 2. 6. An Information, exhibited againſt the Defendant a Sadler, for a Penalty given by the 1 *Jac.* 1. *c.* 22. was quaſhed; and by Lord *Mansfield*, Ch. J. Where a Power is given, as is done in the preſent Caſe, by a Statute, *to enquire, hear and determine*, it always means according to the * Courſe of the Common Law by a Jury; and the Proceeding muſt in ſuch Caſe be by Indictment.

*Page 645

2. In the Conſtruction of one Part of a Statute every other Part ought to be taken into Conſideration.

1 Inſt. 381. 7. The moſt natural and genuine Way of conſtruing a Statute is to conſtrue one Part by another Part of the ſame Statute: For this beſt expreſſeth the Meaning of the Makers; and ſuch Conſtruction is *ex viſceribus actus*.

Plow. 365. *Stowell* v. *Zouch.* 11 Mod. 161. 8. If any Part of a Statute be obſcure, it is proper to conſider the other Parts; for the Words and Meaning of one Part of a Statute do frequently lead to the Senſe of another.

9. A Sta-

9. A Statute ought upon the whole to be ſo conſtrued, that, if it can be prevented, no Clauſe, Sentence or Word ſhall be ſuperfluous, void or inſignificant. 1 Show. 108. *Rex* v. *Berchett.* Hard. 344.

10. The Title of a Statute is not to be regarded in conſtruing it, becauſe this is no Part of the Statute. Hard. 324. Ld. Raym. 77.

11. It is in the general true, that the Preamble of a Statute is a Key to open the Mind of the Makers, as to the Miſchiefs which are intended to be remedied by the Statute. Plow. 369. *Howell* v. *Zouch.* 1 Inſt. 79.

12. But this Rule muſt not be carried ſo far as to reſtrain the general Words of an enacting Clauſe by the particular Words of the Preamble: For there was a Time when Statutes were made without Preambles; and the Preamble of a Statute is no more than a Recital of ſome Inconveniencies, which does not exclude any other, for which a Remedy is given by the enacting Part of the Statute. 8 Mod. 144. *Rex* v. *Althoes.* 6 Mod. 62. Palm. 486. 1 Jon. 164.

13. It was ſaid by Lord *Cooper*, that he could by no Means adopt the Notion, that a Preamble ſhall reſtrain the Operation of an enacting Clauſe; and he added, that if the Preamble of the *Coventry* Act had only recited the Barbarity of ſlitting *Coventry*'s Noſe, and the enacting Clauſe had been general againſt the doing of any Thing whereby a Man is diſfigured or defaced, it might agreeably to that Notion have been ſaid, that cutting off the Lip or putting out an Eye would not have been within the Meaning of this Statute, becauſe neither of theſe is mentioned in the Preamble. 1 Will. 320. *Copeman* v. *Gallant.*

14. The general Words in one Clauſe of a Statute may be reſtrained by the particular Words in a ſubſequent Clauſe of the ſame Statute. 8 Mod. 8. *Rex* v. *The Archbiſhop of Armagh.*

15. If by a Statute Lands *are diſgavelled to all Intents and Purpoſes*, and *made deſcendible as Lands at the Common Law*, the former general Words are ſo reſtrained by the particular ſubſequent Words, that, although the Partability of an Eſtate by which many Families have been reduced to a low Eſtate be thereby put an End to, the Cuſtom to deviſe is not taken away: For this Cuſtom is a Privilege at the Common Law, and no Part of the Cuſtom of Gavelkind. 1 Lev. 80. *Wiſeman* v. *Cotton.*

16. The general enacting Words of a Statute are not to be reſtrained by any Words introductory to the enacting Words. 8 Mod. 144. *Rex* v. *Althoes.* Palm. 486. 1 Jon. 164.

17. If a particular Thing be given or limited in the preceding Part of a Statute, this ſhall not be taken away or altered by any ſubſequent general Words of the ſame Statute. 1 Jon. 26. *Standon* v. *The Univerſity of Oxford.*

* 18. A Saving in a Statute, which is repugnant to the Purview of the Statute, is void. *Page 646. 1 Rep. 47. *Alton Wood*'s Caſe. Plow. 564.

19. The Purview of a Statute may be qualified or reſtrained by a Saving in the Statute: But if the Saving be repugnant to the Purview it is void. 1 Jon. 339. *Rex* v. *Prieſt.* 10 Mod. 115.

20. If a Proviſo in a Statute be directly contrary to the Purview of the Statute the Proviſo is good and not the Purview: Becauſe it ſpeaks the latter Intention of the Legiſlators. Fitzg. 195. *The Attorney General* v. *the Governors of Chelſea Waterworks.*

3. If

3. If divers Statutes relate to the ſame Thing, they ought to be all taken into Conſideration in conſtruing any one of them.

Plow. 206. *Stradling* v. *Morgan.*

21. If one Statute prohibit the doing of a Thing, and another Statute be afterwards made, whereby a Forfeiture is inflicted upon the Perſon doing that Thing, both are to be conſidered as one Statute.

Bro. *Waſte*, pl. 68.

22. When an Action founded upon one Statute is given by a ſubſequent Statute in a new Caſe, every Thing annexed to the Action by the firſt Statute is likewiſe given.

4 Rep. 4. *Vernon's* Caſe.

23. A Statute lately made may be holden to be within the Equity of a Statute made long ſince; and there are in our Books frequent Inſtances of its having been ſo holden.

Ld. Raym. 1028. Sir *Will. Moore's* Caſe. 2 Jon. 63.

24. If a Thing contained in a ſubſequent Statute be within the Reaſon of a former Statute, it ſhall be taken to be within the Meaning of that Statute.

1 Vent. 246. *Bayley* v. *Murin.*

25. The 13 *Eliz. c.* 10. *concerning Leaſes made by ſpiritual Perſons*, being enlarged by the 14 *Eliz. c.* 11. although only the former of theſe Statutes be recited in the 18 *Eliz. c.* 11. it has been holden, that the latter is virtually recited therein.

26. In the ſame Caſe it is laid down, that there is ſuch a Connection betwixt all the Statutes concerning Leaſes made by Eccleſiaſtical Perſons, that they are all to be taken into Conſideration in the Conſtruction of any one of them. The 32 *H.* 8. *c.* 28. is not recited in the 1 *Eliz. c.* 19. nor in the 13 *Eliz. c.* 10. Yet a Leaſe is not warranted by either of theſe Statutes, unleſs it have the Qualifications required by the 32 *H.* 8. *c.* 28.

Barn. Chan Rep. 276. *Wallis* v. *Hodſon.*

27. The 22 & 23 *Car.* 2. *c.* 10. *for the better ſettling of Inteſtates Eſtates*, is continued with ſome additional Clauſes by the 1 *Jac.* 2. *c.* 17. It was holden by Lord *Hardwick* Chancellor, that for this Reaſon the latter Statute muſt be conſtrued as if the former had been therein recited.

MS. Rep. *Rex* v. *Loxdale and others.* Hil. 30 G. 2.

28. A Queſtion ariſing, whether Juſtices of the Peace had a Power to appoint five Overſeers for the Pariſh of *St. Chads* in *Shrewſbury?* it was holden, that they had not: And by Lord *Mansfield* Ch. J. the Number of Overſeers was by the 39 *Eliz. c.* 3. to be preciſely four. As this Number might in ſome Places have been found too large, Power is given by the 43 *Eliz. c.* 2. of appointing four, three, or two, reſpect being had to the Greatneſs of the Pariſh; but no Power is given to exceed in any Place the Number of four. The Rule of Law as to a ſpecial Authority is, that every Thing done under the Colour thereof which is not within it is void. There was no need to inſert negative Words in either of the Statutes: Nay, ſince no Power had been ever given to appoint five Overſeers, it would have been quite nugatory to have ſaid that five ſhall not be appointed. As the 39 *Eliz.* was undoubtedly under the Conſideration of the Legiſlature when the 43 *Eliz.* was made, it ought, although long ſince expired, to be taken into Conſideration in conſtruing the latter Statute: For it is a Rule in the Conſtruction of Statutes, that all * which relate to the ſame Subject, notwithſtanding ſome of them may be expired, or are not referred to, muſt be taken to be one Syſtem and conſtrued conſiſtently; and the Practice has been ſo to do in Caſes of Bankruptcy, Church Leaſes, and in other Caſes.

*Page 647

4. The

4. The common Law ought to be regarded in the Conſtruction of a Statute.

29. If a Statute make uſe of a Word the Meaning of which is well known at the Common Law, the Word ſhall be underſtood in the ſame Senſe it was underſtood at the Common Law. 6 Mod. 143. *Smith* v. *Harman.*

30. To know what the Common Law was before the making of a Statute, whereby it may be known, whether the Statute be introductory of a new Law, or only affirmatory of the Common Law, is the very Lock and Key to ſet open the Windows of a Statute. Plow. 365. *Zouch* v. *Stowell.* 2 Inſt. 301, 308. 3 Rep. 13. Hob. 83, 97.

31. In order to conſtrue a Statute truly, four Things are neceſſary to be underſtood and conſidered. 1. What the Common Law was before. 2. What the Miſchief was for which the Common Law had not provided. 3. The Remedy that is by the Statute provided for the Miſchief. 4. The true Reaſon of the Remedy. 3 Rep. 7. *Heydon's* Caſe. 1 Inſt. 272. 2 Inſt. 301.

32. The beſt Conſtruction of a Statute is to conſtrue it as near to the Rule and Reaſon of the Common Law as may be, and by the Courſe which that obſerves in other Caſes. 1 Will. 252. *Miles* v. *Williams.* Plow. 365. 2 Inſt. 148, 301. 1 Saund. 240. 10 Mod. 245.

33. By the Statute *de donis* it is enacted, that a Fine levied of entailed Lands *ipſo jure ſit nullus:* Yet the Conſtruction has been, that ſuch Fine ſhall not be a Nullity, and only a Diſcontinuance; becauſe at the Common Law, if a Biſhop ſeized in the Right of his Church, or a Huſband in the Right of his Wife, had aliened by a Fine, it was but a Diſcontinuance. 3 Rep. 85. The Caſe of Fines. Hob. 97.

34. When the Proviſion of a Statute is general, it is ſubject to the Controul and Order of the Common Law. 1 Show. 455. *Rex* v. *The Biſhop of London.* Sav. 39. Hard. 62.

35. If a new Remedy be given by a Statute in a particular Caſe, this ſhall not be extended to alter the Common Law in any other than that Caſe. 11 Rep. 59. *Forſter's* Caſe. Hob. 298. Cart. 36. Vaugh. 179.

36. The Statute of 1 *Weſtm. c.* 20. *de malefactoribus in parcis et vivariis* ſhall not extend to *Foreſts*: Becauſe it is in Reſtraint of the Common Law, and ſuch Statute is to be conſtrued ſtrictly. Bro. Parl. pl. 72. 2 Inſt. 455. Vaugh. 179.

37. An obſcure Statute ought to be conſidered according to the Rules of the Common Law. Win. 86. *Hickford* v. *Machin.*

5. The Intention of the Makers of a Statute ought to be regarded in the Conſtruction of the Statute.

38. Such Conſtruction ought to be put upon a Statute, as may beſt anſwer the Intention which the Makers had in View; for *qui hæret in Litera, hæret in cortice.* Plow. 232. *William* v. *Barkley.* 11 Rep. 73.

* 39. The Intention of the Makers of a Statute is at ſometimes to be collected from the Cauſe or Neceſſity of making a Statute; at other *Page 648 Plow. 205. *Stradling* v. *Morgan.* Lit. Rep. 212. 11 Mod. 161. 1 Show. 491. 1 Jon. 105.

Times

Times from other Circumſtances. Whenever this can be diſcovered, it ought to be followed with Reaſon and Diſcretion in the Conſtruction of the Statute, although ſuch Conſtruction ſeem contrary to the Letter of the Statute.

2 Inſt. 11, 136, 181. 40. Great Regard ought in conſtruing a Statute to be paid to the Conſtruction which the Sages of Law, who lived about the Time or ſoon after it was made, put upon it; becauſe they were beſt able to judge of the Intention of the Makers. It is moreover a Maxim, that *Contemporanea expoſitio eſt fortiſſima in Lege.*

Plow. 57. *Wimbiſh* v. *Tailboys.* 41. Wherever any Words of a Statute are obſcure or doubtful, the Intention of the Legiſlators is to be reſorted to, in order to find the Meaning of the Words.

Plow. 366. *Zouch* v. *Stowell.* 10 Rep. 101. 42. A Thing, which is within the Intention of the Makers of a Statute, is as much within the Statute, as if it were within the Letter.

Plow. 366. *Zouch* v. *Stowell.* 43. By the 4 *H.* 7. *c.* 24. it is provided, that the Right of a Perſon, who was within the Age of twenty-one Years at the Time of levying a Fine, ſhall not be thereby bound: Yet if the Diſſeiſee die leaving a Wife with Child, and the Diſſeiſor levy a Fine, and afterwards the Child be born, the Child, although not within the Letter of the Statute, becauſe, as the Age of a Child begins only from its Birth, it cannot be ſaid to have been at the Time the Fine was levied within the Age of twenty-one Years, is within the Meaning; and his Right ſhall be ſaved.

Plow. 57. *Wimbiſh* v. *Tailboys.* 44. The Words of 2 *Weſtm.* 2. *c.* 23. are, *In Caſu quando vir amiſit per defaltam tenementum quod fuit jus uxoris ſuæ, durum fuit quod uxor poſt mortem viri ſui non habuit aliud recuperare quam per breve de recto, propter quod Dominus rex ſtatuit, quod Mulier poſt mortem viri ſui habeat recuperare per breve de Ingreſſu, cui ipſa in vita ſua contradicere non poteſt.* Only a Loſs by Default of the Huſband is within the Letter of the Statute: But the Conſtruction has been, that a Woman ſhall have a Writ of *Cui in vita*, although the Loſs was by Default of both herſelf and Huſband; becauſe, as ſhe preſumed to have acted under the Coercion of her Huſband, this Caſe is within the Intention of the Makers of the Statute.

45. A Thing which is within the Letter of a Statute, is not within the Statute, unleſs it be within the Intention of the Makers.

Plow. 18. *Reniger* v. *Fogaſſa.* 46. The Statute of *Marlebridge*, *c.* 4. prohibits generally *the driving of a Diſtreſs taken in one County into another.* It has however been adjudged, that if Land holden of a Manor in one County lie in another County, the Lord may diſtrain upon the Land, and drive the Diſtreſs into the County where the Manor lies; for as it would be inconvenient and a great Loſs to the Lord, if he could not drive the Diſtreſs to his Manor, this Caſe, although within the Letter, is not within the Meaning of the Statute.

Plow. 205. *Stradling* v. *Morgan.* 47. By the Statute of *Glouceſter*, *c.* 1. it is provided, "That the Diſſeiſee ſhall recover Damages, in a Writ of Entry founded upon a Diſſeiſin, againſt him who becomes Tenant after the Diſſeiſor." Yet if the Diſſeiſor make a Feoffment by Deed to three Perſons, and make Livery of Seiſin to two of them: but the third was not preſent at the Livery, nor ever agreed to the Feoffment, nor received any of the Profits, he ſhall not, although he become, by the Death of the other two, Tenant after the Diſſeiſor, be liable to anſwer in Damages to the Diſſeiſee: For the Legiſlators could not intend to make him, who never aſſented to the Wrong done to the Diſſeiſee, anſwerable for it.

* 6. In what Caſes, a Statute ought to have an equitable Conſtruction. *Page 649

48. By an equitable Conſtruction, a Caſe not within the Letter of a Statute is ſometimes holden to be within the Meaning, becauſe it is within the Miſchief for which a Remedy is provided. The Reaſon for ſuch Conſtruction is, that the Law-maker could not ſet down every Caſe in expreſs Terms. 1 Inſt. 24.

49. In order to form a right Judgment, whether a Caſe be within the Equity of a Statute, it is a good Way to ſuppoſe the Law-maker preſent; and that you have aſked him this Queſtion, Do you intend to comprehend this Caſe? Then you muſt give yourſelf ſuch Anſwer, as you imagine he being an upright and reaſonable Man would have given. If this be, that he did mean to comprehend it, you may ſafely hold the Caſe to be within the Equity of the Statute: For while you do no more than he would have done, you do not act contrary to the Statute but in Conformity thereto. Plow. 467. *Eyſton* v. *Studd.*

50. In ſome Caſes the Letter of an Act of Parliament is reſtrained by an equitable Conſtruction; in others it is enlarged; in others the Conſtruction is contrary to the Letter.

51. That equitable Conſtruction, which reſtrains the Letter of a Statute, is defined by *Ariſtotle* in this Manner. *Æquitas eſt correctio legis generatim latæ qua parte defecit*; or as the Paſſage is explained by *Peronius*, *Æquitas eſt correctio quædam legi adhibita, quia ab ea abeſt aliquid propter generale ſine Exceptione comprehenſionem.* Plow. 465. *Eyſton* v. *Studd.*

52. The Words of 2 *Weſtm. c.* 11. are general, that all Bailiffs and Receivers, who in paſſing their Accounts before Auditors aſſigned ſhall be found in Arrear, may be committed to the next Gaol: Yet if an Infant Bailiff or Receiver be found in Arrear, he ſhall not be committed; for he is not by reaſon of his want of Diſcretion within the Equity of the Statute. Plow. 365. *Zouch* v. *Stowell.*

53. If a Law be made, that whoever does a certain Act ſhall be adjudged a Felon and ſuffer Death, yet if a Madman do this he ſhall be excuſed: For, as the Action is not to be imputed to him, but to an involuntary Ignorance brought upon him by the Hand of God, he is not within the Reaſon of the Law. Plow. 465. *Eyſton* v. *Studd.*

54. But if a felonious Act be done by a drunken Perſon it is Felony; and, although he did not when drunk know what he did, he ſhall becauſe he brought the Ignorance upon himſelf ſuffer Death. He does indeed deſerve to be doubly puniſhed; for he has been guilty of two Offences, the ſetting of an ill Example to others in being drunk, and the doing of a Thing which the Law prohibited. Plow. 19. *Reniger* v. *Fogaſſa.*

55. Actions, which proceed from involuntary Ignorance, are in legal Phraſe ſaid to have been done *ex ignorantia*; Actions which proceed from Ignorance that might have been avoided, are ſaid to have been done *ignoranter.* Ibid.

56. That equitable Conſtruction, which enlarges the Letter of a Statute, is thus defined. *Æquitas eſt verborum legis directio efficiens, cum una res ſolummodo legis cavetur verbis, ut omnis alia in æquali genere eiſdem caveatur verbis.* Plow. 467. *Eyſton.* v. *Studd.*

57. The Words of the 13 *E.* 1. are, *Circumſpecte agatis de negotijs tangentibus Epiſcopum Norvicenſem*; yet this Statute, although only the Biſhop of *Norwich* be named, has been always extended by an equitable Conſtruction to other Biſhops. Plow. 36. *Platt* v. *The Sheriff of London.*

58. The

Plow. 467. *Eyſton* v. *Studd.* 58. The Remedy given by the 9 *E.* 3. *c.* 3. againſt Executors has been always extended by an equitable Conſtruction to Adminiſtrators; becauſe theſe are within the Equity of the Statute.

Plow. 109. *Fulmerſton* v. *Steward.* 59. A Statute ought ſometimes to have ſuch equitable Conſtruction as is contrary to the Letter.

3 Rep. 7. Hob. 346.

*Page650 Plow. 13. *Reniger* v. *Fogaſſa.* * 60. By the 1 *E.* 2. *ſt.* 2. the breaking of a Priſon by a Priſoner confined for Felony is made Felony: Yet if a Priſon be on Fire, and a Priſoner break it in order to ſave his Life, he ſhall be excuſed, notwithſtanding the excuſing of him be directly contrary to the Letter of the Statute.

Plow. 88. *Straunge* v. *Croker.* 2 Inſt. 84. 61. By 2 *Weſtm. c.* 12. the Party acquitted upon an Appeal may recover Damages againſt all who have been Abettors of the Appeal: Yet if a Son abet his Mother in bringing an Appeal, he ſhall not, although he act contrary to the Letter of the Statute, be liable to Damages; for the Common Law and Reaſon both ſay, that it is the Duty of a Son to aid and abet his Mother.

10Mod. 282. *Hammond* v. *Webb.* 62. A Statute, which is to take away a Remedy given by the Common Law, ought never to have an equitable Conſtruction.

Vaugh. 373. *Bole* v. *Horton.* 63. If the Words of a Statute do not extend to a Miſchief which rarely happens, they ſhall not be extended by an equitable Conſtruction to that Miſchief: But the Caſe is to be conſidered as a *Caſus omiſſus*; for the Objects of Statutes are Miſchiefs *quæ frequentius accidunt.*

3 Leon. 133. *Worth* v. *The Counteſs of Suſſex.* 64. A Statute ſhall never have an equitable Conſtruction, in order to overthrow an Eſtate.

Carth. 396. *Inhabitants of Dalbury* v. *Foſton.* Salk. 534. 65. The Senſe of Words uſed in an Explanatory Statute ought not to be extended by an equitable Conſtruction: But their Meaning, the Explanatory Statute being a legiſlative Conſtruction of the Words uſed in a former Statute, ought to be ſtrictly adhered to.

7. A Statute which concerns the public Good, ought to be conſtrued liberally.

11 Rep. 71. *Magdalen College's* Caſe. Stra. 517, 518, 519. 66. The Crown is bound by the general Words of a Statute made for the Maintenance of Religion, the Advancement of Learning, or the Support of the Poor: Becauſe all Statutes, in which the Public are intereſted, ought to be ſo conſtrued that they may be effectual.

Keilw. 198. pl. 1. 67. Every Word in an Act of general Pardon ſhall be taken moſt ſtrongly againſt the King.

Str. 253, 258. *Pierce* v. *Hopper.* 68. A Statute made *pro bono publico* ſhall be conſtrued in ſuch Manner, that it may as far as poſſible attain the End propoſed.

2 Vern. 431. *New River Company* v. *Graves.* 69. The New River Water Act was holden, although only the City of *London* be therein mentioned, to extend to Places adjacent; becauſe all Statutes made for the Conveniency of the Publick ought to have a liberal Conſtruction.

12Mod. 513. *Callady* v. *Pilkington.* 70. It has been holden, that a Statute diſcharging inſolvent Debtors ought to be conſtrued ſtrictly, becauſe it gives away the Property of ſome Subject; and by *Holt*, Ch. J. Let a Statute be ever ſo charitable, if it give away the Property of a Subject, it ought to be conſtrued ſtrictly.

8. A Remedial Statute ought to be conſtrued liberally.

71. Such Conſtruction ought to be put upon a remedial Statute as will tend to ſuppreſs the Miſchief intended to be remedied. 3 Inſt. 381. b.

72. A Statute made for the Suppreſſion of a Fraud, or to give a more ſpeedy Remedy for a Right, ought to be conſtrued liberally; becauſe ſuch Conſtruction is for the Furtherance of Juſtice. Plow. 57. *Wimbiſh* v. *Tailboys.*

73. It is the Duty of Judges to put ſuch Conſtruction upon a Statute, as may redreſs the Miſchief; guard againſt all ſubtle Inventions and Evaſions for the Continuance of the Miſchief *pro privato Commodo*; and give Life and Strength to * the Remedy *pro bono publico*, according to the true Intent of the Makers of the Law. 3 Rep. 7. *Heydon's* Caſe. 1 Rep. 123. 11 Rep. 71. Cro. Car. 533.

*Page 651

74. A Fine levied by a Huſband ſeized in the Right of his Wife is within the Letter of the Statute of *Glouceſter*; but as the Heir would be thereby barred of the Inheritance of his Mother by the Warranty of his Father, although no Aſſets did deſcend upon him, the Conſtruction, in order to prevent this Miſchief, has been, that ſuch Fine does not bind the Heir, unleſs Aſſets did deſcend upon him. 1 Inſt. 381.

75. By the 13 *Eliz. c.* 10. it is enacted, "That from henceforth all "Leaſes, Gifts, Grants, Feoffments, Conveyances or Eſtates to be made, "had, done or ſuffered by any Maſter and Fellows of a College, to any "Perſon or Perſons, Bodies Politick or Corporate, other than for the "Term of twenty-one Years or three Lives, ſhall be utterly void and of "none Effect, to all Intents, Conſtructions and Purpoſes." After the making of this Statute, the Maſter and Fellows of *Magdalen* College granted certain Premiſſes by Indenture to the Queen, her Heirs and Succeſſors for ever, with Condition that ſhe ſhould before a Day mentioned in the Indenture convey and aſſure the ſame, by Letters Patent under the the Great Seal, to *Benedict Spinola* a Merchant of *Genoa*. The Queſtion was, Whether the Grant to the Queen were good, or in other Words, whether the Queen were bound by the general Words of the Statute? It was holden, that where the Crown has by Prerogative any Eſtate, Right, Title or Intereſt, this is not barred by the general Words of a Statute: But that in this Caſe, as the Queen would not be deprived of any Eſtate, Right, Title or Intereſt, which ſhe had in the Premiſſes before the making of the Statute, ſhe is bound thereby; and that ſuch Conſtruction is neceſſary for the preventing of ſubtle Inventions and Evaſions, by which this Act, made for the Maintenance of Religion, and the Advancement of Arts and Sciences, might be eluded. 11 Rep. 74, 75. *Magdalen College's* Caſe.

9. A Penal Statute ought to be conſtrued ſtrictly.

76. The Rules of the Common Law will not ſuffer the general Words of a Statute to be reſtrained, to the Prejudice of a Perſon upon whom a Penalty is inflicted: But there are a Multitude of Caſes to ſhew, that the general Words of a Statute ought to be reſtrained in Favour of ſuch Perſon. Plow. 17. *Reniger* v. *Fogaſſa.* Bro. Parl. pl. 13.

77. Wherever a greater Puniſhment is inflicted by a Statute for a ſecond Offence, an Offender is not liable thereto, unleſs there has been Judgment againſt him for a former Offence; for a penal Statute ought to be conſtrued ſtrictly, and it does not appear, that he has been guilty of a former Offence, unleſs there has been ſuch Judgment. 2 Inſt. 468.

78. The Statute which gives an Action of Attaint in a Plea real, being a penal Statute, has never been extended to a Plea perſonal. Bro. Parl. 20.

79. It

Salk. 205. *Cone* v. *Bowles.*

79. It was in one Caſe holden, that Statutes, which give Coſts, are to be conſtrued ſtrictly; Coſts being a Kind of Penalty.

Rep. in Time of Hard. 357. *Rex* v. *Inhabitants of Glaſtonry.*

80. And in another Caſe, wherein the Authority of the laſt mentioned Caſe was recognized, it was ſaid by Lord *Hardwick*, Ch. J. to be a ſettled Rule; that Statutes, which give Coſts, are to be conſtrued ſtrictly.

3 Rep. 7. *Heydon's* Caſe. 8 Mod. 65.

81. However true it may in the general be, that penal Laws are to be conſtrued ſtrictly; yet even in the Conſtruction of theſe the Intention of the Legiſlators ought to be regarded.

Plow. 86. *Strange* v. *Croker.*

82. It is declared by the 25 *E.* 3. to be Treaſon for a Servant to kill his Maſter. A Queſtion ariſing upon this Statute, whether a Servant who had killed his Maſter's Wife ought to have Judgment to be drawn and hanged or only to be hanged? it was holden by all the Judges, that this is Treaſon, and the Judgment was that he ſhould be drawn and hanged. And by *Cooke* J. notwithſtanding that a Statute, which encreaſes a Puniſhment beyond what it was at the Common Law, ought not to be extended by an equitable Conſtruction, yet the Words of ſuch Statute ought to be conſtrued according to the true Intention of the Makers of the Statute.

*Page 652

Cro. Car. 71. The Soldiers Caſe.

* 83. The 7 *H.* 7. *c.* 1. and the 3 *H.* 8. *c.* 1. make the Departure of a Soldier from his Captain without Licence Felony. A Queſtion ariſing, Whether the Departure of a Soldier without Licence from his Conductor, to whom he was delivered to be brought to the Sea-ſide, was Felony? It was reſolved by nine Judges againſt three that it was Felony; for that a Conductor is a Captain within the Meaning of the Statutes, and that a Penal Statute, when made for the Public Service and Good of the King and Realm, ought to be conſtrued according to the Intention of the Makers of the Statute.

11 Rep. 34, 35. *Poulter's* Caſe.

84. It was holden, that an Offender who had been guilty of Arſon was not entitled to the Benefit of Clergy, notwithſtanding this was not expreſly taken from him by any Statute; and it is added, that there are many Caſes in our Books, where Penal Statutes have been conſtrued by Intendment for the Suppreſſion of a Miſchief, the Advancement of Juſtice, and the putting of a Stop to heinous Offences.

2 Brown. 110, 111, 116.

85. A Statute, which is made for the Good of the Publick ought, although it be penal, to receive an equitable Conſtruction.

Plow. 36. *Platt* v. *The Sheriff of London.* Plow. 59. 10 Mod. 117. 2 Brown. 302.

86. A Statute, which is penal to ſome Perſons, may provided it be beneficial to all others have an equitable Conſtruction; for every Statute is penal to ſome Perſons: And if the extending of a penal Statute by an equitable Conſtruction be more advantageous than prejudicial to the greater Part of the People, it may by the Rules of Law be ſo extended.

10 Mod. 282. *Hammond* v. *Webb.*

87. The Statute of *Marlebridge*, *c.* 24. againſt committing Waſte is penal; yet it has been conſtrued liberally. The Words of this Statute are, *Firmarii non faciant vaſtum*: But it has been holden, that the Word *Firmarii* extends to Strangers; it has likewiſe been holden, that this Statute extends to Waſte *omittendo*, although the Word *faciant* in the ſtrict Senſe of it does only mean active Waſte.

Prec. in Ch. 215. *Attorney General* v. *Sudeli.*

88. It was inſiſted, that the Statute againſt Simony, being a penal Law, ought to receive no Aid from a Court of Equity: But by *Wright* Lord Keeper; This Court will aid remedial Laws notwithſtanding they are penal, not indeed ſo as to make them more penal, but to let them have their proper Effect.

10. Some other Rules, which ought to be obſerved in the Conſtruction of a Statute.

89. Such Conſtruction ought to be put upon a Statute, as does not ſuffer it to be eluded. Hob. 97. *Moore* v. *Huſſey*. 3 Rep. 7. 11 Rep. 73.

90. Every Statute ought to be conſtrued for the preventing of Delay as much as poſſible. 2 Inſt. 611, 614.

91. A Statute ought to be ſo conſtrued, that no Man who is innocent be puniſhed or endamaged. 1 Inſt. 360.

92. No Statute ſhall be conſtrued in ſuch Manner, as to be inconvenient or againſt Reaſon. Cart. 136. *Hughes* v. *Hughes*. 1 Inſt. 97. 5 Rep. *Cawdrie's* Caſe.

93. By the 12 *Car.* 2. *c.* 17. all Perſons preſented to Benefices in the late Times, who ſhould conform as in the Statute was directed, were to be confirmed therein, *notwithſtanding any Act or Thing whatſoever*: Yet it was holden, that the Statute did not extend to the confirming of a Perſon, who had been ſimoniacally promoted. Sid. 232. *Crawley* v. *Phillips*.

94. If the Meaning of a Statute be doubtful, the Conſequences are to be conſidered in the Conſtruction: But where the Meaning is plain no Conſequences are to be regarded in the Conſtruction; for this would be aſſuming a legiſlative Authority. 10 Mod. 344. *The Queen* v. *Simpſon*.

* 95. If a Statute be penned in dubious Terms, Uſage is a juſt Rule to conſtrue it by; for *Jus et norma loquendi* is governed by Uſage, and the Meaning of Words ſpoken or written ought to be allowed to be as it has conſtantly been taken to be: But if the Uſage have been, to conſtrue the the Words of a Statute contrary to their obvious Meaning, ſuch Uſage is not to be regarded; it being rather an Oppreſſion of thoſe concerned than a Conſtruction of the Statute. *Page 653 Vaugh. 169, 170. *Shepherd* v. *Goſneld*.

96. A Statute which gives a new Remedy, ought not to have a liberal Conſtruction. 2 Sid. 63. *Pool* v. *Neel*.

97. A Statute creating a new Juriſdiction ought to be conſtrued ſtrictly. Stra. 258, 260. *Pierce* v. *Hopper*. 10 Rep. 75.

98. It has been holden, that the 6 *G.* 1. *c.* 21. which gives the Commiſſioners of Exciſe a Juriſdiction to condemn in a ſummary Way certain Goods therein mentioned, ought to be conſtrued ſtrictly; becauſe it breaks in upon the ancient Juriſdiction of the Court of Exchequer. Bunb. 106. *Warwick* v. *White*.

99. A private Statute ought not to have a liberal Conſtruction. 2 Mod. 57. *Threadneedle* v. *Lynam*.

(K) How a Perſon guilty of Diſobedience to a Statute may be puniſhed.

1. WHEN a Statute giveth a Forfeiture or Penalty, againſt him who wrongfully detaineth or diſpoſſeſſeth another of his Duty or Intereſt, he that hath the Wrong ſhall have the Forfeiture or Penalty, and ſhall have an Action therefore upon the Statute at the Common Law; for the King ſhall not have the Forfeiture in ſuch Caſe; and ſo it was adjudged in the Exchequer upon Conference with the other Judges, in an Infor- 1 Inſt. 159. 3 Lev. 290.

Information for the treble Value, for not having ſet out Tithes at *Iclington* in the County of *Cambridge*.

2 Inſt. 55, 74. 10 Rep. 75. 2. As every Statute made againſt an Injury, Miſchief or Grievance, does impliedly give a Remedy; the Party injured, if no Remedy be expreſsly given, may have an Action upon the Statute.

6 Mod. 26. Anon. 3. If a Statute command or prohibit a Thing for the Advantage of a particular Perſon, that Perſon ſhall have an Action upon the Statute, to recover Satisfaction for an Injury done him contrary thereto; for it would be ſtrange, that there ſhould in ſuch Caſe be no Remedy except in a Court of Equity.

Poph. 175. *Welden* v. *Veſey*. 4. If a Penalty be given by a Statute, but no Action for the Recovery thereof be given, an Action of Debt will lie for the Penalty.

2 And. 127, 128. *Agard* v. *Tandiſh*. 2 Hawk. 265. 5. If a Thing be prohibited by a Statute under a certain Penalty, and the Penalty or any Part of it be given to him who will ſue for the ſame, any Perſon may bring an Action or Information for the Penalty.

Salk. 178. *Walwyn* v. *Smith*. 6. If the Penalty given by a Statute is to be recovered in a Court of Record, this can only be recovered in one of the ſuperior Courts at *Weſtminſter*; for being a penal Law it ought to be conſtrued ſtrictly, and theſe are the Courts in which the King's Attorney General is ſuppoſed to attend.

Cro. Eliz. 480. *Partridge* v. *Naylor*. 7. If an Action upon a Statute giving a Penalty be brought againſt ſeveral Defendants, only one Penalty can be recovered.

*Page 654 Salk. 182. *The Queen* v. *King*. * 8. But if a Conviction be upon a Statute giving a Forfeiture, each Defendant muſt pay the Forfeiture: For the Forfeiture in ſuch Caſe is not in the Nature of a Satisfaction to the Party injured but a Puniſhment of the Offender; and although Debts be joint Crimes are ſeveral.

Cro. Eliz. 635. *Croucher's* Caſe. 2 Inſt. 131, 163. 1 Hawk. 60. 9. When a Statute commands or prohibits a Thing of publick Concern, the Perſon guilty of Diſobedience to the Statutes, beſides being anſwerable in an Action to the Party injured, is likewiſe liable to be indicted for the Diſobedience.

2 Sid. 209. *Rex* v. *Pawlyn*. 10. If the Thing commanded or prohibited by a Statute can only be prejudicial to one or two Perſons, as if it be to repair the Bank of a River, for want of having done which the Ground of a certain Perſon has been overflowed, no Indictment lies; the Remedy being by an Action upon the Caſe.

1 Mod. 71. *Rex* v. *Leginham*. Ibid. 288. 11. If a Statute, although it extend to all Perſons, do chiefly concern Diſputes of a private Nature, as thoſe relating to Diſtreſſes between Lords and Tenants, an Offence againſt the Statute is not indictable.

Fitzg. 66. *Rex* v. *Woolſton*. 10 Mod. 337. 12. If a Statute inflict a new Puniſhment upon the Perſon guilty of an Offence, before puniſhable at the Common Law, the Offence is ſtill puniſhable as it was before the making of the Statute. The Crime of Forgery, notwithſtanding the 5 *Eliz.* is at this Day puniſhable in the ſame Manner as it was at the Common Law.

Cro. Jac. 643. *Caſtle*'s Caſe. Mich. 21 Jac. 1. 13. An Indictment againſt a Perſon for having acted as a Juſtice of Peace, whereas he had not Lands to the Value of forty Pounds *per Ann.* was holden to be bad; becauſe this is a new Offence, and the Method of recovering the Penalty given is preſcribed in the Statute; and by the Court: Where a Statute creating a new Offence gives a Penalty, and directs how it ſhall be recovered, the Offence cannot be puniſhed in any other Way than that directed by the Statute.

14. Since

14. Since this Caſe it has been holden, that if the Thing commanded or prohibited by a Statute be of publick Concern, an Offender againſt the Statute may be indicted, although the Offence be a new created one, and the Method directed for recovering the Penalty given be not Indictment; for that the giving of other affirmative Remedies ſhall not, unleſs theſe Words, *and not otherwiſe*, are added, take away the general Way of Proceeding which the Law has appointed for the Offence. 1 Mod. 34. *Crofton's* Caſe. Hil. 21. Car. 2. 1 Vent. 63. S. C.

15. The former does however ſeem to be the better Opinion; for it is laid down in divers Books, that if a Satute creating a new Offence appoint a particular Method of Proceeding againſt an Offender, as by Commitment or Information, without mentioning an Indictment, no Indictment lies; becauſe, as other Methods of Proceeding are expreſly mentioned, that by Indictment ſeems to be excluded by Implication. 2 Hawk. 211. Show. 398, 399. Fitzg. 47.

16. In a modern Caſe the Doctrine of the laſt mentioned Books is recognized; and by Lord *Mansfield* Ch. J. *Crofton's* Caſe has been often denied to be Law. 1 Bur. 545. *Rex* v. *Wright.*

17. It has been holden, that if a Statute creating a new Offence, and inflicting a Penalty, provide, that the Penalty may be recovered by Action, Bill, Plaint, Information or *otherwiſe*, an Indictment will lie upon the Statute. 2 Hawk. 211.

18. By the 12 *G.* 1. *c.* 35. a Penalty of twenty Shillings *per* thouſand is given for burning Place Bricks and Stock Bricks together; but there is no Appropriation of the Penalty, nor is any Method of recovering it directed. Upon a Demurrer to an Indictment for this Offence the Court held, that this like every unappropriated Penalty is in the Nature of a Debt to the Crown, and recoverable by Action in a Court of Revenue; but that an Indictment does not lie. Stra. 828. *Rex.* v. *Malland.*

---

* (L) Of pleading a Statute.

*Page655

1. A publick Statute.

1. A Publick Statute may be pleaded without reciting it: For the Rule of Law is, that the Judges are *ex Officio* bound to take Notice of every public Statute. 4 Rep. 76. *Holland's* Caſe. Bro. Parl. pl. 69. 2 Rol. Abr. 465. Cro. Eliz. 601. Doct. pl. 337.

2. Upon this Principle, that the Judges are bound to take Notice of every publick Statute, it is holden, that *Nul tiel Record* cannot be pleaded to a publick Statute: And by the Court: God forbid, that if the Record of a publick Statute ſhould be loſt or deſtroyed by Fire, this ſhould tend to the Prejudice of the Commonwealth. In ſuch Caſe the Judges may from ſome printed Copy, or from ſome Record in which it has been pleaded, or in ſome other Way, inform themſelves of the Contents of the loſt or deſtroyed Statute. 8 Rep. 28. *The Prince's* Caſe. Cro. Car. 355.

3. If Part of a Statute be publick and the Reſidue thereof private, there is no Neceſſity, that the Part which is publick ſhould be recited in pleading. 10 Rep. 57. *The Chancellor of Oxford's* Caſe. Hob. 227. Sid. 24.

2. A private Statute.

4. If a private Statute be pleaded it muſt be recited: For, unleſs this be done, the Judges cannot take Notice of any Thing therein contained. 4 Rep. 76. *Holland's* Caſe. 2 Rol. Abr. 466. 2 Mod 57. Doct. pl. 33.

H. H. C. L. 16. 8 Rep. 28. *The Prince's* Caſe.

5. It is in the general true, that if a private Statute be pleaded, *Nul tiel Record* may be replied: But if the Exemplification of a private Statute under the Great Seal be pleaded, *Nul tiel Record* cannot be replied.

3. Some general Rules for pleading a Statute.

Ld. Raym. 77. *Chance* v. *Adams.*

6. In pleading a Statute, it is not neceſſary to recite the Title; becauſe this is no Part of the Statute.

6 Mod. 62. *Mills* v. *Wilkins.* 8 Mod. 144.

7. In pleading a Statute, it is not neceſſary that the Preamble ſhould be recited: For this, although it do uſually contain the Motives of making it, is no Part of the Statute.

12 Mod. 540. *Birch* v. *Bellamy.*

8. If a Statute make certain Circumſtances neceſſary to the Validity of an Act, which was valid at the Common Law without ſuch Circumſtances, this does not alter the Manner of pleading, which was uſed before the making of the Statute.

Ibid.

9. A Tenant for Years cannot ſince the 29 *Car.* 2. *c.* 3. aſſign over his Term without doing it in Writing: But as he might have done this by Parole at the Common Law, an Aſſignment may be pleaded without alledging it to have been in Writing; and it may be given in Evidence that it was in Writing.

*Page 656

Ibid.

* 10. Where the Power to do an Act was originally granted by a Statute, it muſt be ſhewn in pleading the Statute, that the Act was done according to the Direction of that Statute, and of every ſubſequent Statute relative to the Subject.

Ibid.

11. If a Will of Lands be pleaded, it muſt be ſhewn, that the Will is in Writing, as by the 32 *H.* 8. *c.* 1. by which Power to make ſuch Will was firſt given, is directed: And it muſt be likewiſe ſhewn, that the Requiſites, made neceſſary to the Validity of ſuch Will by the 29 *Car.* 2. *c.* 3. have been complied with.

Stra. 1066. *Rex* v. *Morgan.*

12. When a temporary Statute, which has expired, is continued by a ſubſequent Statute, it is ſufficient to plead the former, without taking any Notice of the latter.

Plow. 206. *Stradling* v. *Morgan.*

13. If one Statute have prohibited the doing of an Act, and another be afterwards made, which inflicts a Forfeiture on the Perſon who ſhall do the Act, the Perſon who ſues for the Forfeiture, muſt plead both Statutes.

Plow. 106. *Fulmerſtone* v. *Steward.* Plow. 65, 410. Cro. Jac. 140. 2 Jo. 50.

14. Exception was taken to a Replication, that only Part of a Statute therein pleaded was recited, and it was inſiſted, that the whole Statute ought to have been recited: But the whole Court agreed: That the Replication was good; for that no Perſon is obliged to recite in pleading any more of a Statute, than the Clauſe which makes for himſelf.

Plow. 410. *Newys* v. *Lark.* Brd. Plead. pl. 164. Ld. Raym. 120.

15. But if there be in that Clauſe of an Act of Parliament, which is pleaded, any Proviſo or Exception, this muſt be recited, altho' it ſhould make againſt the Party reciting it: For, as the Proviſo or Exception is Parcel of the Clauſe which is pleaded, if this ſhould be omitted, it would amount to a Miſ-recital of the Clauſe.

Cro. Jac. 140. *Read* v. *Potter.* Ld. Raym. 120.

16. If one Party have only pleaded ſuch Part of a Statute, as it was for his Intereſt to plead, the other Party may plead any other Part of the Statute.

Ld. Raym. 210. *Birt* v. *Rothwell.*

17. If in pleading a Statute it be ſaid, that the Parliament, at which the Statute was made, continued *uſque ad* a certain Day, the Words *uſque ad*

ad do in this Caſe include the Day to which they relate; for it is uſual to ſay, that a Parliament continued *uſque ad* a certain Day, *quo die* it was prorogued: But in all other Caſes the Day to which they relate is excluded by the Words *uſque ad*.

4. Some Rules for pleading a Statute, which relate to particular Parts of the Pleadings.

18. If a Statute give a new Action, the Statute muſt be recited in the Writ. 2 Inſt. 121. Bro. Act. ſur le Stat. pl. 47. Bro. Parl. pl. 75.

19. But if a Statute giving a new Action aſcertain the Form of a Writ, to be uſed, as is done by the Statute giving a *Formedon in deſcender* and by other Statutes, it is not neceſſary to recite the Statute in the Writ; for the Writ itſelf is in ſuch Caſe in the Words of the Statute. Bro. Act. ſur le Stat. pl. 47. Bro. Parl. pl. 75.

20. If an Action which lay at the Common Law be given by a Statute in a new Caſe, the Statute by which it is given need not to be recited in the Writ. Ibid.

21. If an Action of Treſpaſs be brought by an Executor *de bonis aſportatis in vita teſtatoris*, there is no Neceſſity that the Writ ſhould recite the Statute by which the Action is given; becauſe an Action of Treſpaſs lay at the Common Law in other Caſes. Ibid.

* 22. If a Statute do in any Caſe direct what ſhall be pleaded, the Plea muſt be in the Words of the Statute. *Page 657. 11 Mod. 207. *Hall* v. *Holliday*.

5. Of Miſ-recital in Pleading a Statute.

23. If one Party in pleading a Statute miſ-recite the Matter, Year, Day, or Place, the other Party may demur generally: There being no ſuch Statute; for he who takes upon him to recite a Statute muſt do it truly. Bro. Parl. pl. 87. Cro. Jac. 211. 2 Hawk. 246.

24. If a Party recite a Statute as made upon a certain Day, which was not made on that Day, he has, although the Statute be a publick Statute, failed: For he does not refer to the Knowledge of the Judges, as he would have done, if he had ſaid againſt the Form of the Statute in ſuch Caſe provided. If he had ſaid ſo, the Law would have referred the Pleading to ſuch Statute as had been apt for it; but as he has recited a particular Statute, if there be not ſuch Statute, his Pleading is grounded upon a Thing which does not exiſt. Plow. 79, 84. *Partridge* v. *Straunge*. Bro. Parl. 87.

25. The 32 *H.* 8. *c.* 9. was recited to have been made at a Parliament holden the twenty-eighth Day of *April*, in the thirty-ſecond Year of the Reign of *Henry* the Eighth, whereas in Truth the Parliament began the twenty-eighth Day of *April* in the thirty-firſt Year of that Prince's Reign, and was continued by Prorogation to the Time of making this Act. It was inſiſted that the Miſ-recital was fatal: But it was holden that it was not, and by *Hales* J. every Meeting of a Parliament after a Prorogation is a new Seſſion, and a Statute can never relate further back than to the firſt Day of the Seſſion in which it was made. Plow. 79. *Partridge* v. *Straunge*.

26. In an Action of Debt upon the Statute of *E.* 6. for not having ſet out upon Tithes, the Plaintiff declared, that whereas the fourth Day of *November* in the ſecond Year of the Reign of *Edward* the Sixth it was enacted. It was ſued in Arreſt of Judgment, that there is no ſuch Statute; becauſe the Parliament began in the firſt Year of that Prince's Reign, and was continued by Prorogation to the Time of making this Statute: But by the Court: There are a thouſand Precedents to the contrary, and, Yelv. 126, 127. *Oliver* v. *Collins*. 2 Mod 241. Skin. 110, 111. Cro. Jac. 111

as

as the conſtant Uſage has been to recite this Statute as the Plaintiff has done, we will not depart from that Uſage; the doing of which would diſturb a great Number of Judgments.

Ld. Raym. 210. *Birt* v. *Maſon.* 1 Lev. 296. Ld. Raym. 343. Lutw. 140.

27. The ſafeſt Way of pleading a Statute is to ſay, that it was made at a Parliament holden upon a certain Day of a certain Year of a certain King's Reign, without taking any Notice of the Commencement of the Parliament: For the Judges are bound to take Notice of the Commencement of every Parliament, and likewiſe of its Prorogations and Seſſions.

Mo. 551. *The Biſhop of Norwich's* Caſe. Ld. Raym. 210, 343. 1 Lev. 296.

28. In pleading a private Statute, there was a Miſ-recital of the Day of the Commencement of the Parliament in which it was made. This was holden to be fatal upon a general Demurrer; for, although the Judges cannot *ex Officio* take notice of the Contents of a private Statute, they are bound to take Notice of the Commencement of a Parliament.

12 Mod. 602. Anon. 2 Mod. 242. Ld. Raym. 343.

29. If a Statute is recited to have been made at a Parliament holden upon a Day to which the Parliament was adjourned, this is ſuch Miſ-recital as is fatal: For, as an Adjournment of a Parliament does not put an End to a Seſſion, the Meeting after the Adjournment is only a Continuance of the Seſſion.

1 Brownl. 196. *Woolſey* v. *Shepherd.*

30. It is ſaid, that a Miſ-recital of the Day of making an Act of Parliament, which would have been fatal in a Declaration, is not ſo in a Plea in Bar.

*Page 658 Mo. 302. *Langly* v. *Haynes.* 2 Hawk. 247.

* 31. Repugnancy in reciting the Day of making a Statute is fatal: As if it be ſaid, that a Statute was made on a certain Day in the firſt and ſecond Year of the Reign of a certain King; it being impoſſible, that the ſame Day ſhould be in two different Years.

Ld. Raym. 1224. Anon.

32. A Statute was alledged to have been made upon the twelfth Day of *November* in the ſixth Year of the Reign of *William* the Third, whereas Queen *Mary* being at that Time alive, it ſhould have been in the ſixth Year of the Reign of *William* and *Mary*. For this Miſ-recital, Judgment was arreſted.

Ld. Raym. 77. *Chance* v. *Adams.* Paſch. 8 W. 3.

33. It has been holden, that as the Title of a Statute is no Part of the Statute a Miſ-recital of this is not fatal.

Hardr. 324. *The Attorney General* v. *Hutchinſon.* Paſch. 15 C. 2.

34. This Caſe, which was in the Court of Common Pleas, appears to have been determined upon the Authority of one in the Time of *Hale* Ch. B. which had been determined the ſame Way.

6 Mod. 62. *Mills* v. *Wilkins.* Mich. 2 Ann.

35. But in a later Caſe it was holden, that a Miſ-recital of the Title of a Statute is fatal: And by *Holt*, Ch. J. it is very true, that the Title of an Act of Parliament is no more a Part of the Law than the Title of a Book is a Part of the Book; and there is for that Reaſon no Neceſſity to recite it; But if a Party do take upon him to recite the Title of a Statute, he thereby ties himſelf up to an Act ſo intitled, and if he cannot produce it he is gone. Notwithſtanding my great Veneration for him, I cannot agree with what is reported to have been ſaid by *Hale* as to this Point. *Gould.* J. agreed with the Ch. J. *Powell* J. gave no Opinion: But ſaid, that he had concurred with the other Judges of the Common Pleas, merely upon the Authority of the Opinion of *Hale* as reported in *Hardres.*

Cro. Eliz. 236. *Vanderplanken* v. *Griffith.*

36. A public Statute need not be recited in pleading: But if a Party take upon him to recite a public Statute and miſ-recite it, the Miſ-recital is fatal.

Cro. Car 232. 2 Mod. 99. Preem. 311.

37. If

37. If after pleading a public Statute the Concluſion be, *contra formam Statuti in hujuſmodi Caſu editi*, a Miſ-recital is not fatal; for, as it was not neceſſary to recite the Statute, the Judges, although it be miſ-recited, will take Notice of the true Contents. But if after pleading a publick Statute the Concluſion be, *contra formam Statuti prædicti* or *vigore Statuti prædicti*, a Miſ-recital is fatal; for by the Concluſion the Pleading is tied up to the miſ-recited Statute. Ld. Raym. 382. *Platt* v. *Hill.* Plow. 79, 84. Cro. Car. 233. Freem. 311.

38. A Miſ-recital of a publick Statute is ſo fatal, that the Court, well knowing there is no ſuch Statute, cannot, even if both Parties ſhould conſent, give Judgment. Cro. Eliz. 245. *Love* v. *Wotton.*

39. A private Statute being miſ-recited in Pleading, the Plaintiff demurred: But did not ſhew the Miſ-recital for Cauſe. The Court doubted, whether, in the Caſe of a private Statute, they could from a printed Copy, or from the Record, or in any other Way, take Notice, that the Statute was not as the Defendant had recited it; and the Caſe was adjourned. Sid. 356. Hil. 19 Car. 2. *Holby* v. *Bray.*

40. It has been ſince holden, that, although a private Statute be miſ-recited in Pleading, the Court muſt take it to be as recited, unleſs it is denied to be ſo by Pleading *Nul tiel Record*; or ſhewn to be otherwiſe, by alledging how it ought to have been recited. Ld. Raym. 382. Mich. 10 W. 3. *Platt* v. *Hill.* 2 Mod. 241.

41. Every Miſ-recital of a Statute in a material Part is fatal. Cro. Car. 136, 522. Ld. Raym. 382. 2 Mod. 98.

42. The Words of 8 *H.* 6. *c.* 9. are, *if it be found by Verdict, or in any other Manner by due Form Law, that the Party, &c.* In reciting this Statute * the Words, *or in any other Manner*, were omitted. The Miſ-recital was holden to be fatal; becauſe the Senſe of the Statute is thereby altered, it being tied up to a Recovery by Verdict only: But it was ſaid, that if the Miſ-recital had been of a Part not material, the Miſ-recital would not have been fatal. Cro. Eliz. 186. *Farr* v. *Eaſt.* Ld. Raym. 382. *Page 659

43. By the 8 *Eliz. c.* 2. *par.* 3. it is enacted, That *if any Perſon ſhall cauſe any other Perſon to be arreſted to anſwer in any Court, where any Liberty or Privilege is uſed to hold Plea in any Action or Actions perſonal.* In reciting this Statute the Word *perſonal* was omitted. The Miſ-recital was holden to be fatal; becauſe the Statute was recited, as extending to all Actions, whereas it did in Truth extend only to perſonal Actions. Cro. Eliz. 263. *Vanderplanhen* v. *Griffith.* Cro. Car. 136.

44. A Miſ-recital of a Statute in an immaterial Part is not fatal. Cro. Car. 136, 522. Ld. Raym. 382. 2 Mod. 98.

45. In an Action of falſe Impriſonment, the Defendant juſtified under the 1 *M. c.* 3. which Statute was recited in theſe Words, *if any Perſon ſhall maliciouſly* and *contemptuouſly moleſt.* It was upon a general Demurrer inſiſted, that the Words of the Act are in the Diſjunctive *maliciouſly* or *contemptuouſly:* But by the Court: Where the Word which precedes and the Word which follows are of the ſame Import, the Diſjunctive *or* means the ſame as the Copulative *and:* But if the two Words are of different Import, as *by Word* or Deed, it is otherwiſe. Another Part of this Act was thus recited, *by the ſaid Juſtices or by the* better *Part of them.* To this Recital it was objected, that the Words are *by the ſaid Juſtices or by the* more *Part of them:* But the Objection was over-ruled. Godb. 246. *Croſſe* v. *Stanhope.* 2 Bulſtr. 47, 48, 49.

46. The Words of the Statute of *Wincheſter* are, *foraſmuch as from Day to Day Robberies, Murders, Burnings, and Theft be more often uſed.* In an Action upon this Statute, brought by a Perſon who had been robbed, the Recital was in theſe Words, *foraſmuch as from Day to Day Rolberies, Murders, Burning* of Houſes *and Theft be more often uſed:* 2 Mod. 99. 2 Jon. 51.

uſed: But as the Plaintiff's Caſe was founded upon a Robbery, the Court were unanimouſly of Opinion, that the Miſ-recital was not fatal.

Cro. Eliz. 245. *Love* v. *Wotton.*

47. A Miſ-recital of a publick Statute is not cured by a Verdict: Nor can the Court, who are bound to take Notice of the Contents of every publick Statute, give Judgment; becauſe they know the Statute to be otherwiſe.

Styles 241. *Boomer* v. *Cleve.*

48. It is laid down, that a Miſ-recital of a publick Statute, in a Part which does not go to the Ground of the Action, is after a Verdict cured by the Statute of Jeofails.

Ld. Raym. 382. *Platt* v. *Hill.* 2 Mod. 241.

49. A Miſ-recital of a private Statute is cured by a Verdict: For Advantage ſhould have been taken of the Miſ-recital, by pleading *Nul tiel Record*, or by ſhewing the Statute to be otherwiſe.

6. Of Surpluſage in Pleading a Statute.

Bro. *Nug. et Surpl.* pl. 8.

50. An Act of Parliament, for the Reſtitution of an Heir after the Attainder of his Anceſtor for Treaſon, enabled the Heir to enter. He did enter, and brought a *Scire facias* againſt *J. N. Quare terra reſumi non debet, et liberari querenti.* The Word *raſumi* was not in the Act: Yet the better Opinion was, that the Surpluſage, although in a judicial Writ, was not fatal.

---

*Page 660

* Summons and Severance.

THIS Title is diſtinguiſhed in the Books by the Name of *Summons and Severance:* But the proper Name of it is *Severance*; for the Summons is nothing more than a Proceſs, which muſt in certain Caſes iſſue before Judgment of Severance can be given.

It will here be proper to ſhew,

(A) The Neceſſity of Judgment of Severance in ſome Caſes.
(B) By whom Judgment of Severance may be given.
(C) Where a Summons muſt iſſue, before Judgment of Severance can be given.
(D) At what Time Judgment of Severance muſt be prayed in a Writ of Error.

(E) Who

(E) Who may pray Judgment of Severance.
(F) In what Actions Judgment of Severance may be given.
(G) Where the Writ abates notwithstanding there is Judgment of Severance.
(H) The Consequence of Judgment of Severance to the Party severed.

(A) The Necessity of Judgment of Severance in some Cases.

1. IT is a Rule of Law, that if two or more have a joint Right to a Thing, they must join in an Action for the Recovery thereof.

2. Joint Tenants must implead jointly: For they claim under one Title. 1 Inst. 180.

3. Parceners, who make but one Heir, must in order to recover the Possession of their Ancestor, join in one Præcipe. 1 Inst. 163, 164.

4. Executors, because the Right of their Testator devolves on all of them, must join in an Action for the Recovery of any Thing due to their Testator. Godolph. Orph. Leg. 134. Salk. 3. Carth. 61.

* 5. If two or more Persons, who have a joint Right of Action, have not all joined in an Action which is brought, the Defendant may plead in Abatement: For if any one could recover in such Case singly; every other might; the Consequence of which would be, that the Defendant would be liable to answer in divers Actions for the same Matter. *Page661 Cro. Eliz. 554. *Deering* v. *Moor.* 9 Rep. 37. Salk. 3, 32. 2 Lev. 113. 3 Lev. 354. 1 Mod. 102.

6. It is indeed in the Power of one or more of the Persons who have a joint Right of Action, to commence a Suit in the Name of all in whom the Right is: But, notwithstanding a Plea in Abatement would be thereby prevented, it would still be in the Power of any one of them, by neglecting to appear, or by refusing to proceed afterwards in the Suit, to render it fruitless. 1 Inst. 139. Bro. Summ. and Sev. pl. 17.

7. For if an Action be brought in the Name of two or more, and one make Default, the Nonsuit of him is the Nonsuit of all. Bro. Summ. and Sev. pl. 2. pl. 5. pl. 7.

8. So if a Writ of Error be brought in the Name of two or more, the Assignment of Error cannot be by one without the other or others. Cro. Eliz. 892. *Andrews* v. Ld. *Cromwell.*

9. To prevent the Inconvenience and the Failure of Justice, which would be, if all the other Persons having a joint Right of Action should be precluded by the Negligence or Collusion of one from having the Effect of a Suit, the Law has provided, that if one of the Persons, in whose Name a joint Action is commenced, do not appear, or do after Appearance make Default, the other or others may have Judgment *ad sequendum solum*, or in other Words Judgment of Severance. Hard. 318. *Manley* v. *Lovell.* Bro. Summ. and Sev. pl. 4. pl. 16.

10. If two bring an Assize, and one come not at the Day, a Summons *ad sequendum simul* may issue; and if the Party summoned do not appear at Bro. Summ. and Sev. pl. 4. pl. 18.

at the Return of the Summons, the other Party may pray Judgment *ad ſequendem ſolum.*

Bro. Summ. and Sev. pl. 16. 11. If eight have joined in an Aſſize, and five of them are nonſuited, or will not ſue, Judgment of Severance may be had againſt the five.

Fitz. N. B. 128. 1 Inſt. 139. 12. If in a Writ of *Quo Jure* by two one make Default, Judgment of Severance may be had by the other; in which Caſe the Nonſuit of the one ſhall not be the Nonſuit of the other.

13. After Judgment of Severance againſt one or more of the Plaintiffs in an Action, the other Plaintiff or Plaintiffs may proceed in the Suit.

(B) By whom Judgment of Severance may be given.

Bro. Summ. and Sev. pl. 10. 2 Rol. Abr. 489. JUSTICES of *Niſi Prius* have no Power to give Judgment of Severance; for ſuch Judgment can only be given by the Juſtices of the Court in which the Record is.

Page662 (C) Where a Summons muſt iſſue, before Judgment of Severance can be given.

1 Inſt. 139. Bro. Summ. and Sev. pl. 10. 2 Rol. Abr. 488. 1. IF two or more are joint Plaintiffs in an Action in which there may be Judgment of Severance, and one of them have not appeared, he muſt be ſummoned before Judgment of Severance can be given againſt him; becauſe a Writ may have been purchaſed in a Perſon's Name without his Privity.

Bro. Summ. and Sev. pl. 10. 10 Rep. 135. Hard. 317. 2. But if two or more joint Plaintiffs in an Action have both appeared, and afterwards one make Default, the Court may without a previous Summons give Judgment of Severance againſt him.

(D) At what Time Judgment of Severance muſt be prayed in a Writ of Error.

Cro. Jac. 117. *Blunt* v. *Sneaſtone.* 1. JUDGMENT of Severance cannot be given in a Writ of Error, unleſs it be prayed before the Defendant has pleaded in *Nullo eſt erratum.*

2 Lilly Pr. Reg. 663. 2. But ſuch Judgment may be given after a Joinder in the Aſſignment of Error.

(E) Who may pray Judgment of Severance.

Bro. Summ. and Sev. pl. 17. 1. IF two of four joint Tenants diſſeiſe the other two, the two who are diſſeiſed, may bring an Aſſize in the Name of the four, and may have Judgment of Severance againſt the two Diſſeiſors.

2. Judg-

2. Judgment of Severance may be prayed by one Joint Tenant againſt any other joint Tenant who has joined in an Avowry. 5 Mod. 150, 151. *Pullen* v. *Palmer.*

3. But where two joint Tenants, who had acknowledged a Statute upon which their Land was taken in Execution, did afterwards join in bringing an *Audita querela* upon the Statute, it was holden, that Judgment of Severance could not be given; for the Wrong done to one by taking the Land in Execution being no Wrong to the other, they ought not to have joined, but each ought to have brought an *Audita Querela.* Noy 1. *Farmer* v. *Downes.*

4. One Tenant in Common cannot in the general pray Judgment of Severance; for, as the Titles of Tenants in common are diſtinct, they are not in the general obliged to join in an Action: But one Tenant in Common may pray Judgment of Severance in an Action of *Quare impedit* for the Recovery of an Advowſon; becauſe, as an Advowſon is not diviſible, Tenants in Common muſt join in that Action. 2 Inſt. 197. 5 Mod. 11.

5. If two or more Parceners have joined in an Action for recovering the Eſtate of their Anceſtor, Judgment of Severance may be prayed; becauſe they could not avoid joining in ſuch Action. 1 Inſt. 164.

6. If a Perſon having two Daughters be diſſeiſed, and the Daughters die leaving Iſſue, any of their Iſſue may pray Judgment of Severance: For, as a joint Right deſcended upon them from their common Anceſtor, they * muſt all join in a *Præcipe*; and it makes no Difference, whether the Anceſtor ſeeing he was out of Poſſeſſion, died before the Daughters or after; for in either Caſe the Iſſue muſt make themſelves Heirs to the Perſon laſt ſeiſed. Ibid. *Page 663

7. But if the two Daughters had in this Caſe been actually ſeiſed, and afterwards diſſeiſed, none of their Iſſue could have prayed Judgment of Severance; becauſe as diſtinct Eſtates deſcended from ſeveral Anceſtors, it was not neceſſary for the Iſſue to join in a *Præcipe.* Bro. Coparc. pl. 2. 1 Inſt. 164.

8. Judgment of Severance may be prayed in an Action of Treſpaſs by Executors for an Injury done to the Goods of their Teſtator; becauſe, as in repreſenting him they make but one Perſon, they muſt all join in ſuch Action. Godolph. Orph. Leg. 134. Carth. 61. Salk. 3, 9. 9 Rep. 37.

9. If two or more Perſons, who have joined in a Writ of Error, were under a Neceſſity of joining therein, Judgment of Severance may be prayed. 6 Rep. 25. *Ruddock's* Caſe. Cro. Eliz. 892.

10. No Judgment of Severance can be prayed in a Caſe wherein two or more Perſons, who might have brought ſeparate Actions, have joined in an Action; for it was their Folly ſo to do. 2 Rol. Abr. 488. 6 Rep. 25.

11. If four Perſons join in an Action of *Quare Impedit* for the Recovery of an Advowſon, and one vary from the others in making Title to the Advowſon, Judgment of Severance cannot be prayed, but the Writ ſhall abate; for they ought not to have joined in the Action, unleſs their Title had been joint. Bro. Quar. Imped. pl. 2.

12. *A. B.* and *C.* being jointly ſeiſed of certain Premiſſes made a Leaſe thereof to *D.* for Life; and afterwards *B.* and *C.* releaſed to *A.* In an Action of Waſte by *A.* the Leaſe was pleaded by *D.* in Abatement; and it was inſiſted that *B.* and *C.* ought to have been joined in the Action: But it was holden, that as the Right of *B.* and *C.* was gone by the Releaſe *A.* might ſue without them. Bro. Summ. and Sev. pl 6.

(F) In what Actions Judgment of Severance may be given.

1 Inſt. 139. Bro. Judg. pl. 144. Keilw. 47.

1. JUDGMENT of Severance may be given in an Aſſize; in a Writ of Coſinage; in a Writ of *Quo Jure*; and in all real Actions.

10 Rep. 135. *Read* v. *Redman.*

2. Judgment of Severance cannot be given in a Writ of *Quid Juris clamat*; becauſe the Tenant ſhall not be compelled to attorn to one Perſon.

1 Inſt. 286. Bro. Chart. de Terre, pl. 74.

3. Judgment of Severance may be given in an Action of Detinue of Charter: For this Action ſtandeth in the Realty.

Bro. Summ. and Sev. pl. 20.

4. But Judgment of Severance cannot be given in an Action of Champerty: Becauſe this Action, as only Damages can be recovered therein, is Perſonal.

1 Inſt. 139. Bro. Chart. de Terre, pl. 74.

5. Judgment of Severance may be given in all mixed Actions.

Keilw. 47.

6. Judgment of Severance may be given in an *Ejectione firmæ*, becauſe the Land itſelf, as well as Damages, may be recovered in the Action.

Bro. Summ. and Sev. pl. 9. 2 Rol. Abr. 488.

7. And for the ſame Reaſon Judgment of Severance may be given in an Action of Waſte.

*Page 664

* 8. It is in the general true, that Judgment of Severance cannot be given in a Perſonal Action.

1 Inſt. 139. Bro. Chart. de Terre, pl. 74. Bro. Summ. and Sev. pl. 8. Cart. 191.

Gilb. Hiſt. C. P. 196, 197. Cro. Eliz. 649.

9. If a Treſpaſs be committed upon the Eſtate of two Joint-tenants they muſt join in an Action; yet no Judgment of Severance can be given: For, as either might have releaſed the Damages, either may refuſe to carry on a Suit for the Recovery of Damages.

Ibid.

10. If an Action of Debt be brought by two Obligees of a Bond, Judgment of Severance, although they muſt join in the Action, cannot be given: Becauſe either may diſcharge the Debt; and the Law does not provide for a Caſe, in which one Man has by his own Folly put himſelf into the Power of another.

Cart. 191. *Rickfield* v. *Udall.* Went. Off. of Exec. 96, 104.

11. But Judgment of Severance may be given in a Perſonal Action brought by two or more Executors; for although any one of them may give a Releaſe, the Releaſe would be a *Devaſtavit* in him: But as the refuſing to join in carrying on the Suit is not a *Devaſtavit*, if Judgment of Severance could not be given, any one of them may, by colluding with the Debtor, prevent the Recovery of a Debt due to his Teſtator, without being guilty of a *Devaſtavit*.

Hard. 317. *Manly* v. *Lovell.* 2 Rol. Abr. 488.

12. If two Executors however declare in an Action of Trover for a Bond loſt in the Time of their Teſtator, but lay the Converſion after his Death, Judgment of Severance cannot be given; becauſe as the Converſion, which is the Giſt of this Action, was in their own Time, it is like an Action of Treſpaſs upon their own Poſſeſſion, in which Judgment of Severance cannot be given.

1 Inſt. 139. Bro. Summ. and Sev. pl. 2. pl. 7.

13. Judgment of Severance may be given in an Action of Attaint upon a real Action; for wherever ſuch Judgment might have been given in the Principal Action, it may in an Action of Attaint founded upon that Action.

14. Judg-

14. Judgment of Severance may be given in a Suit upon a Writ of Error, or in a Suit upon a *Scire facias*, provided it might have been given in the original Action; for theſe Actions, although Perſonal, ſhall follow the Nature of the Actions upon which they are founded. 1 Inſt. 139. 6 Rep. 25. Cro. Eliz. 649.

15. Judgment of Severance may ſometimes be given in Suit upon a Writ of Error, although it could not in the original Action. 6 Rep. 25. *Ruddock's* Caſe. Cro. Jac. 177, 616. Cro. Eliz. 649.

16. The Diſtinction ſeems to be, that if any Thing may be recovered by two or more Plaintiffs in a Writ of Error, Judgment of Severance cannot be given; but where a Writ of Error is brought by two or more Plaintiffs to diſcharge themſelves from ſome Burthen, Judgment of Severance may be given. 10 Rep. 135. *Read* v. *Redman*. 6 Rep. 25. Cro. Eliz. 649. Cro. Jac. 117, 616.

17. If two Plaintiffs in an Action of Debt are barred by an erroneous Judgment, and Coſts are taxed againſt them, and they afterwards bring a Writ of Error to get rid of the Coſts, Judgment of Severance cannot be given; becauſe as either of them might before Judgment have releaſed the original Action, it is now in the Power of either of them to give a Releaſe of Error, which ſhall bind the other. Cro. Eliz. 649. *Razing* v. *Ruddock*. 6 Rep. 23. Cro. Jac. 117, 616.

18. But if divers are Defendants in an Action, and Judgment be againſt them, and they bring a Writ of Error to diſcharge themſelves of the Coſts and Damages of the Action, Judgment of Severance may be given: For, although the Coſts and Damages are a meer Perſonal Duty, it would be hard, that a Releaſe of Error by one, with whom the others are compelled to join in bringing a Writ of Error, ſhould be prejudicial to the others: Nay this would put it into the Power of a Plaintiff, to ſecure himſelf always againſt a Writ of Error, nothing more being neceſſary, than to make ſome Perſon, upon whom he can depend to collude with him, a Defendant in the Action. Cro. Jac. 616. *Bythall* v. *Harris*. 6 Rep. 25. 10 Rep 135. Cro. Eliz. 649. Cro. Jac. 19, 117.

19. It has been holden, that if there be Judgment of Outlawry againſt two, a Writ of Error to reverſe the Judgment muſt be in the Name * of both; that if only one appear, Judgment of Severance may be given againſt the other; and that the Judgment in the original Action may in ſuch Caſe be reverſed for the Benefit of him who does appear. Salk. 496. *Symmons* v. *Bingoe*. *Page665

20. This Determination, if not miſtaken by the Reporter, ſeems to have been a haſty one; for it is laid down, and in Books of the beſt Authority, that where four had joined in a Writ of Error to reverſe a Judgment of Outlawry, and two of them had made Default, Judgment of Severance could not be given; becauſe, as they might have had ſeveral Writs of Error, it was their Folly to join in one Writ. 6 Rep. 25. *Ruddock's* Caſe. Bro. Summ. and Sev. pl. 11.

21. Judgment of Severance may be given in a Suit upon a Writ of *Audita Querela*, brought by two upon a Judgment in a perſonal Action: For, as the Suit is by Way of Defence, it would be hard, that the Nonſuit of one ſhould be the Nonſuit of the other. 1 Inſt. 139. Bro. Summ. and Sev. pl. 2. 6 Rep. 25. Cro. Eliz. 649. Cro. Jac. 616.

22. It is ſaid that Judgment of Severance may be given in an Action upon the Caſe, *Quare exaltavit ſtagnum, per quod ſuum pratum fuit inundatum*. Godb. 59. *Giles's* Caſe.

(G) Where a Writ abates after Judgment of Severance.

10 Rep. 134. *Read* v. *Redman.*

1. IF two Jointenants join in a Suit upon a Writ of *Scire facias*, and one die after Judgment of Severance, the Suit does not abate; becauſe it is founded upon a judicial Writ.

Cro. Car. 574. *Rex* v. *Dryden.* 10 Rep. 134. Cro. Jac. 19.

2. But if two Jointenants join in a real Action, and one die after Judgment of Severance, the Action does abate; becauſe it is founded upon an original Writ.

10 Rep. 134. *Read* v. *Redman.* Cro. Jac. 19. Cro. Car. 574.

3. For the ſame Reaſon, if two Parceners join in a real Action, and one of them die after Judgment of Severance, the Action does abate.

11 Rep. 45. *Godfrey's* Caſe. 10 Rep. 134. 1 Saund. 285.

4. The Reaſon why an original Writ abates in the two latter Caſes is, that the Survivor, who upon the Death of the other became intitled to the Whole, may have an original Writ to recover the Whole: For if an original Writ, which when it was ſued out was proper, become afterwards untrue or unfit for the Party's Caſe, and he may have another original Writ which agrees with the real Truth of his Caſe, the original Writ does abate, notwithſtanding the Alteration was occaſioned by the Act of God; becauſe the Law will not ſuffer a Party to recover under an original Writ, the Words of which are falſe or unfit for his Caſe.

10 Rep. 134. *Read* v. *Redman.*

5. But if an original Writ become after Judgment of Severance untrue or unfit for the Party's Caſe by ſome Act of his own, the Writ does not *ipſo facto* abate, it being only abateable; becauſe it would in ſuch Caſe, provided there had been no Judgment of Severance, have only been abateable.

1 Inſt. 197, 286. 10 Rep. 134.

6. If two Parceners or two Jointenants join in a Writ *Quare Impedit*, for the Recovery of an Advowſon, and one die after Judgment of Severance, the Writ, notwithſtanding it is an original Writ, does not abate: Becauſe, as an Advowſon is not deviſable, the Party who proceeded in the Suit would have recovered the Whole if the other Party had lived, and conſequently no new Right is acquired by his Death.

*Page 666 10 Rep. 135. *Read.* v. *Redman.* 6 Rep. 25. Cro. Eliz. 649. Cro. Jac. 117, 616.

* 7. If two Perſons join in a Writ of Error brought to reverſe a Judgment, and one die after Judgment of Severance, the Writ, although it be an original Writ, does not abate: Becauſe, as the Deſign of the Plaintiffs is only to diſcharge themſelves of a Judgment, the deceaſed Party could not, although there had been no Judgment of Severance, have releaſed the Error.

Inſt. 139. Cro. Eliz. 448. Cro. Jac. 19. 6 Rep. 256. 10 Rep. 135.

8. The Death of one of the Plaintiffs after Judgment of Severance in a Suit upon a Writ *Audita Querela* does not abate the Writ, although it be an original Writ, becauſe nothing can be recovered in the Suit; the Deſign thereof being only to get rid of a Charge to which the Plaintiffs are liable.

Cro. Eliz. 652. Anon. 10 Rep. 135. Hard 317. Went. Off. of Exec. 96, 104

9. If an Action of Debt be brought by two Executors, and one die after Judgment of Severance, the Writ does not abate: For the Right of the Survivor, who might if the other had lived have recovered the whole Debt, is not thereby altered.

10. A Writ

10. A Writ does not abate, after Judgment of Severance, becauſe the Party againſt whom Judgment has been given was an Alien; for Advantage ſhould have been taken of this in Pleading. Bro. Brief 121.

(H) The Conſequence of Judgment of Severance to the Party ſevered.

1. THE Power, which a Party againſt whom Judgment of Severance has been given, had over an Action, is thereby ſo intirely at an End, that his Name can never after be made Uſe of in any of the Proceedings. Bro. Proc. pl. 12. 2 Rol. Abr. 489.

2. An Action of Debt had been brought by ſix Executors, but there was afterwards Judgment of Severance againſt three of them; and final Judgment was entered in the Names of the three who had proceeded in the Suit. It was aſſigned for Error, that the other three, notwithſtanding the Judgment of Severance, were ſtill Executors, and conſequently that they ought to have been named in the final Judgment: But the Court held, after ordering Precedents to be ſearched, that the final Judgment ought to be entered only in the Names of the Executors who had proceeded in the Suit. Cro. Car. 420. *Price* v. *Parkhurſt.* 2 Rol. Abr. 98.

3. Two Executors had joined in an Action; but there was Judgment of Severance againſt one of them. The other proceeded to final Judgment, and then died. As the Survivor was no Party to the final Judgment, it was holden, that he could not take out Execution upon it. Wentw. Off. of Exec. 104, 105. Dal. 51. pl. 17. 53. pl. 30.

4. One Executor may indeed, although Judgment of Severance be given againſt him, releaſe the Debt, for which an Action is brought in the Name of him and another Executor, at any Time before final Judgment: But this does not proceed from any Power he has over the Action, but from an Intereſt which he ſtill has in the Debt. The Preſumption of Law, is moreover, that, as he is liable to anſwer for the Debt ſo releaſed, it being a *Devaſtavit*, his Co-executor is not thereby injured. Godolph. Orph. Leg. 134. Dal. 51. pl. 17, 53. pl. 30. Wentw. Off. of Exec. 104.

5. If a Writ of Partition be brought in the Name of three Parceners and there be Judgment of Severance againſt one, that Party ſhall notwithſtanding the Judgment have a third Part of the Eſtate; the Deſign of the Suit being to make Partition of the Eſtate. Jenk. 211. pl. 46.

SUPER-

*Page667

* SUPERSEDEAS.

A *Superſedeas*, in the ſtrict Senſe of the Word, means the ſetting aſide or annulling of an Act.

But the Word, in its legal Acceptation, means the preventing, as well as the ſetting aſide or annulling of an Act.

The Matter which falls properly under this Title ſhall be ranged in the following Order:

(A) Of the different Kinds of Superſedeas.
(B) Who may award a Writ of Superſedeas.
(C) In what Caſes a Writ of Superſedeas may be awarded.
(D) Of certain Writs which are Superſedeas's by Implication.

1. Of a Writ of *Audita Querela*.
1. A Writ of ſecond Deliverance.
2. A Writ of *Habeas Corpus ad faciendum & recipiendum*.
3. A Writ of *Certiorari*.
4. A Writ of Error.

(E) Of certain Requiſites, which are neceſſary to the making of a Writ of Error a Superſedeas.

1. It muſt be allowed.
2. Bail muſt be put in thereto.
3. It muſt be proceeded in without Delay.

(F) To what Time a Writ of Error relates as a Superſedeas.
(G) What the Effect of a Superſedeas is.
(H) How Diſobedience to a Superſedeas may be puniſhed.

(A) Of the different Kinds of Superſedeas.

1. A *Superſedeas* is ſometimes expreſs, at other Times it is implied.

2. An expreſs *Superſedeas* may be by Writ or without Writ.

3. When it is by Writ, the Perſon to whom the Writ is directed is
*Page668 commanded, to forbear the doing of an Act therein * mentioned; or if the Act have already been done to annul it as far as poſſible.

4. If

4. If an Exigent have been awarded againſt a Perſon, he may have Writ directed to the Sheriff, commanding him, upon the Perſon's finding Sureties to appear at the Return of the Exigent, that if he have not arreſted him, he do not arreſt him, but ſuffer him to go in Peace; and that if he have arreſted him, he diſcharge him. Fitzh. N. B. 236.

5. Or the Perſon againſt whom an Exigent has been awarded may, upon finding Sureties in a Court which has Power to award a Writ *Superſedeas*, have Writ of *Superſedeas*, directed to the Sheriff, to the ſame Effect. Ibid.

6. An expreſs *Superſedeas* without Writ is, where a Perſon, who has purſuant to an Authority in him veſted made an Order for the doing of an Act, does by a ſecond Order forbid the doing of the Act.

7. If a Juſtice of the Peace have made an improper Order, he may, upon finding that he has ſo done, by a ſecond Order ſuperſede the former Order. Stra. 6. *The Inhab. of Pancras* v. *The Inhab. of Rumbald.*

8. But if the Act directed by the former Order to be done were done before the Delivery of the ſecond Order, it is doubtful whether this ſhall annul the Act; and it may perhaps be proper, that only a Writ of *Superſedeas* ſhould have a retroſpective Power. 1 Hawk. 154.

9. Every Writ is a *Superſedeas* by Implication, by which, although no Writ of *Superſedeas* have iſſued thereupon, the doing of an Act is prevented.

10. But a Writ, which is only a *Superſedeas* by Implication, cannot annul an Act, which was done before the Writ iſſued.

(B) Who may award a Writ of Superſedeas.

1. A Writ of *Superſedeas* does not lie from any other Court to the Court of Chancery: But this Court may award a Writ of *Superſedeas* to a Writ from the ſame Court.

2. If one Perſon have ſued out a Writ of *Supplicavit* from the Court of Chancery, for arreſting another to find Sureties of the Peace, the Perſon againſt whom this Writ is awarded, may have a Writ of *Superſedeas* from the ſame Court, commanding the Sheriff to forbear to arreſt him. Fitzh. N. B. 238.

3. A Writ of *Superſedeas* may at any Time be awarded from the Court of Chancery to any other Court.

4. A *Capias ad Satisfaciendum* having iſſued from the Court of King's Bench, a Writ of *Superſedeas* was awarded by the Court of Chancery, commanding the Juſtices of that Court to ſurceaſe. This Writ was by ſome thought to be contrary to the Law: But *Finch*, becauſe it was out of a higher Court, did ſurceaſe, and no further Proceedings were had. Bro. Superſ. pl. 5.

5. If after Surety of the Peace have been granted by the Court of King's Bench, a Writ of *Superſedeas* come from the Court of Chancery to the Juſtices of that Court, their Power is at an End. Bro. Peace, pl. 17.

6. Any Court of Record at *Weſtminſter* may in Term Time award a Writ of *Superſedeas*, to any Writ or Proceſs which has iſſued from the ſame Court; or to the Proceedings of any other Court, in caſe the other Court have proceeded in a Matter properly conuſable in the Court from whence the Writ of *Superſedeas* is awarded.

* 7. If a *Capias* or an Exigent have been awarded againſt a Perſon, he may in Term Time have a Writ of *Superſedeas* out of the Court which awarded it. *Page 669 Fitzh. N. B. 236.

Bro. Superſ. pl. 13. Fitzh. N. B. 239. 8. If after a Perſon, who is ſued in a Court Chriſtian, have obtained a Writ of Prohibition, the Spiritual Court proceed to Excommunication, he may in Term Time have a Writ of *Superſedeas* out of the Court, from which the Writ of Prohibition was awarded.

Salk. 293. *Rex* v. *Fowler.* 9. Heretofore a Writ of *Superſedeas* to a Writ *De excommunicato capiendo* could only be had from the Court of Chancery, unleſs the Court Chriſtian had proceeded after the awarding of a Writ of Prohibition: But as every Writ *De excommunicato capiendo* muſt, purſuant to the 5 *Eliz. c.* 23. be entered of Record in the Court of King's Bench, before it be delivered to the Sheriff, and muſt likewiſe be returned to that Court a Writ of *Superſedeas* may at this Day be awarded by this Court.

Bro. Superſ. pl. 38. 10. If an Accountant of the Court of Exchequer be ſued in the Court of Common Pleas, the Court of Exchequer may in Term Time award a Writ of *Superſedeas* to the Juſtices of the Court of Common Pleas, commanding them to ſurceaſe.

Ibid. 11. The Court of Exchequer cannot award a Writ of *Superſedeas* to the Juſtices of the Court of King's Bench; becauſe the Pleas in this Court are before the King himſelf: But the Record of the Court of Exchequer may be ſhewn to this Court, and if the Perſon therein ſued appear to be an Accountant of the Court of Exchequer, the Court of King's Bench will diſmiſs the Suit.

Bro. Superſ. pl. 11. 12. If after the Plaintiff have recovered in an Action of Debt upon a Bond in the Court of Common Pleas, the Defendant bring a Writ of Error in the King's Bench, and the Plaintiff pending the Writ bring another Action of Debt upon the ſame Bond in the Court of Common Pleas, this Court cannot award a Writ of *Superſedeas* to the ſecond Action: But the Court of King's Bench may.

13. By the 2 *E.* 3. *c.* 8. it is provided, "That it ſhall not be commanded by the great nor little Seal to diſturb or delay common Right; and though ſuch Commandment do come the Juſtices ſhall not therefore ſurceaſe to do Right in any Point."

Bro. Superſ. pl. 26. Fitzh. N. B. 238. 14. In an Action of Treſpaſs there was Judgment for the Plaintiff, and a *Capias* was awarded for the Fine due to the King. And an Exigent was afterwards awarded. Hereupon the Defendant obtained a Writ of a *Superſedeas* under the Privy Seal, commanding the Juſtices to ſurceaſe all Proceſs for the King. The Writ of *Superſedeas* was holden to be conſiſtent with the 2 *E.* 3. *c.* 8. for although the Fine aroſe upon the Suit of the Party, the King may at his Pleaſure, as the *Capias* was not executed, put a Stop to all Proceedings for his Fine: But if a Defendant have in ſuch Caſe been arreſted upon the *Capias*, the King ſhall not, unleſs the Plaintiff be ſatisfied, ſet him at Liberty; for the Plaintiff may elect to have the *Capias* for his Execution.

15. An expreſs *Superſedeas* without Writ can only be granted by the Perſon or Perſons, who did the Act which is intended to be ſuperſeded.

Stra. 6. *The Inhab. of Pancras* v. *The Inhab. of Rumbald.* 16. Two Juſtices of the Peace may by a ſecond Order ſuperſede a former Order made by themſelves.

Salk. 472. *The Inhab. of Oſwell* v. *The Inhab. of Woking.* 17. But a Court of Quarter Seſſions cannot by their Order ſuperſede an Order made by two Juſtices of the Peace.

1 Hawk 154. Dyer 187. H. H. P. C. 140. 18. The ſame Juſtices by whom Reſtitution was awarded upon a Conviction on an Indictment for a forcible Entry found before them, may, upon the Inſufficiency of the Indictment appearing to them, ſuperſede the Award of Reſtitution, in caſe it have not been executed.

19. And

* 19. And it is ſaid, that if the Award of Reſtitution were made by four or five Juſtices, it may be ſuperſeded by any one or two of them. *Page 670 Cro. Eliz. 915. *Fitzwilliam*'s Caſe.

20. But it ſeems to be agreed that no other Juſtice or Juſtices of the Peace, nor other Court whatſoever, except the Court of King's Bench, have a Power to ſuperſede ſuch Award. 1 Hawk. 154. Dyer 187.

21. If one Juſtice of the Peace have iſſued a Warrant, to compel a Perſon to find Surety of the Peace, any other Juſtice may, upon the Perſon's entering into a Recognizance before him for keeping the Peace, ſuperſede the former Warrant. 1 Hawk. 128. Lamb. 95, 96, 99.

(C) In what Caſes a Writ of Superſedeas may be awarded.

1. IF a *Capias* or an Exigent have been awarded, the Perſon againſt whom it was awarded may, whether he has or has not been arreſted thereupon, have a Writ of *Superſedeas*. Fitzh. N. B. 236.

2. But if a Perſon have been arreſted upon *a Capias ad ſatisfaciendum*, no Writ of *Superſedeas* lies; becauſe he is taken in Execution. Fitzh. N. B. 237.

3. If a Declaration be not filed againſt a Defendant, who is in Priſon, within two Terms, he may have a Writ of *Superſedeas*: But the Plaintiff may bring a ſecond Action; for, notwithſtanding the former Action was for want of declaring in due Time ſuperſeded, the Cauſe of Action remains. 8 Mod. 306. *Henley* v. *Roſſe*. Carth. 469.

4. Two Sheep having been diſtrained, the Owner applied for a Writ of *Superſedeas*. It was hereupon ſaid, that this Writ lies only for the Perſon, and not for any Chattels: But by *Lacon* it lies for both. Bro. Superſ. pl. 34.

5. A Writ of *Superſedeas* lies to Proceſs of Outlawry. Fitzh. N. B. 237.

6. If one Juſtice of the Peace have granted a Warrant, to compel a Perſon to find Surety of the Peace, any other Juſtice may, upon the Perſons entering into a Recognizance before him for keeping the Peace, ſuperſede the former Warrant. 1 Hawk. 128. Lamb. 95, 96, 99.

7. If a Writ of *Supplicavit* have iſſued from the Court of Chancery, to compel a Man to find Surety of the Peace, he may, upon finding Surety in that Court, have a Writ of *Superſedeas*. Fitzh. N. B. 238.

8. Heretofore if a Juſtice of the Peace had granted a Warrant, to compel a Perſon to find Surety of the Peace, the Court of Chancery or King's Bench might, upon the Perſon's finding Surety, have granted a Writ of *Superſedeas* to the Warrant. Ibid. Lamb. 96.

9. But by the 21 *Jac.* 1. *c.* 8. *par.* 3. after reciting, that divers turbulent and contentious Perſons, deſervedly fearing to be bound to the Peace or good Behaviour, by Juſtices of the Peace of the Counties where they dwell, do oftentimes procure themſelves to be bound to the Peace or good Behaviour, in the Court of Chancery or King's Bench, upon inſufficient Sureties, or upon colourable Proſecution of ſome Perſon or Perſons, who will be ready at all Times to releaſe them at their own Pleaſure: whereupon his Majeſty's Writs of *Superſedeas* are oftentimes directed to the Juſtices of the Peace, and others his Majeſty's Officers, requiring them and every of them to forbear to arreſt or impriſon the Parties aforeſaid; by Means whereof the ſaid turbulent and contentious Perſons miſdemean themſelves amongſt their Neighbours with Impunity, to the great

A Superſedeas to the Warrant of a Juſtice of the Peace, for compelling a Man to find Surety of the Peace, is not to iſſue without putting in Bail.

Offence and Diſturbance of their Neighbours amongſt whom they converſe and live, to the Affront of the Juſtices of the Peace, and to the evil Example and Encouragement of like ill-diſpoſed Perſons, it is enacted, "That all Writs of *Superſedeas*, granted by either of the Courts *Page 671 "* aforeſaid, ſhall be void and of none Effect, unleſs ſuch Proceſs be "granted upon Motion in open Court firſt made, and upon ſuch ſuffi- "cient Sureties, as ſhall appear unto the Judge or Judges of the ſame "Court reſpectively upon Oath, to be aſſeſſed at five Pounds Lands or "ten Pounds in Goods in the Subſidy Book at the leaſt; and unleſs it "ſhall alſo appear unto the ſaid Judge or Judges, from whom ſuch "*Superſedeas* is deſired, that the Proceſs of the Peace or good Behaviour "is proſecuted againſt him or them deſiring ſuch *Superſedeas*, *bona fide* "and by ſome Party grieved, in that Court out of which ſuch *Superſedeas* "is deſired to be awarded."

Fitzh. N. B. 239. 10. If a Perſon in a Writ of Right in a Court Baron, or in any other Court, vouch a Foreigner to Warranty, the Tenant may ſue forth a Writ of *Superſedeas* directed to the Court, commanding them not to proceed till the Warranty is determined.

Ibid. 11. If a Court Chriſtian, after a Writ of Prohibition has been awarded, proceed to Excommunication, and a Writ *De excommunicato capiendo* be awarded, a Writ of *Superſedeas* lies.

1 Sid. 181. Anon. 12. It has been holden, that no Writ of *Superſedeas* ſhall be awarded by the Court of King's Bench, to a Writ *De excommunicato capiendo*, before the Writ is returned; becauſe the Party, as the contrary cannot till then appear, may have been excommunicated for one of the Cauſes mentioned in the 5 *Eliz. c.* 23.

10 Mod. 351, 352. *Rex* v. *Theed.* Stra. 43. 13. But if from the Entry of a Writ *De excommunicato capiendo* in the Court of King's Bench, it appear to have iſſued upon a Sentence of Excommunication for ſome Cauſe not within the 5 *Eliz. c.* 23. the Court may award a Writ of *Superſedeas* without waiting till it is returned; otherwiſe the Party, who if taken into Cuſtody muſt at the Return of the Writ be diſcharged, may in the mean Time be deprived of his Liberty, upon a Writ which ought not to have been awarded.

Sayer 257. *Rex* v. *Stephens.* 14. It was in a modern Caſe holden upon great Conſideration, that a Writ of *Superſedeas* ought not to be awarded to a Writ *De excommunicato capiendo*, which iſſued from the Court of *Chancery* in *England*, upon a *Significavit* from a Court of Delegates in *Ireland*, which ſat under an Authority derived from the Court of Chancery in *England*.

Fitzh. N. B. 239. 15. If a Plea of Treſpaſs *vi et armis* be holden in a Sheriff's Court, the Defendant may have a Writ of *Superſedeas*, with a Recital, that Plea of Treſpaſs *vi et armis* ſhall not be holden in a leſſer Court than before the King himſelf, or other Juſtices by his Commandment.

Ibid. 16. If a Sheriff hold Plea of forty Shillings a Writ of *Superſedeas* lies.

Ibid. 17. If a Man ſue in the Sheriff's Court for an entire Debt of more than forty Shillings, by divers Plaints each under the Sum of forty Shillings, the Defendant may have a Writ of *Superſedeas*, commanding the Sheriff not to hold Plea of thoſe Plaints.

Fitzh. N. B. 240. 18. If the Conſtable of *Dover* hold Plea of a Thing which he ought not to hold Plea of, a Writ of *Superſedeas* lies.

Vaugh. 155. *Buſhel's* Caſe. 19. If a Perſon, who on the Account of Privilege ought only to be ſued in a certain Court, be ſued in any other Court, he may have a Writ of *Superſedeas*.

Sty. 177. Earl *Rivers's* Caſe. 20. But where a Peer, being in Cuſtody upon a Bill of *Middleſex*, moved for a Writ of *Superſedeas*, upon a Suggeſtion that he ought not to have been arreſted, the Court directed him to plead his Privilege; and ſaid they could not upon Motion take Notice thereof.

21. If

21. If a Proceſs or Writ have iſſued erroneouſly, or improperly, a Writ of *Superſedeas* lies.

22. In an Action upon the Caſe for Words ſpoken in *London*, the Defendant juſtified for Words ſpoken in the County of *Suffolk*. The Plaintiff replied *De injuria ſua propria*, and ſued out a *Venire facias* for *London*. A Writ of *Superſedeas* was awarded; becauſe the *Venire facias* ought to have been for the County of *Suffolk*. Lit. Rep. 314. *Harvey's* Caſe. Cro. Jac. 43.

* 23. If a Writ of *Habere facias Poſſeſſionem* have iſſued erroneouſly and been executed, a Writ of *Superſedeas* will lie to reſtore the Poſſeſſion. *Page 672 Jenk. Cent. 58.

24. It is in the general true, that a Writ of *Superſedeas* does not lie where a Writ of Attaint is brought; for a Verdict having been found upon the Oath *Duodecem legalium et proborum hominum*, the Law will not, upon ſo ſlight a Ground as the bringing of a Writ of Attaint, preſume that it is a falſe Verdict. Skin. 422. The Caſe of Certiorari's. Bro. Superſ. pl. 24. Dyer 81.

25. But if, after the Defendant in an Action of Treſpaſs *vi et armis* have brought a Writ of Attaint, the Plaintiff ſue out an *Elegit*, and a *Capias* is awarded for the Fine due to the King, the Defendant may have a Writ of *Superſedeas* as to the *Capias*, upon a Suggeſtion, that ſince the bringing of the Writ of Attaint, the Plaintiff has ſued out an *Elegit*. Fitzh. N. B. 237, 238.

26. If an *Audita Querela* be brought, the Plaintiff, if the *Audita Querela* be founded upon Matter of Record or Writing, may have a Writ of *Superſedeas* to ſtay Execution; but not if it be founded upon Matter in *Pais*. 2 Rol. Abr. 493. *Morſton* v. *Parrie*.

Fitzh. N. B. 104. Bro. Superſ. pl. 24. Noy 145. Cro. Eliz. 364. Salk. 92.

27. If an *Audita Querela* be brought, after the Party who brings it has been taken in Execution, he may have a Writ of *Superſedeas* as to his Body; but as he is only thereby diſcharged for a Time, that he may the better proſecute the *Audita Querela*, in caſe he be not relieved upon the *Audita Querela*, he ſhall again be a Priſoner in Execution. 2 Rol. Abr. 493. *Whidner* v. *Conyers*. Salk. 92.

28. If the Plaintiff in an *Audita Querela*, after having been nonſuited, bring a ſecond *Audita Querela*, he ſhall not have a Writ of *Superſedeas*. Bro. Superſ. pl. 35. 2 Rol. Abr. 492.

29. Heretofore if a Writ of Error were brought, Execution might in all Caſes be ſtayed by a Writ of *Superſedeas*.

30. But by the 3 *Ja.* 1. *c.* 8. after reciting, that his Highneſs's Subjects are now more commonly withholden from their juſt Debts, and often in Danger to loſe the ſame, by Means of Writs of Error, which are now more commonly ſued than they have heretofore been, it is enacted, "That no "Execution ſhall be ſtayed or delayed upon or by any Writ of Error, or "*Superſedeas* thereupon to be ſued, for the reverſing of any Judgment, given "or to be given in any Action or Bill of Debt upon any ſingle Bond for "Debt, or upon any Obligation with Condition for the Payment of Money "only; or in any Action or Bill of Debt for Rent, or upon any Contract; "in any of the Courts of Record at *Weſtminſter*, or in the Counties Pala- "tine of *Cheſter*, *Lancaſter* or *Durham*, or in the Courts of Great Seſſions "in *Wales*, unleſs ſuch Perſon or Perſons, in whoſe Name or Names ſuch "Writ of Error ſhall be brought, with two ſufficient Sureties, ſuch as "the Court wherein ſuch Judgment is or ſhall be given ſhall allow of, ſhall, "before ſuch Stay made, or *Superſedeas* be awarded, be bound, unto the "Party for whom any ſuch Judgment is or ſhall be given, by Recog- "nizance to be acknowledged in the ſame Court, in double the Sum "adjudged to be recovered by the ſaid former Judgment, to proſecute "the ſaid Writ of Error with Effect, and alſo to ſatisfy and pay, if the "ſaid Judgment be affirmed, all and ſingular the Debts, Damages and

A Writ of Error is not a *Superſedeas* in certain Caſes until Bail be put in.

* Coſts

" Coſts adjudged or to be adjudged upon the former Judgment, and all " Coſts and Damages to be awarded for the ſame delaying of Execution."

Cro. Jac. 350. *Goldſmith* v. *Platt.*

31. The Defendant an Executrix pleaded *Plene adminiſtravit*, and there was Judgment againſt her *De bonis Teſtatoris*. Upon bringing a Writ of Error it was moved, that ſhe ſhould not have a Writ of *Superſedeas* to ſtay Execution, unleſs Bail were put in as is required by the 3 *Jac.* 1. *c.* 8. It was holden, that the Statute does only intend that there ſhould be Bail where the Judgment is againſt the Party himſelf, or where it is general againſt Executors: But where the Judgment againſt Executors is ſpecial; namely, that Execution ſhall be of the Goods * of their Teſtator and Damages only of their own Goods, it is not reaſonable, nor the Intent of the Statute, that the Executor ſhould be obliged to find Sureties, to pay all the Judgment may be affirmed for with his own Goods: And *Coke* Ch. J. ſaid, it had been ruled according to this Difference in the Court of Common Pleas, when he was there.

*Page 673

Show. 14. *Garret* v. *Dandy.* Com. 322.

32. It has been holden, that no Bail is neceſſary, where a Writ of Error is brought upon a Judgment in an Action of Debt upon a Bond for Payment of Money upon a Bottomree Contract; for that ſuch Bond is not within the Meaning of the Statute.

Stra. 476. *Pitt* v. *Coney.*

33. But it is in a later Caſe laid down, that if the Contingency mentioned in a Bottomree Bond have happened, it is in every reſpect a Bond for the Payment of Money only, and that Bail muſt be put in, in caſe a Writ of Error be brought upon a Judgment in an Action of Debt upon the Bond.

Carth. 29. *Gerrard* v. *Danby.*

34. A Bond was with Condition to pay Money and to do a collateral Act. It was holden, notwithſtanding the Breach aſſigned was only the Non-payment of the Money, that the Bond was not within the 3 *Jac.* 1. *c.* 8. and a Writ of Error brought upon a Judgment in an Action of Debt upon the Bond was allowed without Bail.

Stra. 959. *Dyſbordes* v. *Horſey.*

35. But where the Condition of a Bond was for the Payment of 500*l.* at a certain Day, being the Sum mentioned in certain Indentures, it was holden, that there ought to be Bail in a Writ of Error brought upon a Judgment in an Action of Debt upon the Bond; for that the material Part of the Condition is the Payment of the Money, the other Words being only added to ſhew, that the Bond and the Indentures are both Securities for the ſame Sum of 500*l.*

The Proviſion of 3 Jac. 1. c. 8. extended to other Caſes.

36. By the 13 *Car.* 2. *ſt.* 2. *c.* 2. *par.* 9. after reciting, the 3 *Jac.* 1. *c.* 8. and that divers other Caſes within the ſame Miſchief are not thereby provided for, it is enacted, " That no Execution ſhall be ſtaid, in any " of the Courts therein mentioned, by any Writ of Error or *Superſe-* " *deas* thereupon, after any Verdict and Judgment thereupon, in any " Action of Debt, grounded upon the Statute made in the ſecond Year " of the Reign of *Edward* the Sixth for not ſetting forth of Tithes, " nor in any Action upon the Caſe upon any Promiſe for the Payment " of Money, Action *ſur Trover*, Action of Covenant, Detinue or Treſ- " paſs, unleſs ſuch Recognizance, and in ſuch Manner as by the ſaid " Act is directed, ſhall be firſt acknowledged in the Court where ſuch " Judgment is given."

The ſame Proviſion extended to all Perſonal Actions.

37. By the 16 & 17 *Car.* 2. *c.* 8. *par.* 3. it is enacted, " That no Exe- " cution ſhall be ſtaid, in any of the Courts mentioned in a Statute made " in the third Year of the Reign of *James* the Firſt, by Writ of Error " or *Superſedeas* thereupon, after any Verdict and Judgment thereupon, " in any Action Perſonal whatſoever, unleſs a Recognizance, with Con- " dition as in the ſaid Statute is directed, ſhall be firſt acknowledged in " the Court where ſuch Judgment ſhall be given: And that, in a Writ " of Error to be brought upon any Judgment after a Verdict in any Writ " of Dower, or in any Action *Ejectione Firmæ*, no Execution ſhall be there-

" thereupon or thereby ſtaid, unleſs the Plaintiff or Plaintiffs in ſuch " Writ of Error ſhall be bound unto the Plaintiff in ſuch Writ of Dower " or Action of *Ejectione Firmæ*, in ſuch reaſonable Sum as the Court to " which ſuch Writ of Error ſhall be directed ſhall think fit, with Con- " dition, that if the Judgment ſhall be affirmed in the ſaid Writ of Er- " ror, or that the ſaid Writ of Error be diſcontinued in Default of the " Plaintiff or Plaintiffs therein, or that the ſaid Plaintiff or Plaintiffs be " nonſuit in ſuch Writ of Error, that then the ſaid Plaintiff or Plaintiffs " ſhall pay ſuch Coſts, Damages and Sum or Sums of Money, as ſhall " be awarded upon or after ſuch Judgment affirmed, Diſcontinuance or " Nonſuit had."

38. But by *par.* 5. it is provided, " That this Act, or any Thing " therein contained, ſhall not extend to any Writ of Error to be brought " by an Executor or Adminiſtrator; nor unto any Action popular, nor " unto any other Action, which is or hereafter * ſhall be brought upon " any penal Law or Statute, except Actions of Debt for not ſetting forth " of Tithes; nor to any Indictment, Preſentment, Inquiſition, Informa- " tion or Appeal; any Thing herein before expreſſed to the contrary " thereof notwithſtanding." Some Caſes excepted out of the 16 & 17 C. 2. c. 8. *Page 674

39. It is in the general true, that a Writ of *Superſedeas* cannot be had upon a ſecond Writ of Error, after the Plaintiff in Error has been non-ſuited in a former Writ of Error in the ſame Court, or ſuch former Writ of Error has abated by the Act of the Party, or has been quaſhed. Bro. Superſ. pl. 35. Bro. Err. pl. 55. Latch 57. 1 Vent. 100. 1 Mod. 285. Stra. 880, 1015.

40. But if a Perſon bring a Writ of Error in the Exchequer Chamber as upon a Judgment of the King's Bench before Judgment is ſigned, he may bring a ſecond Writ of Error, and have a Writ of *Superſedeas* thereupon; for the firſt Writ of Error being a Nullity, becauſe brought too early, the ſecond is to be conſidered as the firſt. 1 Vent. 100. 2 Rol. Abr. 492. *Smith* v. *Bowles.*

41. If a firſt Writ of Error abate by the Act of God, or for want of Form, or in any Way not by the Act of the Party, a Writ of *Superſedeas* may be had upon a ſecond. Latch 57. *Crouch* v. *Haine.* Bro. Err. pl. 55. pl. 140.

42. It was formerly holden, that if one Writ of Error in Parliament had abated by a Prorogation, and a ſecond were brought in the next Seſſion, a Writ of *Superſedeas*, if a Term had intervened, could not have been awarded upon the ſecond Writ of Error; although the firſt did not abate by the Act of the Party. 1 Vent. 31. *Wortley* v. *Holt.* 2 Lev. 93.

43. But an Order was made, about the Year 1674, by the Houſe of Lords, that no Cauſe therein depending ſhall be diſcontinued by a Pro-rogation. 1 Vent. 266. Lord *Eure* v. *Turton.* 2 Lev. 93.

44. It has ſince the making of this Order been inſiſted, that, although the Cauſe is not diſcontinued by a Prorogation, the Writ of Error does abate; and a Motion was made in the Court of Exchequer for Leave to take out Execution in ſuch Caſe. The Motion was denied; and by the Court: If the Writ of Error be abated by the Prorogation, you may take out Execution without applying to the Court; if it be not, the Court cannot give Leave to do it. The Buſineſs of the Houſe of Lords, in their judicial Capacity, goes over from Seſſion to Seſſion, as Matters below do from Term to Term. Bunb. 131. *Wright* v. *Grove.* Trin. 9 G. 1.

45. Upon the Reverſal of a Judgment upon a Writ of Error the Defendant, who was in Cuſtody, obtained a Writ of *Superſedeas*: But before ſhe could get it allowed, ſhe was charged with a new Declaration at the Suit of the ſame Plaintiff. Application was hereupon made to the Court, 1 Barnes 273. *Sherwin* v. *Bowes.*

Court, and ſhe was ordered to be diſcharged. Being arreſted a ſecond Time, for the ſame Debt for which the firſt Action had been brought, the Court was moved, that ſhe might upon entering a Common Appearance have a Writ of *Superſedeas*. *Wills* Ch. J. and *Comyns* J. were of Opinion, that, as ſhe had the Benefit of a Writ of *Superſedeas* in the firſt Action, which was at the End by the Reverſal of the Judgment, the Plaintiff was now at Liberty to proceed in a ſecond Action. *Denton* J. and *Forteſcue* J. were of Opinion, that ſhe ought to be diſcharged upon entering a Common Appearance. The Court being divided, no Rule was made.

(D) Of certain Writs, which are Superſedeas's by Implication.

1. A Writ of *Audita Querela*.

2 Rol. Abr. 493. pl. 4.

1. IT is in one Caſe laid down, that if an *Audita Querela* be brought upon a Statute Merchant before Execution, it is a *Superſedeas* by Implication.

*Page 675

Salk. 92. *Langton* v. *Grant*.

* 2. But it is in another Caſe laid down, that an *Audita Querela* is never a *Superſedeas* by Implication.

2. A Writ of ſecond Deliverance.

Latch 72. Anon. Goldſb. 185.

3. The Plaintiff in an Action of Replevin having been nonſuited, the Defendant had Judgment *De retorno habendo*, and a Writ iſſued to inquire of the Damages. A Writ of ſecond Deliverance being afterwards brought by the Plaintiff, it was holden to be a *Superſedeas* by Implication, as to the Return of the Goods, but not as to the Writ of Enquiry.

3. A Writ of *Habeas Corpus ad faciendum & recipiendum*.

2 Rol. Abr. 493. *Johnſon* v. *Ellis*.

4. A Writ of *Habeas Corpus ad faciendum & recipiendum* does ſo ſuperſede the Power of the Court to which it is directed, that every Proceeding after it is ſerved and before a *Procedendo* is awarded is void.

Cro. Eliz. 916. Cro. Car. 261. Salk. 352. 1 Mod. 195.

Skin. 244. *Dorington* v. *Edwin*.

5. As the Perſon of the Defendant is by a Writ of *Habeas Corpus ad faciendum & recipiendum* removed out of the Juriſdiction of the Inferior Court, new Bail muſt be put in, and the Plaintiff muſt declare *de novo*.

No Habeas Corpus to be allowed unleſs delivered before Iſſue or Demurrer joined.

6. By the 21 *Ja.* 1. *c.* 23. *par.* 2. it is enacted, "That no Writ of *Habeas Corpus* or any other Writ whatſoever, except Writs of Error or Attaint, to be ſued forth out of any Court, having or pretending to have Power to award ſuch Writ, to remove or ſtay any Action, Bill, Plaint, Suit or Cauſe, brought, commenced or depending, in any Court or Courts of Record, within any City, Liberty, Town Corporate or elſewhere, which ſhall have Juriſdiction, Power or Authority to hold Plea in that Action, Bill, Plaint, Suit or Cauſe, the ſame Cauſe of Action, Bill, Plaint or Suit ariſing or growing within the ſaid City, Liberty, Town Corporate or Juriſdiction, ſhall be received or allowed by the Steward or Stewards, Judge or Judges, Officer or Officers, of

" the

" the Court or Courts, wherein and to whom any ſuch Writ ſhall be " directed and delivered; but that he and they ſhall and may proceed " in the ſaid Cauſe, as though no ſuch Writ was delivered to him or them, " except the ſaid Writ be delivered to the Steward or Stewards, Judge " or Judges, Officer or Officers of the ſaid Court, before Iſſue or De- " murrer joined in the ſaid Cauſe ſo depending in ſuch Court of Record, " ſo as the ſaid Iſſue or Demurrer be not joined within ſix Weeks next " after the Arreſt or Appearance of the Defendant or Defendants to ſuch " Action."

7. By *par.* 3. it is enacted, " That if any Action, Bill, Plaint, Suit or " Cauſe, which ſhall be brought, commenced or depending in any Court " of Record, in any City, Liberty, Town Corporate or elſewhere, ſhall " be removed or ſtayed by any Writ of *Habeas Corpus* or other Writ, and " afterwards the ſame Action, Bill, Plaint, Suit or Cauſe ſhall be re " manded, or ſent back again, by any Writ of *Procedendo* or other " Writ whatſoever; that the ſaid Action, Bill, Plaint, Suit or Cauſe " ſhall never afterwards be removed or ſtayed, before Judgment by any " Writ * whatſoever; any Law, Statute, Cuſtom, Uſage or Reſtraint " to the contrary in any wiſe notwithſtanding." If a Cauſe removed be remanded it is not to be removed a ſecond Time by Habeas Corpus. *Page 676

8. By *par.* 4. it is enacted, " That if in any Action, Bill, Plaint, Suit " or Cauſe, not concerning any Freehold or Inheritance or Title of Land, " or Leaſe or Rent, which ſhall be brought, commenced or depending in " any ſuch Court of Record, in any City, Liberty, Town Corporate or " elſewhere, it ſhall appear or be laid in the Declaration, that the " Debt, Damages, or Thing demanded doth or ſhall not amount to or " exceed the Sum of five Pounds; that then ſuch Action, Bill, Plaint, " Suit or Cauſe ſhall not be ſtayed or removed into any of his Majeſty's " Courts whatſoever, by any Writ or Writs whatſoever, other than by a " Writ of Error or Attaint; any Law, Statute, Uſage, Cuſtom or Re- " ſtraint to the contrary in any wiſe notwithſtanding." No Suit for leſs than the Value of five Pounds to be removed out of an inferior Court.

9. But by *par.* 6. it is provided, That this Act ſhall extend only to " ſuch Courts of Record, and for ſuch Time only, as there ſhall be an " utter Barriſter of three Years ſtanding at the Bar of one of the four " Inns of Court, that is or ſhall be Steward, Under Steward or Deputy " Steward, Town Clerk, or Judge or Recorder of the ſame inferior " Court; or that ſhall be Aſſiſtant from Time to Time to ſuch Judge " of ſuch inferior Court as ſhall not be an utter Barriſter as aforeſaid, " and there preſent, in which ſuch Action, Bill, Plaint, Suit or Cauſe " ſhall be brought, commenced or depending and not of Counſel in " any Action, Bill, Plaint, Suit or Cauſe then depending in the ſame " inferior Court." This Act only to extend to ſuch Courts of which a Barriſter is Judge or aſſiſtant Judge.

10. A Writ of *Habeas Corpus ad faciendum et recipiendum* being delivered to the Court of *Guildford* in *Surry* after Iſſue joined, which was not joined till more than ſix Weeks after the Action was commenced, the Judge refuſed to allow it: But the Proceedings after the Delivery of the Writ were holden to be void, and a Writ of *Superſedeas* was awarded. Firſt, becauſe as it was an Action of Debt upon a Bond for 200 *l.* not made within the Vill, the Cauſe of Action did not ariſe within the Juriſdiction of the Court, and conſequently the Caſe was not within the Meaning of the 21 *Ja.* 1. *c.* 23. Secondly, becauſe the Proceedings were before the Town Clerk who was not an utter Barriſter, and conſequently that Statute does not extend to the Caſe. Cro. Car. 79. *Clapham's* Caſe.

A Writ

4. A Writ of *Certiorari*.

Salk. 148. *Croſs* v. *Smith.* Cro. Eliz. 915. Cro. Car. 261. Salk. 148. 2 Hawk. 291.

11. A Writ of *Certiorari*, in which are theſe Words *coram nobis terminari volumus et non alibi* ſuperſedes all Proceedings ſubſequent to the Delivery thereof, although the Record intended to be certified be never certified.

1 Keb 93. *Rex* v. *Spelman.* Moor 73.

12. It has been holden, that a Writ of *Certiorari* is a *Superſedeas* to the inferior Court from the Time it was ſued out; in the ſame Manner as the ſuing out of a Writ of *Superſedeas* from the Court wherein a Record is, which is an Appearance upon Record, will avoid an Outlawry pronounced after, although the Writ of *Superſedeas* were not delivered to the Sheriff before the *Quinto exactus*.

Cro. Eliz. 915. *Fitzwilliam's* Caſe. Cro. Jac. 282. 6 Mod. 61.

13. But it is laid down in other Books, that a Writ of *Certiorari* is not a *Superſedeas*, until it is delivered to the Court, or Perſon, to whom it is directed.

Salk. 144. *Rex* v. *North.* 6 Mod. 61.

14. And it is in ſome Books laid down, that if a *Certiorari*, for removing an Indictment before Juſtices of Peace, be not delivered before a Jury is ſworn for the Trial of the Indictment the Juſtices may proceed.

*Page 677

15. By the 21 *Ja.* 1. *c.* 8. *par.* 7, 8. it is enacted, "That every Writ "of *Certiorari*, for the Removal of any Indictment of Riot, Forcible En- "try or Aſſault and Battery, found before the Juſtices of the Peace at "their Quarter-Seſſions of the Peace or otherwiſe, ſhall be delivered at "ſome Quarter-Seſſions in open Court, and that in Default thereof it "ſhall be lawful for the ſaid Juſtices to proceed to the Trial of ſuch In- "dictment; any ſuch Writ of *Certiorari* to remove the ſame Indictment "notwithſtanding."

16. A Recognizance was likewiſe ordered by this Statute to be entered into, before the Allowance of a Writ of *Certiorari*: But it is unneceſſary to mention the Terms thereof; becauſe by the 5 & 6 *W.* & *M.* *c.* 11. which extends to all Indictments found at the General or Quarter Seſſions of the Peace, a Recognizance to the ſame Effect, and with ſome new Conditions, is to be entered into before the Allowance of a Writ of *Certiorari*.

A Writ of *Certiorari* brought by a Defendant, for removing an Indictment from the Quarter-Seſſions, is no *Superſedeas* unleſs a Recognizance be entered into.

17. By this Statute, *par.* 2. it is enacted, "That all Parties who have "been indicted ſhall, before the Allowance of a *Certiorari* for removing "any Indictment or Preſentment from the General or Quarter Seſſions of "the Peace, find two ſufficient Manucaptors, who ſhall enter into a Re- "cognizance, before one or more Juſtices of the Peace of the County or "Place, in the Sum of twenty Pounds, with Condition to appear at the "Return of ſuch Writ, and plead to the ſame Indictment or Preſent- "ment in the Court of King's Bench; and at his and their own Coſts "and Charges to cauſe and procure the Iſſue, that ſhall be joined upon "ſuch Indictment or Preſentment, or any Plea relating thereunto, to be "tried at the next Aſſizes, to be held for the County wherein the ſaid "Indictment or Preſentment was found, after ſuch *Certiorari* ſhall be re- "turnable, if not in the Cities of *London* or *Weſtminſter* or in the "County of *Middleſex*; and if in the ſaid Cities or County, then to "cauſe or procure it to be tried the next Term after that wherein ſuch "*Certiorari* ſhall be granted, or at the Sitting after the ſaid Term, if "the Court of King's Bench ſhall not appoint any other Time for the "Trial thereof; and if any other Time ſhall be appointed by the "Court of King's Bench, then at ſuch other Time; and to give due

"Notice

" Notice of ſuch Trial to the Proſecutor or his Clerk in Court; and " that the ſaid Recognizance ſhall be certified into the Court of King's " Bench with the ſaid *Certiorari* and Indictment, to be there filed, and " the Name of the Proſecutor, or ſome publick Officer, to be indorſed " on the Back of the ſaid Indictment; and if the Perſon proſecuting " ſuch *Certiorari*, being the Defendant, ſhall not procure ſuch Manu- " captors to be bound in a Recognizance as aforeſaid, the Juſtices of " the Peace may and ſhall proceed to the Trial of the ſaid Indictment, " at the ſaid Seſſions, notwithſtanding the Delivery of ſuch Writ of " *Certiorari*."

Such Recognizance may be taken by one of the Juſtices of the King's Bench.

18. By the 8 & 9 *W.* 3. *c.* 33. *par.* 2. it is enacted, " That the Party " or Parties, proſecuting any *Certiorari* to remove any Indictment or Pre- " ſentment from the Quarter or General Seſſions of the Peace, may find " two ſufficient Manucaptors, who ſhall enter into a Recognizance be- " fore any one of his Majeſty's Juſtices of the Court of King's Bench, in " the ſame Form and under the ſame Condition as is required by the " 5 & 6 *W.* & *M. c.* 11. whereof Mention ſhall be made on the Back of " ſuch Writ under the Hand of the Juſtice taking the ſame, which ſhall " be as effectual and as available, to ſtay or ſuperſede any further Pro- " ceedings upon any Indictment or Preſentment, for the Removal of which " the ſaid Writ of *Certiorari* was granted, as if the Recognizance had " been taken before any one of the Juſtices of the Peace of the County or " Place where ſuch Indictment was found or Preſentment made; and " alſo it ſhall be added to the Condition of every Recognizance, taken by " virtue of this Act, or the Act made in the fifth and ſixth Years of the " Reign of King *William* and the late Queen *Mary*, that the Party or " Parties proſecuting ſuch Writ of *Certiorari* ſhall appear from Day " * to Day in the Court of King's Bench, and not depart until he or they *Page678 " ſhall be diſcharged by the ſaid Court."

A Writ of *Certiorari*, for removing a Conviction for Deer-ſtealing is no *Superſedeas* without Security for the Payment of Coſts.

14. By the 3 *W.* & *M. c.* 10. intituled *An Act for the more effectual Diſcovery and Puniſhment of Deer-ſtealers*, *par.* 6. it is enacted, " That no " *Certiorari* ſhall be allowed to remove any Conviction made, or other " Proceeding of, for or concerning, any Matter or Thing in this Act, " unleſs the Party or Parties, againſt whom ſuch Conviction ſhall be " made, ſhall before the Allowance of ſuch *Certiorari* become bound to " the Perſon or Perſons proſecuting in the Sum of fifty Pounds, with " ſuch ſufficient Sureties as the Juſtice or Juſtices of the Peace before " whom ſuch Offender was convicted ſhall think fit, with Condition to " pay unto the ſaid Proſecutors, within one Month after ſuch Conviction " confirmed or a *Procedendo* granted, their full Coſts and Damages, to " be aſcertained upon their Oaths; and that in Default thereof it ſhall be " lawful for the ſaid Juſtice or Juſtices, and others, to proceed to the " due Execution of ſuch Conviction, in ſuch Manner as if no *Certiorari* " had been awarded."

A Writ of *Certiorari*, for removing a Conviction for deſtroying Game, is no *Superſedeas* without Security for the Payment of Coſts.

20. By the 4 & 5 *W.* & *M. c.* 23. intituled *An Act for the more eaſy Diſcovery and Conviction of ſuch as ſhall deſtroy the Game of this Kingdom*, *par.* 7. it is enacted, " That no *Certiorari* ſhall be allowed to re- " move any Conviction made, or other Proceeding of, for or concerning, any " Matter or Thing in this Act, unleſs the Party or Parties, againſt " whom ſuch Conviction ſhall be made, ſhall before the Allowance of " ſuch *Certiorari* become bound to the Perſon or Perſons proſecuting in " the Sum of fifty Pounds, with ſuch ſufficient Sureties as the Juſtice or " Juſtices of the Peace before whom ſuch Offender was convicted ſhall " think fit, with Condition to pay unto the ſaid Proſecutor, within one " Month after ſuch Conviction confirmed or a *Procedendo* granted, their " full Coſts and Charges, to be aſcertained upon their Oaths; and that " in Default thereof it ſhall be lawful for the ſaid Juſtice or Juſtices,

" and

" and others, to proceed to the due Execution of ſuch Conviction, in ſuch " Manner as if no *Certiorari* had been awarded."

A Writ of *Certiorari*, for removing an Order of Juſtices, is no *Superſedeas* without a Recognizance for the Payment of Coſts.

21. By the 5 *G.* 2. *c.* 19. *par.* 2. after reciting that divers Writs of *Certiorari* have been procured to remove Judgments or Orders of Juſtices of the Peace into his Majeſty's Court of King's Bench at *Weſtminſter*, in hopes thereby to diſcourage and weary out the Parties concerned in ſuch Judgments and Orders by great Delays and Expences, it is enacted, " That no *Certiorari* ſhall be allowed, to remove any ſuch Judgment or " Order, unleſs the Party or Parties proſecuting ſuch *Certiorari* ſhall " before the Allowance thereof enter into a Recognizance with ſufficient " Sureties, before one or more Juſtice or Juſtices of the Peace of the " County or Place, or before the Juſtices at their General Quarter-" Seſſions or General Seſſions, where ſuch Judgment or Order ſhall have " been given or made, or before one of his Majeſty's Juſtices of the " ſaid Court of King's Bench, in the Sum of fifty Pounds, with Con-" dition to proſecute the ſame at his or their own Coſts and Charges with " Effect, without any wilful or affected Delay, and to pay the Party or " Parties, in whoſe Favour and for whoſe Benefit ſuch Judgment or " Order was given or made, within one Month after the ſaid Judgment " or Order ſhall be confirmed, their full Coſts, to be taxed according to " the Courſe of the Court where ſuch Judgment or Order ſhall be " confirmed; and in caſe the Party or Parties proſecuting ſuch *Cer-*" *tiorari* ſhall not enter into ſuch Recognizance, or ſhall not perform the " Conditions aforeſaid, it ſhall and may be lawful for the ſaid Juſtices " to proceed, and make ſuch further Order or Orders, for the Benefit " of the Party or Parties for whom ſuch Judgment ſhall be given, in " ſuch Manner as if no *Certiorari* had been granted."

2 Rol. 492. Anon.

22. It is ſaid, that a Writ of *Certiorari*, for removing a Recognizance to appear at the next General Aſſize, and in the mean Time to be of good Behaviour, is a *Superſedeas* to the Obligation of the Recognizance.

*Page 679

Cro. Jac. 482. *Roſſe* v. *Pye*. Yelv. 207.

* 23. But it is laid down in other Books, that although the Recognizance be in ſuch Caſe removed by the *Certiorari* the Defendant is bound to appear; and that in Default of Appearance it ſhall be forfeited.

1 Bulſtr. 156. 2 Hawk. 294.

5. A Writ of Error.

Cro. Jac. 534. *Biſhop of Oſſory*'s Caſe. Godb. 439.

24. A Writ of Error is a *Superſedeas* by Implication.

Bro. Exec. pl. 68. Bro Superſ. pl. 16, 17. Cro. Jac. 534. Skin. 422.

25. If the Record of a Judgment be removed by a Writ of Error it is neceſſarily a *Superſedeas*; for the Record being removed it is impoſſible for the Juſtices of the Court, in which it was, to award Execution.

26. And when the Record of a Judgment is not removed, it would be quite unreaſonable that the Law ſhould ſuffer a Writ of Error to be brought, the Conſequence of which may be a Reverſal of the Judgment, and ſuffer Execution to be taken out upon the Judgment pending the Writ of Error.

1 Mod. 28. *Hughes* v. *Underwood*.

27. Some of the Parties Names having been omitted in a Writ of Error Execution was taken out upon the Judgment; the Plaintiff being adviſed, that the Record of the Judgment was not removed by this defective Writ: But it was holden, that although the Record was not thereby removed, the Hands of the Court were ſo tied up by the Writ of Error, that

that a Writ of Execution ought not to have iſſued. Such Defect may be a Reaſon to quaſh a Writ of Error: But a defective Writ of Error is, until it be quaſhed, a *Superſedeas*.

28. A Plaintiff who has ſigned Judgment in a real Action may, if his Entry were lawful without the Judgment, enter notwithſtanding a Writ of Error is brought: For he does not in this Caſe enter by Virtue of the Judgment; and the Writ of Error ſhall not put him into a worſe Condition than he was before. 12 Mod. 398. *Badger* v. *Floyd.*

29. *J. N.* having obtained Judgment againſt *J. S.* he ſued out a Writ of *Capias ad ſati faciendum*, to which the Return was *Non eſt inventus*. Hereupon he ſued out a *Scire facias* againſt his Bail, and upon the Return thereunto ſued out a ſecond *Scire facias*. Before the Return to the ſecond *Scire facias* the Defendant brought a Writ of Error: It was holden that the Writ of Error was not a *Superſedeas* to the Proceedings againſt the Bail; becauſe theſe are founded upon an Original different from that upon which the Judgment is founded. 2 Rol. Abr. 491. *Lock* v. *Tillierd.*

30. And for the ſame Reaſon, if *J. N.* after obtaining Judgment againſt *J. S.* proceed to Judgment upon a *Scire facias* againſt his Bail, and the Bail bring a Writ of Error, this ſhall not ſuperſede Execution upon the Judgment againſt *J. S.* 2 Rol. Abr. 491. C. pl. 5.

31. But if a *Scire facias* be brought to have Execution upon a Judgment, a Writ of Error brought upon the Judgment will be a *Superſedeas* to the Proceedings upon the *Scire facias*, becauſe theſe are founded upon the ſame Original as the Judgment is. 2 Rol. Abr. 490. B. pl. 3.

32. Upon this Diſtinction, between Proceedings founded upon the ſame or different Originals, it was formerly holden, that although a Writ of Execution cannot iſſue upon a Judgment pending a Writ of Error, an Action of Debt may be brought upon the Judgment; becauſe the Action of Debt is founded upon a different Original. Bro. Err. pl. 170. 2 Rol. Abr. 490. B. pl. 4. Dyer 32.

33. But this Doctrine was long ago queſtioned, and many Attempts have been made to overthrow it.

34. It was once pleaded to an Action of Debt upon a Judgment brought pending a * Writ of Error, that the Record of the Judgment was removed: But the Opinion of the Court was, that notwithſtanding the Removal the Action lay. Dyer 32. Anon. *Page 680

35. It is in one Caſe ſaid, that if an Action of Debt upon a Judgment be brought before a Writ of Error the Action lies: But that if the Writ of Error be brought firſt the Action does not lie. Raym. 100 *Adams* v. *Tomlinſon.*

36. In Anſwer to this Diſtinction the Caſe of *Limbuy* v. *Langham*, which is cited by *Dolben* in a Caſe in *Skinner*, and mentioned in Sir *Thomas Raymond*'s Reports, has been frequently relied upon; wherein it was holden by all the Judges, that a Writ of Error, whether it be brought before or after an Action of Debt upon a Judgment, is not a *Superſedeas* to the Action. Skin. 388. *Grandvill* v. *Digleton.*

37. It was once pleaded in Bar to an Action of Debt upon a Judgment, that a Writ of Error was depending upon the Judgment. This Plea was upon a Demurrer holden to be bad; but the Opinion of the Court of King's Bench was, that if the ſame Matter had been pleaded in Abatement it would have been good. Carth. 1. *Rogers* v. *Mayhoe*, Trin. 3 Jac. 2.

38. And in the ſame Term a Plea in Abatement, wherein the ſame Matter was pleaded, was holden by the Court of King's Bench to be good. Carth. 191. *Aby* v. *Buxton*, Trin. 3 Jac. 2.

39. But another Plea in Abatement, wherein the ſame Matter was pleaded, was ſhortly after holden to be bad; and it was laid down, that ſuch Matter pleaded in Abatement is as inſufficient as if it had been pleaded, Show. 146. *Rottenhoffer* v. *Lenthall.* Patch. 2 W. & M.

pleaded in Bar; and that ſuch Plea in Abatement had never, except in the Caſe of *Aby* v. *Buxton*, been holden to be good.

Sid. 236. *Adams* v. *Tomlinſon*, Hil. 16. Car. 2.

40. At another Time a Diſtinction was taken, between an Action of Debt upon a Judgment of the Court of King's Bench, and one upon a Judgment in the Court of Common Pleas, or of any other Court out of which the Record of the Judgment is removed by a Writ of Error; and it was holden, that a Writ of Error is not a *Superſedeas* to an Action of Debt brought in the Court of King's Bench upon a Judgment of that Court; becauſe the Record, as only a Tranſcript thereof is ſent upon bringing a Writ of Error into the Court of Exchequer, or the Houſe of Lords, remains in that Court: But a Doubt was made, if ſuch Action would not lie in the Court of Common Pleas, upon a Judgment of that Court.

41. This, which would be prejudicial to the Court of Common Pleas, is not reconcileable with what is laid down in divers Books.

7 H. 6. 31. Bro. Exec. pl. 68. 18 E. 4. 6. b.

42. As long ago as the ſeventh Year of *Henry* the Sixth it was holden, that an Action of Debt would lie in the Court of Common Pleas upon a Judgment of that Court, notwithſtanding a Writ of Error had been brought upon the Judgment.

2 Rol Abr. 491. D. pl. 3. 1 Lev. 153. 12 Mod. 391.

43. And it is laid down in divers Caſes, that a Writ of Error is only a *Superſedeas* ſo far as to bind the Hands of the Court, that a Writ of Execution cannot be iſſued upon the Judgment.

3 Lev. 397. *Gale* v. *Hill*. Paſch. 6 W. & M.

44. Upon the Strength of theſe Authorities it was, not many Years after the Doubt made in the Court of King's Bench, reſolved by the Court of Common Pleas, that, although the Record of a Judgment of the Court of Common Pleas be removed by a Writ of Error, an Action of Debt will lie in that Court upon the Judgment pending the Writ of Error.

45. At length Courts of Juſtice hit upon a Method, of preventing the Effect of an Action of Debt brought upon a Judgment pending a Writ of Error. This was, and indeed there was no other Way of doing it, without determining contrary to what had been holden in a Number of Caſes, by making a Rule, that upon giving Judgment in the Action Execution ſhall be ſtayed until the Writ of Error is determined.

Skin. 388. *Glanville* v. *Dighton*.

46. The Practice of making ſuch Rules ſeems to have been introduced at the latter End of the Reign of *William* the Third, or early in the Reign of Queen *Anne*: For in the fifth Year of the Reign of *William* and *Mary* it was holden by the Court of King's Bench, that ſuch Action would lie; and no Notice is taken of any Method to render it ineffectual.

*Page 681 11 Mod. 78. Anon.

* 47. In one Caſe, which was in the fifth Year of the Reign of *Anne*, the Law is ſaid to be ſettled, that a Writ of Error is a *Superſedeas* to all Proceedings upon a Judgment.

1 Barn. 140. *Humphrys* v. *Daniel*, Eaſt. 9 G. 2. Ibid. 143. *Clarkſon* v. *Phyſick*. Mich. 13. G. 2.

48. But it appears from later Caſes, that unleſs Application be made to the Court to ſtay the Proceedings, an Action of Debt upon a Judgment may not only be proceeded in pending a Writ of Error, but that Execution may be taken out upon the Judgment in ſuch Action.

49. If this be ſo, it could not in the fifth Year of the Reign of *Anne* have been ſettled, that a Writ of Error is a Superſedeas to all Proceedings upon a Judgment: But it was probably about that Time ſettled, that if an Action of Debt have been brought upon a Judgment, after a Writ of Error has been brought upon the Judgment, the Court will, upon giving Judgment in the Action of Debt, order Execution in that Action to be ſtayed, until the Writ of Error is determined.

Sayer 166. *Ridout* v. *Wheeler*.

50. Upon a Rule to ſhew cauſe, why a Writ of *Fieri Facias* ſhould not be ſet aſide, and why the Money levied thereupon ſhould not be reſtored, it appeared, that a Writ of Error *coram Vobis* had been brought and allowed; that the Plaintiff's Attorney had been ſerved with a Notice of the

the Allowance before the Writ of *Fieri Facias* was ſued out; that the Writ of Error was not determined; and that the Writ of *Fieri Facias* was ſued out without Leave of the Court. The Rule was made abſolute; and by the Court: A Writ of Error *coram Vobis* is not a *Superſedeas*, in itſelf: but Execution cannot be taken out whilſt it is depending, without Leave of the Court. It would be very unreaſonable, that it ſhould be in the Power of a Plaintiff, to take out Execution upon a Judgment without Leave of the Court, whilſt a Queſtion is depending concerning a Fact, by which, in caſe the Fact be as it is alledged, his Right of Action will be deſtroyed.

(E) Of certain Requiſites, which are neceſſary to the making of a Writ of Error a Superſedeas by Implication.

1. IT has under the laſt Head been ſhewn, that a Writ of Error is in the general a *Superſedeas* by Implication: But it ſhould be remembered, that it is not ſo, unleſs certain Requiſites have been complied with.

1. It muſt be allowed.

2. It has been holden, that a Writ of Error is a *Superſedeas* from the Time of its being ſealed. 1 Mod. 28. *Hughes* v. *Underwood.* 1 Ventr. 30. 1 Keb. 12.

3. But the better Opinion is, that a Writ of Error is not a *Superſedeas*, until it be allowed, except Notice of its having been ſued out be given to the Defendant in Error. Salk. 321. *Perkins* v. *Woolaſton.* 1 Ventr. 255. 1 Mod. 112. 6 Mod. 130. Poph. 132. 8 Mod. 147.

4. Notice to the Defendant of a Writ of Error having been ſued out is however only a temporary *Superſedeas*: For, if the Writ be not allowed within four Days after it is ſued out, Execution may be taken out. 1 Mod. 112. *Lampiere* v. *Mereday.* 1 Ventr. 255. 2 Keb. 129.

5. The Allowance of a Writ of Error, although no Notice is given of its having been ſued out, makes it a *Superſedeas*: But, although a Writ of Error be from the Time of the Allowance a *Superſedeas*, an Attorney who takes out Execution after the Allowance, is not guilty of a Contempt, unleſs he had Notice of its having been ſued out. Salk. 321. *Perkins* v. *Woolaſton.* 6 Mod. 130. 2 Rol. Abr. 492. 1 Ventr. 30. Rep. of Pr. in C. B. 35, 39. Str. 632. 1 Mod. 148.

6. Other Writs of Error, being Writs of Right, are allowed of Courſe: But a Writ of Error *coram vobis* cannot be allowed without Leave of the Court. Stra. 949. *Horne* v. *Buſcel.* 1 Ventr. 207. Stra. 690.

7. And the Court will not give Leave for the Allowance of a Writ of Error *coram Vobis*, unleſs there be an Affidavit of ſome Error in Fact; by which, in caſe the Fact be as it is alledged, the Plaintiffs Right of Action will be deſtroyed. Sayer 166. *Rabout* v. *Wheeler.*

2. Bail

*Page 682 * 2. Bail must be put in thereto.

1 Barn. 139. *Cramborne* v. *Quennell.* 8. If the Chief Justice, to whom a Writ of Error is directed die before it is returned, the Writ becomes ineffectual; but Execution cannot be taken out without Leave of the Court.

Sayer 52. *Spratt* v. *Frederick.* 9. Upon a Rule to shew Cause, why a *Scire Facias*, which had been sued out upon a Judgment, should not be set aside, it appeared, that a Writ of Error was delivered to the Clerk of the Errors before the *Scire Facias* was sued out: But that Bail was not put in at the Time of suing it out. The Rule was made absolute; and by the Court: Upon the Delivery of a Writ of Error to the Clerk of the Errors, it becomes a *Supersedeas* to a *Scire Facias* upon a Judgment; and continues to be so for the Space of four Days from the Allowance of the Writ; after which Time, if the Plaintiff in Error neglect to put in Bail, it ceases to be a *Supersedeas.*

1 Keb. 690. *The Dean of St. Paul's* v. *Capel.* 3 Lev. 312. 10. Execution having been taken out after special Bail was put into a Writ of Error, because Notice was not given of Bail being put in, a Writ of *Supersedeas* was granted; and by the Court: The putting in of Bail, if no Exception be taken thereto, is sufficient to stay Execution; for the giving of Notice is not necessary, and is only done for the Sake of making the Party, who takes out Execution after Notice, liable to be proceeded against for the Contempt.

1 Barn. 142. *Mason* v. *Simmonds.* 11. In an Action against five Defendants Damages of twenty Pounds were found by a Verdict against four of them, and five Shillings against the other who had suffered Judgment to go by Default. A Writ of Error was brought by the four, in the Name of him against whom the Judgment by Default was; and as he was not obliged to put in Bail, no Bail was put in: The Court gave Leave to take out Execution notwithstanding this Writ of Error.

Salk. 97. *Tilly* v. *Richardson.* 8 Mod. 80. Stra. 527. 12. A Writ of Error was brought in the Court of King's Bench upon a Judgment of the Court of Common Pleas; and the Judgment was affirmed. Upon bringing a Writ of Error afterwards in Parliament it was insisted, that no new Recognizance was required by the 3 *Ja.* 1. *c.* 8. But by the Court: The first Recognizance does not include the Payment of Costs to be assessed in the House of Lords; and therefore a new Recognizance ought within the Meaning of that Statute to be entered into. It is not the Business of this Court, to enquire, whether Bail were put into the first Writ of Error; in as much as, the Want of Bail does not prevent the Proceeding upon a Writ of Error, for it does only prevent its being a *Supersedeas.*

3. It must be proceeded in without Delay.

Jenk. 93. pl. 80. 2 Rol. Abr. 491. 13. If there be too long a Day between the Teste and the Return of a Writ of Error, or if the Plaintiff in Error do not remove the Record before the Return Day, Execution may be taken out; it plainly appearing that the Writ of Error was brought for Delay.

Sid. 44. Anon. Jenk. 93. pl. 80. 14. A Motion was made in *Michaelmas* Term, that the Time of the Return of a Writ of Error, brought upon a Judgment of the Court of King's Bench, which was made returnable in the Court of Exchequer in *Hilary* Term following, might be shortened; or that the Court would award Execution. As to the first Point the Court said, that, as the Writ had issued from the Court of Chancery, they had no Power to make any Alteration therein. As to the second Point, the Court said, that the Law is open to all Men; and if the Return be as suggested, Execution may be taken out: For, if a Writ of Error be sued out with too long a Return, it is not a *Supersedeas.*

15. It

15. It has been holden, that a Writ of Error returnable *ad proximum Parliamentum* is not, by Reaſon of the Diſtance of the Return, a *Superſedeas.* 1 Ventr. 31. *Wortly* v. *Holt.*

16. A Writ of Error in Parliament being made returnable the firſt Day of a Seſſion, the Houſe was moved, that if the Plaintiff in Error do not tranſcribe the Record within eight Days Execution may be taken out. An Order was made to ſhew Cauſe: But it was afterwards diſcharged; * for that, as by the Order of the Houſe, of the 13th Day of *July*, 1678, fourteen Days after the Beginning of the Seſſion in which a Writ of Error is returnable are given to tranſcribe the Record, it is not reaſonable, that the Defendant in Error ſhould take out Execution within that Time. Com. 420. *Barnes* v. *Otway.* *Page 683

17. But where a Record was not tranſcribed within fourteen Days, after the Beginning of a Seſſion, it was ordered, that the Record ſhould be tranſcribed and certified into Parliament within eight Days, or that the Defendant in Error ſhould be at Liberty to take out Execution. Bunb. 69. *Froſt* v. *Dawes.*

(F) To what Time a Writ of Error relates as a Superſedeas.

1. ALTHOUGH the Teſte of a Writ of Error be before Judgment, it is good, in caſe there be Judgment before the Return of the Writ. 1 Mod. 112. Anon.

2. A Writ of Error being returnable on the Eſſoin Day of *Hilary* Term, and Judgment not being ſigned till three Days after the Eſſoin Day, the Plaintiff, apprehending the Record was not removed by the Writ of Error, took out Execution. The Execution was ſet aſide with Coſts; and by the Court: As every Judgment relates to the Eſſoin Day of the Term of which it is entered; the Record was well removed. 1 Barn. 134. *White* v. *Morgan.*

3. Execution having been taken out upon a Judgment ſigned in a *Trinity* Vacation, notwithſtanding the Allowance of a Writ of Error returnable in the *Trinity* Term, it was ſet aſide with Coſts; and by the Court: The Judgment, although ſigned in the Vacation, related to the firſt Day of the preceding Term, and conſequently, as it was ſigned before the Return of a Writ of Error, the Writ of Error was a *Superſedeas.* 1 Barn. 131. *Warwick* v. *Figg.*

4. The Plaintiff having obtained a Verdict at an Aſſize in a long Vacation, the Defendant brought a Writ of Error, which was allowed and Bail put in on the 24th Day of *October* following. Upon the 27th Day of *October* the Plaintiff entered Judgment generally, and took out Execution, Teſte the firſt Day of the then *Michaelmas* Term, which was executed before Notice was given of the Writ of Error. But Reſtitution was awarded; and by the Court: By the putting in of Bail to the Writ of Error the Hands of the Court were ſo tied up, that the Execution, although no Notice was given of the Writ of Error, is void. The Judgment does indeed, the Entry being general, relate to the firſt Day of the *Michaelmas* Term, namely, the 23d Day of *October*, and the Execution relates to the ſame Day; and conſequently the Date of both is antecedent to the Allowance of the Writ of Error, which was upon the 24th Day of *October*: But as the Judgment is founded upon a Verdict in the Vacation of *Trinity* Term, it could not be entered till the *Quarto die poſt*; namely until the 27th of *October*, before which Day the Writ of Error was allowed. 3 Lev. 312. *Smith* v. *Cave.* Hob. 329. 8 Mod. 148.

5. A Plaintiff not having ſigned his Judgment until the Return Day of a Writ of Error was paſt, the Queſtion was, whether the Writ of Error were a *Superſedeas*. It was holden that it was not; and by the Court: Rep. of Pr. in C. B. 50. *Harding* v. *Avery.*

The Plaintiff may ſign his Judgment when he pleaſed; and, as he did not in fact ſign it till after the Return Day of the Writ of Error, the Writ did not attach upon the Judgment.

Rep. of Pr. in C. B. 71. *Duffield* v. *Warden*, Eaſt. 5 G. 2.

6. In a ſubſequent Caſe wherein the Plaintiff, who had been called upon to do it, delayed the ſigning of Judgment until the Return Day of a Writ of Error was paſt, the Court ordered him to pay the Defendant his Coſts, and to ſue out a new Writ of Error at his own Expence. The Reporter of this Caſe cites the Caſe of *Harding* v. *Avery*, and adds *Quære tamen*; for it does not appear, that the Plaintiff has in this Caſe in any Manner miſbehaved himſelf.

1 Barn. 177. *Arden* v. *Lamley*. Eaſt. 8 G. 2.

7. In another ſubſequent Caſe wherein the Plaintiff's Attorney, who had artfully delayed the ſigning of Judgment until the Return Day of a Writ of Error was paſt, then ſigned Judgment, and brought an Action of Debt upon the Judgment, a Rule was made for ſtaying Proceedings in the Action; and that a new Writ of Error ſhould be ſued out at the Attorney's Expence.

*Page 684 MS. Rep. *Fiſher* v. *Brandon*. Hil. 5 G. 3. in C. B.

8. In a very modern Caſe, the Plaintiff's Attorney, notwithſtanding he had Notice of the Allowance of a Writ of Error, delayed the ſigning of Judgment, until the Return Day of the Writ of Error was paſt, and then ſigned Judgment, and took out Execution. A Rule was made for ſetting aſide the Execution, and that a new Writ of Error ſhould be ſued out at the Attorney's Expence; and by Lord *Mansfield*, Ch. J. In the Caſe of *Arden* v. *Lamley*, 1 *Barn.* 177, a Rule of the ſame Kind, notwithſtanding there are ſome old Caſes to the contrary, was made.

(G) What the Effect of a Superſedeas is.

Cro. Jac. 379. *Withers* v. *Henley*.

1. UPON a Demurrer to a Declaration in an Action of falſe Impriſonment againſt a Sheriff it was ſaid, that as the Defendant had arreſted the Plaintiff upon a *Capias*, before a Writ of *Superſedeas* was delivered to him, he was not bound, the Arreſt being lawful, to diſcharge him, but may return the Writ upon which he was arreſted, together with the Writ of *Superſedeas*, for the Court to do as they think proper: But it was holden unanimouſly, that the Writ of *Superſedeas* was as obligatory upon the Sheriff to diſcharge the Plaintiff, as the *Capias* was to arreſt him; and that as he did not obey it, he is liable to an Action of falſe Impriſonment.

1 Ventr. 2. Anon. Fitz. N. B. 237. Jenk. 92. pl. 80.

2. If a *Capias ad Satisfaciendum* have iſſued upon a Judgment, and the Defendant be arreſted upon it, the Sheriff is not bound to diſcharge him, notwithſtanding a Writ of *Superſedeas* be delivered to him, or he have Notice of the Allowance of a Writ of Error; becauſe the Defendant is in that Caſe taken in Execution.

Jenk. 92. pl. 80.

3. But if the Perſon who is arreſted upon a *Capias ad Satisfaciendum*, have a Writ of *Superſedeas* in his Pocket, and deliver it to the Sheriff immediately upon being arreſted, he ought to be diſcharged.

1 Barn. 261. *Peachy* v. *Bowes*.

4. After the Reverſal of a Judgment, the Defendant, who was in Cuſtody, ſued out a Writ of *Superſedeas*: But before ſhe could get the Writ allowed the Plaintiff charged her with another Declaration. She was notwithſtanding this Declaration, ordered to be diſcharged; and by the Court: As the Defendant was in Cuſtody at the Plaintiff's Suit only, ſhe could not regularly be charged with a ſecond Declaration after the Reverſal of the Judgment, upon which ſhe had been wrongfully detained.

5. If

5. If Goods be taken in Execution after the ſuing out a Writ of *Superſedeas* or the Allowance of a Writ of Error, the Court, although the Writ were not delivered to the Sheriff, or although Notice were not given to him of the Allowance of the Writ of Error before the taking of the Goods, will order Reſtitution, or, in caſe the Goods have been ſold, will order the Money to be brought into Court. 1 Ventr. 30. *Cotton* v. *Daintry.* Rep. of Pr. in C. B. 35, 39.

6. It has been holden, that if before Sale of Goods, which have been ſeized under a *Fieri Facias*, the Defendant deliver a Writ of *Superſedeas* to the Sheriff, he ſhall have the Goods again; for that the Property is not altered by the Seizure. 2 Rol. Abr. 491. *Sare* v. *Shelton.*

7. But this Caſe does not ſeem to be Law; for it is laid down in other Books, that if an Execution be begun, it ſhall, notwithſtanding the Delivery of a Writ of *Superſedeas* or the Allowance of a Writ of Error, proceed. 2 Rol. Abr. 492. D. pl. 6. Ibid. 493. H. pl. 2.

Dyer 98. Yelv. 6. 1 Vent. 255. Salk. 323. Ld. Raym, 990.

8. A Sheriff having ſeized Goods under a *Fieri Facias* upon a Judgment of the Court of King's Bench; the Record, before the Sale of the Goods, was removed by a Writ of Error into the Exchequer Chamber and a Writ of *Superſedeas* was awarded. Upon the Return of the Sheriff to the *Fieri Facias*, that he had ſeized the Goods, and that they remained in his Hands *pro Defectu Emptorum*, Reſtitution was prayed. It was holden, that as the Execution was begun before the Writ of *Superſedeas* was delivered to the Sheriff, a Writ of *Veditioni exponas* ſhould be awarded to perfect it; and that, although * the Plea Roll be removed by the Writ of Error, the Writ of *Venditioni exponas* may be awarded from the Return to the *Fieri Facias*. Cro. Eliz. 597. *Carter* v. *Peter.* *Page 685

9. But if a Writ of Execution have iſſued contrary to a Rule of Court, or upon a Judgment entered irregularly, it may, notwithſtanding it has been in Part executed, be ſet aſide, *quia improvide emanavit.* Jenk. 93. pl. 80.

10. If a Perſon, who has been taken in Execution and his Lands extended upon a Statute Merchant, bring a Writ of *Audita Querela*, he may have a Writ of *Superſedeas quoad* his Perſon: But as the Writ of *Superſedeas* is awarded, for the Sake of giving him an Opportunity of proſecuting the *Audita Querela*, he ſhall, in caſe he be not relieved upon the *Audita Querela*, be taken into Cuſtody again. 2 Rol. Abr. 493 *Whidner* v. *Conyers.*

11. Upon a Rule to ſhew Cauſe, why a Judgment ſhould not be ſet aſide for Irregularity, and why the Defendant ſhould not be diſcharged out of Cuſtody, it appeared; that eight Years before a Writ of *Superſedeas* had been awarded, for diſcharging the Defendant out of Cuſtody, becauſe he was not charged in Execution in proper Time after Judgment had been ſigned againſt him; and that he was now in Cuſtody upon a *Capias ad ſatisfaciendum*, which had iſſued upon a Judgment in an Action of Debt upon the former Judgment. The Rule was made abſolute; and by the Court: It has been truly ſaid, that, if after a Defendant has been diſcharged out of Cuſtody for want of being charged in Execution in proper Time, his Perſon cannot be afterwards taken in Execution upon the ſame Judgment: But this does not apply to the preſent Caſe; for the Defendant has not been taken in Execution upon the Judgment in the former Action, but upon a Judgment in a different Action. MS. Rep. *Baldwin* v. *Foot.* Eaſt. 14 G. 3. in C. B.

(H) How Diſobedience to a Superſedeas may be puniſhed.

Cro. Jac. 379. *Wythers* v. *Henley.* 1 Rol. Rep. 241. 3 Bulſtr. 97. Fitzh. N. B. 236.

1. IF a Sheriff, or other Officer, detain a Perſon in Cuſtody, who has been arreſted upon a *Capias* or an Exigent, after a Writ of *Superſedeas* was delivered to him, an Action of falſe Impriſonment lies.

1 Ventr. 2. Anon. Fitzh. N. B. 237. Jenk. 92. pl. 80.

2. But no Action lies, for detaining a Perſon who has been arreſted upon a *Capias ad ſatisfaciendum:* Becauſe ſuch a Perſon is taken in Execution.

2 Hawk. 151.

3. A Judge of an inferior Court is liable to be puniſhed for a Contempt if he proceed in a Cauſe after the Delivery of a Writ of *Habeas Corpus ad faciendum et recipiendum*, or after Notice of the Allowance of a Writ of Error.

Fitzh. N. B. 14. Fitzh. Replev. 31.

4. A Sheriff is liable to be puniſhed for a Contempt, if he proceed in a Cauſe in his County Court after the Delivery of a Writ of *Superſedeas.*

Moor 677. *Fitzwilliams's* Caſe. 1 Mod. 44. Cro. Eliz. 915. 2 Hawk. 251.

5. Juſtices of the Peace, or Commiſſioners of Sewers, are liable to be puniſhed for a Contempt, if they proceed in a Matter after the Delivery of a Writ of *Certiorari.*

1 Vent. 30. *Cotton* v. *Daintry.* Rep. of Pr. in C. B. 35.

6. A Sheriff, who has taken a Perſon, or the Goods of a Perſon, in Execution after the Delivery of a Writ of *Superſedeas*, or after Notice of the Allowance of a Writ of Error, is liable to be puniſhed for a Contempt.

1 Barn. 275. *Hannot* v. *Farrettes.* Rep. of Pr. in C. B. 35.

7. If an Attorney take out Execution after Notice of the Allowance of a Writ of Error, he is liable to be puniſhed for a Contempt.

---

*Page 686

* Surety of the Peace.

SURETY of the Peace is a Recognizance entered into to the King for keeping the Peace.

Under this Title it will be proper to ſhew,

(A) In what Caſes, a Juſtice of the Peace may ex Officio compel a Perſon to find Security for keeping the Peace.

(B) Who

(B) Who may crave Surety of the Peace.
(C) Against whom Surety of the Peace may be granted.
(D) In what Cases, Surety of the Peace ought to be granted.
(E) The Manner of granting Surety of the Peace by the Court of Chancery.
(F) The Manner of granting Surety of the Peace by the Court of King's Bench.
(G) The Manner of granting Surety of the Peace by a Justice of the Peace.
(H) In what Cases, a Recognizance for keeping the Peace is forfeited.
(I) In what Cases, a Recognizance for keeping the Peace may be discharged.

(A) In what Cases, a Justice of the Peace may ex Officio compel a Person to find Security for keeping the Peace.

1. A Justice of the Peace may at his Discretion bind all those to keep the Peace, who in his Presence shall make any Affray, or shall threaten to kill or beat any Person, or shall contend together with hot Words; and all those, who shall go about with unusual Weapons or Attendants to the Terror of the People; and all such Persons as he shall know to be common Barretors; and all who shall be brought before him by a Constable for a Breach of the Peace in the Presence of such Constable; and all Persons who having been before bound to keep the Peace, shall be convicted of having forfeited their Recognizance. Lamb. 77, 78. Bro. Peace. pl. 7, 8. 1 Hawk. 126.

---

* (B) Who may crave Surety of the Peace. *Page 687

1. ALL Persons under the King's Protection, being of *sane* Memory, whether natural born Subjects or Aliens, good Subjects or attainted of Treason or other Crime, have a Right to crave Surety of the Peace. Lamb. 78, 79, 80. 1 Hawk. 126.

2. It has been questioned, whether Jews or Pagans, or Persons attainted of *Præmunire*, have a Right to crave Surety of the Peace. Lamb. 80. 1 Hawk. 126.

3. A Wife may crave Surety of the Peace against her Husband, if he threaten to beat her outrageously, or to kill her. Fitz. N. B. 80. Lamb. 80. 2 Lev. 128. 1 Hawk. 127.

4. A Woman exhibited Articles of the Peace, in which she called herself the Wife of the Defendant, and set forth the Pendency of a Suit in the Ecclesiastical Court for the Restitution of Conjugal Rights. When the Stra. 1231. *Rex* v. *Bambridge*.

the Defendant came to put in Bail, he desired, that the Recognizance might not be taken so as to carry with it an Admission of a Marriage: And the Court ordered it to be in these Terms; "To keep the Peace "towards our Sovereign Lord the King and all his liege People, and "particularly towards *Hannah Pemm*, who hath exhibited Articles of the "Peace against him the said *James Bambridge* by the Name of *Hannah* "*Bambridge* Wife of him the said *James*."

Stra. 1207. *Sims*'s Case. 1Hawk.127.

5. Surety of the Peace may be craved by a Husband against his Wife.

Pult. 18.

6. It is said, that Surety of the Peace is usually granted at the Request of one Person, for that the Fear of one Person can scarce ever be the Fear of another; and that if Surety of the Peace be granted against two or more Persons, every one of them must enter into a separate Recognizance.

MS. Rep. *Rex* v. *Nettle and two others*. Mich. 23 G. 2.

7. But in a modern Case, the Court of King's Bench allowed three Women to file joint Articles of the Peace against three Men.

(C) Against whom Surety of the Peace may be granted.

Lamb. 81. 1Hawk.127.

1. SURETY of the Peace may be granted against every Person of *sane* Memory, whether of full Age or under Age.

1Hawk.127. Lamb. 81.

2. If Surety of the Peace be granted against an Infant or Feme Covert, who cannot themselves be bound, a Recognizance must be entered into by their Friends.

(D) In what Cases, Surety of the Peace ought to be granted.

Lamb. 82. 1Hawk.127. Stra. 473.

1. IF one Person have just Cause to Fear, that another Person will burn his House, or do him some corporal Hurt; or that he will procure a third Person to do him some corporal Hurt, Surety of the Peace ought to be granted.

*Page688 Bro. Peace, pl. 22.

* 2. It is said, that Surety of the Peace ought not to be granted for threatning to imprison; because Damages may be recovered in an Action of false Imprisonment.

Lamb. 83. 1Hawk.127.

3. But the better Opinion is, that it ought to be granted in such Case, because Imprisonment is a corporal Hurt. The Reason given for its not being granted is no more conclusive in this Case than in that of a Battery: For an Action will lie for a Battery; and yet Surety of the Peace ought to be granted for threatning to beat.

Moor. 874. Sir *Thomas Seymour*'s Case. Godb. 215. Fitzh. N. B. 80.

4. Surety of the Peace ought to be granted against a Husband, if he give his Wife unreasonable Correction.

1 Keb. 290. *Rex*. v. *Douglas*.

5. Divers Persons having made a Disturbance in a Church, and pulled the Minister who was reading the Common Prayer, out of the Desk, the Court of King's Bench gave Leave to exhibit Articles of the Peace against them.

6. If

6. If one Perſon threaten to hurt the Wife or Child of another, Surety of the Peace ought to be granted. Dalt. 266.

7. But Surety of the Peace ought not to be granted, becauſe one Perſon threatens to hurt the Servant or Cattle of another. Lamb. 83.

8. Surety of the Peace ought not to be granted on Account of a paſt Beating, unleſs there be Fear of future Danger: The Remedy in ſuch Caſe being by Action or Indictment. Dalt. 266.

9. Surety of the Peace ought to be craved ſoon after the Cauſe of the Fear on Account of which it is craved; for the ſuffering of much Time to paſs before it is craved ſhews, that the Party craving it has not been under great Fear. 6 Mod. 132. *The Queen* v. *Lane.*

(E) The Manner of granting Surety of the Peace by the Court of Chancery.

1. AT the Common Law it was ſufficient, in order to obtain Proceſs for Surety of the Peace from the Court of Chancery, for the Party who craved it to make Oath, that he was in Fear of a corporal Hurt; and that he did not crave Surety of the Peace from Malice, but for the Safety of his Perſon. Fitz. N. B. 79, 80.

2. But by the 21 *Jac.* 1. *c.* 8. after reciting, that divers turbulent and contentious Perſons, ſome out of Malice and others in hope of Gain by way of Compoſition, do oftentimes upon their corporal Oaths, or otherwiſe upon falſe Suggeſtions and Surmiſes, procure Proceſs of the Peace or good Behaviour out of his Majeſty's Courts of Chancery and King's Bench againſt divers of his Majeſty's quiet Subjects, whoſe Dwellings and Abodes are for the moſt Part in Counties far diſtant and remote from the ſaid Courts, to their intolerable Trouble and Vexation; whereas they might, upon good Cauſe ſhewed, receive Juſtice at the Hands of the Juſtices of the Peace in the Counties where they dwell, it is enacted, "That all Proceſs of the Peace or good Behaviour, to be granted or "awarded out of the ſaid Courts or either of them, againſt any Perſon "or Perſons whatſoever, at the Suit of or by the Proſecution of any "Perſon or Perſons whatſoever, ſhall be void and of none Effect, unleſs "ſuch Proceſs ſhall be granted or awarded upon Motion firſt made be"fore the Judge or Judges of the ſame Courts reſpectively ſitting in "open Court; and upon Declaration in Writing upon their corporal "Oaths, to be then exhibited by the Parties which ſhall deſire ſuch Pro"ceſs, of the Cauſes for which ſuch * Proceſs ſhall be granted or *Page 689 "awarded by or out of the ſaid Courts reſpectively, and unleſs ſuch Mo"tion and Declaration be mentioned to be made upon the Back of the "Writ, the ſaid Writings there to be entered and remain of Record: "And if it ſhall afterwards appear to the ſaid Courts, or either of them "reſpectively, that the Cauſes expreſſed in ſuch Writings or any one of "them be untrue, then the Judge or Judges of the ſaid Courts, or either "of them reſpectively, ſhall and may award ſuch Coſts and Damages "unto the Parties grieved, for their or any of their wrongful Vexations "in that Behalf, as they ſhall think fit; and that the Party or Parties ſo "offending ſhall be committed to Priſon by ſuch Judge or Judges, until "he or they ſhall pay the ſaid Coſts and Damages." All Proceſs of the Peace to be void, if granted without Motion in Court and exhibiting Articles of the Peace.

3. If Articles of the Peace are exhibited in the Court of Chancery, and Oath be made, that the Surety of the Peace is not craved by the Party from Malice, but for the Safety of his Perſon, a Writ of *Supplicavit* Fitzh. N. B. 80.

iſſues,

iſſues, directed to the Juſtices of the Peace generally, or to ſome one Juſtice of the Peace, or to the Sheriff, commanding them or him to take Security in the Sum thereon indorſed, and if the Party refuſe to find ſuch Security to commit him to the next Gaol, until he do find ſuch Security.

Bro. Offic. pl. 39. Fitzh.N. B. 81.

4. If a Writ of *Supplicavit* be directed to the Sheriff, he may iſſue a Precept to a Bailiff to arreſt the Party: But only the Sheriff himſelf can take a Recognizance; for the Power given by the Writ being judicial it cannot be delegated.

Bro. Peace, pl. 9. Lamb. 107.

5. If a Writ of *Supplicavit* be directed to the Juſtices of the Peace generally, only the Juſtice of the Peace to whom it is delivered can grant a Warrant to compel the Party to find Security. The Warrant muſt likewiſe be made returnable before the Juſtice of the Peace to whom it is delivered; for only he can take a Recognizance or make a Return to the Writ.

1Hawk.129. Lamb. 101.

6. The Recognizance to be entered into before the Juſtice of the Peace, to whom a Writ of *Supplicavit* is directed or delivered, muſt be in ſuch Sum as is indorſed upon the Writ.

2 Will. 202. *Clavering's* Caſe.

7. The Sum, in which Security is to be given upon a Writ of *Supplicavit*, is ſometimes very large. A Writ of *Supplicavit* was once indorſed in the Sum of 4000 *l.*

Fitzh. N. B. 81. 1Hawk.129. Lamb. 108, 109.

8. If no Return be made to a Writ of *Supplicavit*, the Party who ſued it out may have a Writ of *Certiorari*, directed to the Perſon who ought to make a Return, commanding him to certify the Writ of *Supplicavit*, together with what has been done thereupon.

Fitzh. N. B. 81, 238.

9. If a Writ of *Supplicavit* have iſſued from the Court of Chancery againſt a Perſon, he may by himſelf or ſome Friend come into the Court, and give Security there, that he will not do any Harm to the Perſon who ſued out the Writ; and thereupon he ſhall have a Writ of *Superſedeas*, reciting the Writ of *Supplicavit* and the Security given, directed to the Juſtices of the Peace generally, or to ſome one Juſtice of the Peace, or to the Sheriff, commanding them or him to ſurceaſe to arreſt the Perſon againſt whom the Writ of *Supplicavit* iſſued; or in caſe he have been arreſted for that Cauſe and no other to deliver him.

(F) The Manner of granting Surety of the Peace by the Court of King's Bench.

Ante page 688.

1. AT the Common Law the Oath of the Party was a ſufficient Ground for the Court of King's Bench to grant Surety of the Peace, but this Court cannot, ſince the Statute made in the twenty-firſt Year of the Reign of King *James* the Firſt grant Surety of the Peace, unleſs Articles of the Peace are exhibited in open Court.

Skin. 61. *Mullineux's* Caſe. *Page 690

2. *Mullineux*, who had been taken into Cuſtody upon a Writ of *Supplicavit* out of the Court of Chancery, being brought by a *Habeas* * *Corpus* before *Jones* Juſtice of the King's Bench, he entered into a Recognizance to appear in the Court of King's Bench the firſt Day of the next Term. He appeared at the Time; and the Court was moved, that the Articles exhibited in the Court of Chancery might be read, and that he might enter into a Recognizance for keeping the Peace. No Rule was made; and by the Court: The Record is not before us. If the Witneſſes, who ſwore to the Articles in the Court of Chancery, had been here, and had

ſworn

ſworn to Articles to the ſame Effect, we could have taken a Recognizance; but we cannot now do it.

3. If Articles of the Peace are exhibited in the Court of King's Bench, and Oath be made that the Party does not crave the Surety of the Peace from Hatred or Malice, but for the Safety of his Perſon, an Attachment of the Peace iſſues, directed to the Sheriff, commanding him to take a Bond for the Appearance of the Party in the Court of King's Bench, at the Return of the Attachment, to put in Bail to the Articles, and, if ſuch Bond be not given, to commit the Party to the next Gaol. Comb. 427. *Ruſſel's* Caſe. Fitzh. N. B. 79.

4. It is a great Hardſhip, that it ſhould be in the Power of one Perſon to compel another, who lives in a very remote Part of *England*, to appear and enter into a Recognizance in the Court of King's Bench, when he might have had the Surety of the Peace from a neighbouring Juſtice; and it ſeems to have been the Opinion of the Court of King's Bench, ſome Years ago, that a Stop ought to be put to this Vexation.

5. Upon a Motion on the Behalf of *Ruſſel* to exhibit Articles of the Peace againſt ſeven or eight Perſons who lived at *Nottingham*, *Holt*, Ch. J. ſaid, then we ſhall give ſeven or eight Perſons the Trouble to come up to this Court to put in Bail, why did you not go to a Juſtice of the Peace in the County? The Complainant anſwered, I could not have had Juſtice there, they are Relations. Hereupon the Motion was granted, *ſed hæſitanter*. Comb. 427. *Ruſſel's* Caſe. Trin. 9 W. 3.

6. In a late Caſe, wherein the Court of King's Bench was moved on the Behalf of *Borough* for Leave to exhibit Articles of the Peace againſt *Wait*, Leave was unanimouſly refuſed; it appearing that *Wait* lived at the *Devizes*, and that *Borough* had not endeavoured to obtain the Surety of the Peace in the County wherein *Wait* lived; and by Lord *Mansfield*, Ch. J. Apply to the Magiſtrates of the County, and if Surety of the Peace be not granted, come here again. MS. Rep. *Borough's* Caſe, Eaſt. 32 G. 2.

7. When the Party, againſt whom Articles of the Peace are exhibited, comes into Court to put in Bail, the Articles muſt be read to him. 6 Mod 132. *The Queen* v. *Lane*.

8. Articles of the Peace having been exhibited againſt Lord *Vane*, and Proceſs of the Peace having iſſued, it was inſiſted, when he came to put in Bail, that the Facts charged in the Articles were not a ſufficient Ground for granting Surety of the Peace; or if ſufficient, that the Facts were falſe, and Affidavits were offered to diſprove them. The reading of the Affidavits was oppoſed, and it was ſaid, that the Courſe of the Court had always been, to give ſuch Credit to the Oath of the Party as to order Security: But it was admitted, that the Court might review the Articles, and hear any Objection ariſing upon the Face of them; and by the Court: This is all we can do. The reading of Affidavits to diſprove the Facts charged in the Articles was never attempted before; and we muſt adhere to the Courſe of the Court, which is to take the Articles to be true. Upon reviewing theſe Articles, the Court were of Opinion, that the Facts therein charged were a ſufficient Ground for granting Surety of the Peace. Stra. 1202. Lord *Vane's* Caſe.

9. *Robert Parnel* exhibited Articles of the Peace againſt Sir *Thomas Allen*, Bart. and three others; and an Attachment of the Peace iſſued againſt them. Before a Recognizance was entered into, *Parnel* preſented a Petition, in which he recited ſome of the Facts ſworn to in the Articles, and endeavoured to explain them. Hereupon the Counſel for the Defendants moved for a Rule to review the Articles, and ſome Affidavits were read to contradict the Facts therein charged. Upon reading this Petition and the Affidavits, in which the Facts were flatly contradicted by five or ſix Perſons, a Rule was made to ſhew Cauſe, why the Articles ſhould not be reviewed, and that *Parnel* ſhould attend upon MS. Rep. *Rex* v. *Sir Thomas Allen, Bart. and others*, Hil. 32 G. 2.

the

the Day for ſhewing Cauſe. He did attend, and the Court was upon the whole ſo ſatisfied of his having been guilty of Perjury, that he was immediately committed for wilful and corrupt Perjury; and a Rule was made that all farther Proceedings upon the Articles ſhould ſtay. The Rule was pronounced in theſe Terms, and not to take the Articles off the File, in order to give the Defendants an Opportunity of proſecuting *Parnel* for Perjury, which could not otherwiſe have been done.

MS. Rep. *Rex* v. *Bennet and others.* East. 32 G. 2.

10. Articles of the Peace having been exhibited by *John Brown* againſt *Hannah Bennett* and three others, a Rule was made, upon reading the Affidavits of the Defendants, to ſhew Cauſe, why the Articles ſhould not be reviewed. It was ſworn in the Affidavits, that the Defendants did not know ſuch a Perſon as *Brown* the Articulant, and beſides other ſtrong Facts ſworn to it was ſuggeſted, that the exhibiting of the Articles was a freſh Contrivance of the Defendant *Bennett*'s Huſband to oppreſs her. No Cauſe being ſhewn, the Articles were ordered to be taken off the File.

Stra. 835. *Rex* v. *Lewis.*

11. Upon a Motion for a *Mandamus* to three Juſtices of the Peace in the County of *Brecon*, to take Security upon Articles of the Peace exhibited in the Court of King's Bench, an Affidavit was produced, in which it was ſworn that the Defendant, * who lived in that County, was ſeventy Years of Age, and ſo infirm as to be unable to travel; and *Seymour*'s Caſe *M.* 6 *Ann.* was cited. A *Mandamus* was awarded.

*Page691

Sayer 252. *Rex* v. *Hellier.*

12. Upon a Rule to ſhew Cauſe, why a *Mandamus* ſhould not be awarded to two Juſtices of the Peace in the Country, to take a Recognizance for keeping the Peace, it appeared, that Articles of the Peace had been exhibited in the Court of King's Bench; that the Defendant was in Priſon; and that he was ſo poor, as not to be able to be at the Expence of a *Habeas Corpus* for bringing him up to the Court. The Rule was diſcharged; and by the Court: It has always been doubted, whether a Recognizance for keeping the Peace can be taken by Juſtices of the Peace, upon Articles of the Peace exhibited in this Court. There has been only one Inſtance of late Years, wherein a *Mandamus* for taking ſuch Recognizance has been awarded; and in that Caſe, which was the Caſe of *Rex* v. *Lewis*, *Trin.* 3 *G.* 2. there were very particular Circumſtances; namely, that the Defendant was ſeventy Years of Age, and that he was ſo infirm as not to be able to travel.

Bro. Peace, pl. 17.

13. If after Surety of the Peace has been granted by the Court of King's Bench, a Writ of *Superſedeas* come from the Court of Chancery to the Juſtices of the Court of King's Bench, their Power is at an End; and the Party is as to the Recognizance in this Court diſcharged.

(G) The Manner of granting Surety of the Peace by a Juſtice of the Peace.

Lamb. 36.

1. A Juſtice of the Peace is impowered by the Commiſſion of the Peace, "To cauſe to come before him all thoſe, who to any "one or more of our People concerning their Bodies or the firing of "their Houſes have uſed Threats, to find ſufficient Security for the "Peace or their good Behaviour towards us and our People, and if they "ſhall refuſe to find ſuch Security, then them in our Priſons, until they "ſhall find ſuch Security, to cauſe to be ſafely kept."

Lamb. 93. Fitzh. N. B. 79. 2 Hawk. 127.

2. If Oath be made before a Juſtice of the Peace by one Perſon, of his fearing that another Perſon will burn his Houſe, or do or procure to be done to him ſome corporal Hurt, and that he does not crave the

Surety

Surety of the Peace from Malice, but for the Safety of his Perſon, the Juſtice is bound to grant him the Surety of the Peace.

3. A Juſtice of the Peace may grant Surety of the Peace againſt a Peer; But it is ſaid to be the ſafer Way, to apply to the Court of Chancery or the Court of King's Bench. 1 Hawk. 127. Lamb. 81.

* 4. It is ſaid, that, if the Perſon againſt whom Surety of the Peace is craved be preſent, the Juſtice of the Peace may commit him immediately, unleſs he offer Security for keeping the Peace; and *a fortiori* that he may be required to find Security, and be committed for not finding it. *Page 692 Bro. Mainpr. pl. 39. 1 Hawk. 127.

5. But it was in a very late Caſe laid down by *Pratt* Ch. J. that no Perſon ought to be committed by a Juſtice of the Peace, for not finding Security for keeping the Peace, until he has been required to find Security, and has refuſed or neglected to do it. MS. Rep. *Wilkes*'s Caſe. Eaſt. 3 G. 3. in C. B.

6. If the Perſon, againſt whom Surety of the Peace is craved, be abſent, a Warrant for committing him cannot be granted, until a Warrant has been granted commanding him to find Security for keeping the Peace; and the Warrant, which muſt be under Seal, ought to ſhew the Cauſe for which and upon whoſe Complaint it was granted. Lamb. 85. 1 Hawk. 128.

7. The Juſtice of the Peace, who grants a Warrant, commanding a Perſon to find Security for keeping the Peace, may make the Warrant ſpecial for bringing the Perſon before himſelf only; for, as he has moſt Knowledge of the Matter, he is beſt qualified to do Juſtice therein. 5 Rep. 59. *Foſter*'s Caſe. 1 Hawk. 128.

8. If a Warrant commanding a Perſon to find Security for keeping the Peace be general, the Officer who executes it has an Election to carry the Perſon before what Juſtice he pleaſes, and may carry him to Gaol under the ſame Warrant, if he refuſe to find Security for keeping the Peace before ſuch Juſtice; for the Warrant has theſe Words in it, *if he ſhall refuſe to find Security*. Bro. Falſe Impriſ. pl. 11. 5 Rep. 59. 1 Hawk. 128.

9. If a Perſon, who is under an Apprehenſion that Surety of the Peace will be craved againſt him, give Security for keeping the Peace before a Juſtice of the Peace, either before or after a Warrant is granted againſt him, he may have an Order of *Superſedeas* from the Juſtice; and this ſhall prevent or diſcharge him from an Arreſt under the Warrant of any other Juſtice of the Peace. Lamb. 95, 96, 99. 1 Hawk. 128.

10. A Writ of *Superſedeas* might heretofore have been had, as a Thing of Courſe, to a Warrant of a Juſtice of the Peace, commanding a Perſon to find Security for keeping the Peace. Fitz. N. B. 238.

11. But by the 21 *Jac.* 1. *c.* 8. *par.* 3. after reciting, that divers turbulent and contentious Perſons, deſervedly fearing to be bound to the Peace or good Behaviour by Juſtices of the Peace of the Counties where they dwell, do oftentimes procure themſelves to be bound to the Peace or good Behaviour in the Court of Chancery or King's Bench upon inſufficient Sureties, or upon colourable Proſecution of ſome Perſon or Perſons, who will be ready at all Times to releaſe them at their own Pleaſure; whereupon his Majeſty's Writ of *Superſedeas* are oftentimes directed to the Juſtices of the Peace, and other his Majeſty's Officers, requiring them and every of them to forbear to arreſt or impriſon the Parties aforeſaid; by Means whereof the ſaid turbulent and contentious Perſons miſdemean themſelves among their Neighbours with Impunity, to the great Offence and Diſturbance of their Neighbours amongſt whom they converſe and live, to the Affront of the Juſtices of the Peace, and to the evil Example and Encouragement of like ill-diſpoſed Perſons, it is enacted, "That all Writs of *Superſedeas*, to "be granted, by or out of either of the Courts aforeſaid, ſhall be void and "of none Effect, unleſs ſuch Proceſs be granted upon Motion in open "Court firſt made, and upon ſuch ſufficient Sureties as ſhall appear, unto "the Judge or Judges of the ſame Court reſpectively, upon Oath to be "aſſeſſed

A *Superſedeas* to the Warrant of a Juſtice of the Peace, commanding a Man to find Security for the Peace, is not to iſſue without a Motion in Court.

" aſſeſſed at five Pounds in Lands or ten Pounds in Goods in the Subſidy " Book at the leaſt; and unleſs it ſhall alſo appear, unto the ſaid Judge " or Judges from whom ſuch *Superſedeas* is deſired, that the Proceſs of " the Peace or good Behaviour is proſecuted by him or them deſiring ſuch " *Superſedeas bona fide* by ſome Party grieved.

Lamb. 100. 1 Hawk. 129. 12. A Recognizance for keeping the Peace is to be regulated, as to the Number and Sufficiency of the Sureties, the Largeneſs of the Sum it is to be taken in, and the Time it is to continue in force, at the Diſcretion of the Juſtice of the Peace by whom it is taken.

*Page 693 1 Hawk. 129. Lamb. 100. * 13. It is ſaid, that a Recognizance taken by a Juſtice of the Peace for keeping the Peace as to *A. B.* for a Year, or for the Life of *A. B.* without expreſſing any certain Time, which ſhall be intended to be for the Life of *A. B.* although no Time or Place be fixed for the Appearance of the Recognizor, or he be not bound to keep the Peace as to all the King's Liege People, is good.

Lamb. 103. 1 Hawk. 129. 14. But it is the ſafer Way, to bind the Recognizor to appear at the next Seſſions of the Peace, and in the mean Time to keep the Peace as to all the King's Liege People, and eſpecially as to the Party who craved the Surety of the Peace.

A Recognizance for keeping the Peace, taken by a Juſtice of Peace, to be ſent to the next Seſſions. 15. By the 3 *H.* 7. *c.* 1. it is enacted, " That every Juſtice of the " Peace within this Realm, that ſhall take any Recognizance for keeping " the Peace, ſhall certify, ſend or bring, the Recognizance at the next " Seſſions of the Peace where he is or hath been Juſtice, that the Party ſo " bound may be called."

Lamb. 113. Bro. Peace, pl. 17. 1 Hawk. 129. 16. If one of the Sureties in a Recognizance for keeping the Peace die, the Recognizor is not obliged to find a new Surety; the Executors and Adminiſtrators of the dead Perſon being bound by the Recognizance.

(H) In what Caſes, a Recognizance for keeping the Peace is forfeited.

If a Party do not appear upon his Recognizance it is to be eſtreated. 1. BY the 3 *H.* 7. *c.* 1. it is enacted, " That if the Party, who is called " at the Seſſion of the Peace upon a Recognizance for keeping the " Peace, make Default, the Default ſhall be there recorded, and the " Recognizance with the Record of the Default ſhall be ſent and certi- " fied into the Chancery, or afore the King in his Bench, or into the King's " Exchequer."

Bro. Peace, pl. 17. Lamb. 109. 2. He who is bound to keep the Peace, and to appear at a Seſſion of the Peace, muſt appear and record his Appearance, otherwiſe his Recognizance is forfeited; and although the Party who craved the Surety of the Peace come not, to pray that it may be continued, the Juſtices may at their Diſcretion order it to be continued till another Seſſion of the Peace.

1 Hawk. 130. 3. But if an Excuſe, which is by the Court judged to be reaſonable, be given for the Non-appearance of the Recognizor, the Court is not bound to record his Default, but may diſcharge the Recognizance, or reſpite it till the next Seſſions of the Peace.

Lamb. 115, 127. Bro. Peace, pl. 20. 1 Hawk. 130. 4. A Recognizance for keeping the Peace is forfeited by the doing of Violence to any Perſon, whether it be done by the Party bound or by any other by his Procurement.

5. Upon

5. Upon a Rule to ſhew Cauſe, why the Proceedings upon a *Scire facias* ſhould not be ſtayed, it appeared, that the *Scire facias* was brought upon a Recognizance entered into by *Stanley* and his Bail, for *Stanley's* keeping the Peace as to all the King's Subjects; that the Recognizance was entered into in Conſequence of Articles of Peace exhibited by *J. S.* againſt *Stanley*; and that *Stanley* had been guilty of aſſaulting *J. N.* The Rule was diſcharged; and by *Rider* Ch. J. If the Peace have not been broken by an Aſſault upon the Perſon who exhibited Articles of the Peace, the Court will not permit a Proceeding by *Scire facias* upon the Recognizance entered into for keeping the Peace, in caſe the Proceeding appear clearly to be vexatious: But if the Recognizance be for keeping the Peace as to all the King's Subjects, as well as to the Perſon who exhibited the Articles, the Court will not in a doubtful Caſe ſtay the Proceedings upon a *Scire facias*; becauſe the Queſtion, whether the Breach of the Peace, by aſſaulting another Perſon, did amount to a Forfeiture of the Recognizance? may be determined upon the Plea of Not guilty to the *Scire facias*. Sayer 139. *Rex* v. *Stanley and his Bail.*

6. A Recognizance for keeping the Peace is not forfeited, where an Officer having a Warrant to arreſt a Perſon who will not ſuffer himſelf to be arreſted, beats or wounds him in an Attempt to arreſt him. Lamb. 128. 1 Hawk. 130.

7. If a Parent in a reaſonable Manner chaſtiſe his Child; a Maſter his Servant; a Schoolmaſter his Scholar; a Gaoler his Priſoner; or a Huſband his Wife, neither of theſe is a Forfeiture of a Recognizance for keeping the Peace. 1 Sid. 176, 177. Lamb. 127, 128. Hetl. 149, 150. 1 Hawk. 130. Fitzh. N. B. 80.

* 8. And without enumerating all the Aſſaults, which one Perſon may make upon another without forfeiting a Recognizance for keeping the Peace, it may in the general be ſaid, that the Recognizance is not forfeited by any Aſſault, which could have been juſtified in an Action or upon an Indictment for the Aſſault. *Page 694

9. A Recognizance for keeping the Peace is forfeited by Treaſon againſt the Perſon of the King, or by any unlawful Aſſembling *in terrorem populi*. Lamb. 115. 1 Hawk. 130.

10. It has been holden, that Words which tend directly to a Breach of the Peace, as challenging a Man to fight, or threatning to beat a Perſon who is preſent, amount to a Forfeiture of a Recognizance for keeping the Peace. Lamb. 115. 1 Hawk. 130. Cro. Eliz. 86.

11. A Recognizance for keeping the Peace is forfeited by threatning to beat a Perſon who is abſent, if the Perſon threatning do afterwards lie in wait to beat the Perſon threatned. Lamb. 115.

12. A Recognizance for keeping the Peace is not forfeited by Words of Heat, as calling a Perſon Knave, Liar or Raſcal: For although ſuch Words may provoke a haſty Perſon to break the Peace, they have not a direct Tendency thereto; nor does it appear that the Speaker intended to carry his Reſentment any further. Cro. Car. 498. *Rex* v. *Heyward and his Bail.* 1 Hawk. 130.

13. Nay it has been holden, that a Recognizance for being of good Behaviour is not forfeited by ſuch Words; and *a fortiori* a Recognizance for keeping the Peace is not. Cro. Eliz. 86. *King's* Caſe. Mo. 249. 1 Hawk. 130.

14. A Recognizance for keeping the Peace is not forfeited by a Treſpaſs upon the Lands or Goods of any Perſon, unleſs it be committed with actual Force. Cro. Jac. 498. 1 Hawk. 193.

15. Nor is it forfeited by hurting a Perſon in playing at Cudgels or ſuch like Sport by Conſent; in as much as, ſuch Sports, which tend to promote Activity, and Courage, are lawful. Dalt. 294. 1 Hawk. 131.

16. But a Recognizance for keeping the Peace is forfeited by wounding a Perſon in fighting with naked Swords; becauſe no Conſent can make ſo dangerous a Thing lawful. Bro. Car. 219. 1 Hawk. 131.

17. If

1Hawk.131. Hob. 134. 2 Rol. Abr. 548. 17. If a Soldier hurt a Perſon, by diſcharging his Gun in exerciſing without ſufficient Caution, it is not a Forfeiture of a Recognizance for keeping the Peace; for although the Soldier would be liable to an Action for the Damage ſuſtained, this is not ſuch a wilful Breach of the Peace, as is within the Meaning of the Recognizance.

1Hawk.130 18. A Court of Quarter-Seſſion cannot proceed againſt a Perſon for the Forfeiture of a Recognizance for keeping the Peace: But the Recognizance muſt be ſent into one of the King's Courts of Record at *Weſtminſter*.

1 Rol. Abr. 900. *Perrow's* Caſe. Cro. Jac. 598. 19. Advantage of a forfeited Recognizance muſt be taken by *Scire facias*, and not by Indictment.

1 Hawk. 130. Ante 414.

(I) In what Caſes, a Recognizance for keeping the Peace may be diſcharged.

Sav. 53. *Halfhide's* Caſe. 1. IF the Perſon who has entered into a Recognizance for keeping the Peace die, the Recognizance may be diſcharged.

1 Lev. 235. 1Hawk.129. 2. If the Perſon who has craved the Surety of the Peace die, the Recognizance may be diſcharged.

*Page695 Bro. Peace, pl. 17. Lamb. 111. * 3. A Releaſe from the Perſon upon whoſe Complaint it was entered into, is not a Diſcharge of a Recognizance for keeping the Peace; for, as the Recognizance was entered into to the King, it is not in the Power of that Perſon to diſcharge it.

11Mod.109. *The Queen* v. *Lord George Howard.* 4. A Recognizance being entered into by a Huſband, upon Articles exhibited in the Court of King's Bench by his Wife to keep the Peace for a Year: A Motion was made to diſcharge the Recognizance, upon a Suggeſtion that the Wife conſented thereto. No Rule was made; and by *Holt* Ch. J. How can we diſcharge a Recognizance before the Condition thereof is performed.

1Hawk.129. 11Mod.109. 5. A Releaſe however from the Perſon, upon whoſe Complaint a Recognizance for keeping the Peace was entered into, may, if no Time for its Continuance is mentioned in the Recognizance, be an Inducement to the Court to diſcharge it.

Bro. Peace, pl. 15. 1Hawk 129. 6. The Demiſe of the King is a Diſcharge of a Recognizance for keeping the Peace; for as the Condition is *ſervare pacem Noſtram*, his Succeſſor cannot take Advantage of a Breach.

Bro.Recogn. pl. 22. Pro. Chart. de pard. pl. 24. 1Hawk.129. 2Hawk.392. 7. After the Condition of a Recognizance for keeping the Peace is broken, the King may pardon the Forfeiture: But the King cannot releaſe the Condition before it is broken; in as much as, the Perſon, upon whoſe Complaint the Recognizance was entered into, has an Intereſt in the Condition.

2 Rol. Abr. 492. F. pl. 1. pl. 2. Dalt. 278. 8. It has been holden, that if a Recognizance for keeping the Peace be removed by a Writ of *Certiorari*, the Obligation to appear upon the Recognizance is diſcharged.

Cro. Jac. 282. *Roſſe* v. *Pye* Yelv. 207. 2Hawk.294. 9. But this would be highly inconvenient; and it ſeems to be the better Opinion, that a Writ of *Certiorari* is no Diſcharge of the Obligation to appear upon a Recognizance for keeping the Peace.

10. If no Time for the Continuance of a Recognizance for keeping the Peace be mentioned, it is in the Power of the Court, by which the Recognizance

cognizance was taken, or to which it has been certified, to discharge it at their Discretion.

11. The Practice of Courts of Quarter-Session is to continue a Recognizance for keeping the Peace from Session to Session, until it be discharged.

12. The Practice of the Court of King's Bench is, to continue the Person bound to keep the Peace upon his Recognizance for twelve Months; and if no Indictment be within that Time preferred against him to discharge it at the Expiration of that Time. 12 Mod. 251. Anon. Stra. 835.

13. This seems likewise to be the Practice of the Court of Chancery; for upon a Motion to discharge a Writ of *Supplicavit*, it was said by Lord *Macclesfield* Chancellor: The Application is too early; let the Party stay until a Year is expired, and in the mean Time let him take care to behave himself peaceably. 2 Will. 202. *Clavering*'s Case.

---

* Surety of the good Behaviour.

*Page 696

SURETY of the good Behaviour is a Recognizance entered into to the King for being of good Behaviour.

A Recognizance for being of good Behaviour does in so many Respects resemble a Recognizance for keeping the Peace, that the going into the particular Consideration thereof would be little more than a Repetition of what has been said under the Title *Surety of the Peace*.

But as Surety of the good Behaviour may be granted in some Cases where Surety of the Peace cannot; and as a Recognizance for being of good Behaviour may be more easily forfeited than a Recognizance for keeping the Peace, it will be proper to shew,

(A) In what Cases, Surety of the good Behaviour may be granted, where Surety of the Peace ought not to be granted.

(B) What is a Forfeiture of a Recognizance for being of good Behaviour, which would not have been so of a Recognizance for keeping the Peace.

(A) In what Cases, Surety of the good Behaviour may be granted, where Surety of the Peace ought not to be granted.

Persons not of good Fame to find Security for their good Behaviour.

1. BY the 34 *E.* 3. *c.* 1. Justices of the Peace are impowered "to take "of all them that be not of good Fame, where they shall be "found, sufficient Surety and Mainprize towards the King and his "People."

4 Inst. 181. 2 H. 7. 2. B. 3. A.

2. It is laid down, that the Words in the 34 *E.* 3. *c.* 1. *them that be not of good Fame*, extend only to such Persons, as are justly suspected of having formed a Design to break the Peace.

Lamb. 115, 116, 117. 1 Hawk. 132.

3. This Construction seems too narrow: For the Words *them that be not of good Fame*, do, in the usual Acceptation of them, as well extend to Persons of a scandalous Behaviour in other Respects, as to those who give just Cause of Suspicion that they intend to break the Peace.

*Page 697 Lamb. 117. 2 Roll. Rep. 199, 227. Palm. 126. 1 Hawk. 232.

* 4. A good deal is by the Words *them that be not of good Fame*, which are Words of great Latitude, left to the Discretion of Justices of the Peace: But it is laid down, that they have Power to demand Surety of the good Behaviour of those who sleep in the Day and go abroad in the Night; of such as keep suspicious Company; of such as are generally suspected of being Robbers; of Eves-droppers; of common Drunkards; and of all others, whose Misbehaviour may be reasonably intended to bring them within the Meaning of the Statute.

1 Hawk. 193.

5. The Author of an obscene Book is liable to be bound to be of good Behaviour, as a Person not of good Fame.

Lamb. 119. 12 Mod. 566. Crompt. 140, 142. 1 Hawk. 132.

6. Surety of the good Behaviour may be demanded of a Person who haunts Bawdy-houses; and of a Person who keeps Women of bad Fame in his House; and of all lewd Persons.

12 Mod. 566. *Claxton*'s Case.

7. If a Person, who has no visible Means to enable him so to do, live at an extravagant Rate, he may be compelled to find Surety of the good Behaviour.

2 Vent. 22, 23, 24. *Rudyard*'s Case.

8. If a Person have been guilty of exciting the People to Disobedience to the Law, he may be compelled to find Surety of the good Behaviour.

2 Lill. Pr. Reg. 649.

9. If one Person lie in wait to hinder another from coming to a Court of Justice, Surety of the good Behaviour may be demanded of him.

Cro. Eliz. 449. *Coskain* v. *Witman*.

10. If *J. S.* offer a Woman Money to buy Medicines, to destroy a Child of which she is pregnant, he may be compelled to find Surety of the good Behaviour.

11. Surety of the good Behaviour is by divers Statutes directed to be taken of the Offenders against those Statutes: As by the 1 *M. st.* 2. *c.* 3. of Persons who have been guilty of disturbing any licensed Preacher.

12. By the 5 *Eliz. c.* 21. of Persons who have been guilty of unlawful Fishing or Hunting.

13. By the 23 *Eliz. c.* 1. of Persons who neglect to come to Church for the Space of one Month.

14. By the 1 *Jac.* 1. *c.* 13. of Persons who have been guilty of unlawful hunting, or of stealing Deer or Conies.

Styles 16. *Broker*'s Case.

15. A Justice of the Peace cannot however compel a Person to find Surety of the good Behaviour upon a general Information.

16. Surety

16. Surety of the good Behaviour may be granted for Words, which tend to disturb or deter an inferior Officer of Justice, as a Constable, in the Execution of his Office. Cro. Car. 469. *Rex* v. *Heyward.* 2 Roll. Rep. 228. Palm. 127. 1 Ventr. 16. 1 Hawk. 132.

17. It may likewise be granted for Words of Contempt spoken to an inferior Magistrate, as a Justice of the Peace or a Mayor, although he be not in the actual Execution of his Office. Cro. Eliz. 78. *Simons* v. *Sweet.* 1 Hawk. 132. 1 Lev. 52, 53.

18. But it ought not to be granted for calling a Person Rascal, Knave, Liar or Drunkard; these being only Words of Heat. 2 Roll. Rep. 227. Palm. 130. Cro. Eliz. 86. 1 Hawk. 132.

19. If one Man call another Liar in *Westminster-Hall*, or before any great Concourse of People, he is liable to be bound to be of good Behaviour. 2 Lev. 107. *Collins* v. *Man* Far. 29.

20. A Woman may demand Surety of the good Behaviour against her Husband, if he be guilty of ill Usage to her. 2 Vent. 345. *Smithson's* Case.

* 21. If a Person have been convicted of a Misdemeanor, it is usually Part of the Judgment, that he shall find Security for his good Behaviour for some Time. * Page 698

(B) What is a Forfeiture of a Recognizance for being of good Behaviour, which would not have been so of a Recognizance for keeping the Peace.

1. IT is laid down, that the doing of a Thing, for which the Doer might be compelled to find Surety of the good Behaviour, is a Forfeiture of a Recognizance for being of good Behaviour. Palm. 129. *Stamp* v. *Hyde.*

2. But this is denied to be Law; and it seems to be very unreasonable. The good of the Publick may make it proper in some Cases, to compel a suspected Person to enter into a Recognizance for being of good Behaviour: But it would be extremely hard, that the Recognizance should be forfeited, before he has been guilty of Misbehaviour. Cro. Car. 449. *Rex* v. *Heyward.* 1 Hawk. 133.

3. A Recognizance for being of good Behaviour is forfeited by the speaking of seditious Words. Palm. 129. *Stamp* v. *Hyde.* Cro. Car. 499. 1 Hawk. 133.

4. A Recognizance for keeping the Peace is not forfeited by threatning Words, unless the Party threatned be present: But a Recognizance for being of good Behaviour is forfeited by such Words, although the Party concerning whom they were spoken be not present. 2 Roll Rep. 199. *Stamp* v. *Hyde.* 1 Hawk. 130.

5. A Recognizance for being of good Behaviour is not in the general forfeited by Words of Heat, as calling a Person Knave, Rascal, Liar or Drunkard. Cro. Eliz. 86. *King's* Case. Mo. 249.

6. But if Words of Heat are spoken to a Justice of the Peace in the Execution of his Office, this is such Misbehaviour as amounts to a Forfeiture of a Recognizance for being of good Behaviour; for the publick Good requires that Magistrates should be treated with Respect. 2 Roll. Rep. 150, 228. Palm. 130. 1 Hawk. 133.

Lamb. 116. H. 7. 2. 7. A Recognizance for being of good Behaviour is forfeited by the Recognizor's having a Number of armed Attendants, although he have not been guilty of a Breach of the Peace.

2 Leon 166. *Crabdell's* Caſe. Godb. 622. 8. If a Perſon, who is under a Recognizance for being of good Behaviour, is arreſted upon Suſpicion of Felony, and afterwards eſcape, it is a Forfeiture of the Recognizance; and by the Court: Although the Arreſt were tortious, no Felony having been committed, the Recognizance is forfeited by the Eſcape, which is a Miſbehaviour; it being the Duty of every Perſon to ſtand to the Law and anſwer to every Thing he is charged with.

Lamb. 118. 9. When a Recognizance for being of good Behaviour is purſuant to the Direction of a Statute entered into by a Perſon, who has done ſomething prohibited by the Statute, the being afterwards guilty of another Offence againſt the Statute is a Forfeiture of the Recognizance.

Cro. Jac. 412. *Rex* v. *Hutchins.* 10. In a *Scire facias* upon a Recognizance for being of good Behaviour the Breach aſſigned was, that the Recognizor had aſſaulted and beat *J. S.* but it not being charged that the Aſſault and beating were *vi et armis*, Judgment was arreſted.

End of the FOURTH VOLUME.